



**SUBMISSIONS TO THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS
FOR THE NEXT THEMATIC REPORT ON SAFEGUARDING THE INDEPENDENCE JUDICIAL SYSTEMS IN
THE FACE OF CONTEMPORARY CHALLENGES TO DEMOCRACY**

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INTRODUCTION

The Kenyan Section of the International Commission of Jurists seeks to strengthen capacity, integrity, and accountability of justice sector institutions for expanded access to justice. This seeks to amongst others enhance the efficiency, transparency, and accountability of justice systems.

BACKGROUND CONTEXT OF JUDICIAL INDEPENDENCE

The historical context of judicial independence in Kenya reflects a complex interplay of colonial legacy, struggles for independence, political developments, and constitutional reforms. The country has made significant strides in establishing an independent judiciary, but challenges persist, requiring ongoing efforts to safeguard and strengthen judicial autonomy¹.

Looking back, Kenya was a British colony from the late 19th century until it gained independence in 1963. During this period, the Judiciary was subordinate to the colonial administration, and the legal system reflected British legal principles. The Judiciary was not independent, as judges were appointed and served the interests of the colonial Government.²

Kenya's 1963 independence constitution created a multiparty system which guaranteed democracy, a bicameral parliament, and judicial independence. At its inception, the post-colonial state was autocratic despite its liberal Constitution because it inherited all of the colonial state's laws, cultures, and practices.³ In addition, Kenya experienced single-party rule under the Kenya African National Union (KANU), with President Daniel Arap Moi succeeding Jomo Kenyatta in 1978. During this period, there were instances of political interference in the Judiciary, limiting its independence.⁴ Equally, in the 1990s, there was growing pressure for political and constitutional reforms in Kenya. The multiparty system was reintroduced in 1991, and subsequent constitutional amendments sought to address governance issues, including the independence of the Judiciary.⁵

The government appoints a Committee headed by retired Appeal Court Judge Richard Otieno Kwach to investigate "judicial rectitude". The Kwach report⁶ discloses a systematic practice of petty and grand corruption in the Kenyan judiciary, taking the form of "inducing court officials to lose or

¹ Issack, Sadam, Recusal of Judges: A Coronary Concept to the Right of Fair Hearing in Kenya (August 2, 2016). Available at SSRN: <https://ssrn.com/abstract=2817304> or <http://dx.doi.org/10.2139/ssrn.2817304>

² See Njeri Thuki, A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England, 19 Ann. Surv. of Int'l & Compar. L.45, 9(2013).

³ <https://www.aljazeera.com/opinions/2021/6/12/the-kenyans>

⁴ Journal of African Law

[Vol. 27, No. 1 \(Spring, 1983\)](#), pp. 42-61.

⁵ See Abdirizak Arale Nunow, Constitution Making and Legal Reform Process in Kenya 6 (2004) (unpublished manuscript)

⁶ Report of the Committee on the Administration of Justice 1998

misplace files, delay trials, judgments and rulings. It notes that there was actual payment of money to judges and magistrates to influence their decisions."⁷ In 2003 The President suspended the Chief Justice Bernard Chunga and set up a tribunal to investigate him on charges of corruption. Judge Evans Gicheru was appointed acting Chief Justice. Chief Justice Chunga resigns from office in February. The Acting Chief Justice revives the Judiciary Committee on Reforms and Development. A sub-committee, called the "Integrity and Anti-Corruption Committee" headed by Justice Aaron Ringera, is established. The Justice (Rtd) Aaron Ringera Committee in 2003 released the infamous Ringera Report, where five out of nine Court of Appeal justices, 18 out of 36 High Court justices and 82 out of 254 magistrates were implicated as corrupt. Before informing the accused of the allegations against them, the Government ordered the publication of their names, which then appeared in the national press⁸.

Through the recommendations in the Ringera Report, sufficient clamour was made for establishing an independent commission, the Judicial Service Commission (JSC to appoint and discipline judges).⁹

Despite constitutional reforms, notably with the promulgation of a new Constitution in 2010, judicial independence in Kenya was still under some challenges. These included political pressures, allegations of corruption, and concerns about the impartiality of the Judiciary.¹⁰ Progressively, efforts to strengthen judicial independence continue, with ongoing discussions and reforms to address challenges and enhance the Judiciary's autonomy.¹¹

FRAMEWORK UNDER THE CONSTITUTION 2010.

The Constitution of Kenya 2010 makes provisions for the Judiciary under Chapter Ten, emphasising its independence and setting out the principles and values that guide the Judiciary.¹² Article 160¹³ explicitly states that in the exercise of judicial authority, the Judiciary is independent and subject only to the Constitution and the law. In addition, the Judicial Service Commission is established under Article 171¹⁴, and plays a crucial role in safeguarding the independence of the Judiciary. It is responsible for the appointment and discipline of judges and other judicial officers.

In Kenya, Judges are afforded security of tenure to protect them from arbitrary removal or interference. Article 168¹⁵ provides for removing judges only in limited circumstances and through a well-defined process that includes an investigation by the JSC and approval by Parliament. In addition, the Judiciary is granted financial independence to ensure that the Executive or Legislative arms of Government do not unduly influence it. Article 173¹⁶ outlines the financial provisions for the Judiciary. It is worth noting that the process of appointing judges is crafted in a way that enhances independence. The Judicial Service Commission (JSC) is involved in the selection and nomination of judges, and the President appoints judges based on the recommendations of the JSC.

In the spirit of accountability and independence, Judges are required to take an oath of office, committing to uphold the Constitution and the law without fear, favour, bias, affection, ill-will, or prejudice¹⁷. Part of the crucial role the Judiciary plays is hearing and determine all elections disputes,

⁷ Ibid Page 10

⁸ https://www.icj.org/wp-content/uploads/2012/04/kenya_judicial_independence_report_2005.pdf

⁹ <http://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf>

¹⁰ <http://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf>

¹¹ <http://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf>

¹² Chapter 10 of the Constitution of Kenya 2010

¹³ Article 160 of the Constitution of Kenya 2010

¹⁴ Article 171 of the Constitution of Kenya 2010

¹⁵ Article 168 of the Constitution of Kenya 2010

¹⁶ Article 173 of the Constitution of Kenya 2010

¹⁷ <http://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf>

in a quest to promote fairness, integrity, and legality of democratic elections. The Judiciary's role is outlined under Article 160(5) of the Constitution of Kenya 2010¹⁸.

In addition to the constitution there is in place other legislative statutes that make provisions on the Judiciary such as the Judicial Service Act.¹⁹

FRAMEWORK UNDER INTERNATIONAL AND REGIONAL LAW.

International and regional instruments also assert the importance of upholding judicial and prosecutorial independence as a cornerstone of a democratic society. The Instruments guarantee the separation of powers, and any attempts to undermine these institutions threaten the foundations of the democratic system. These guarantees are contained in the Universal Declaration of Human Rights (UDHR)²⁰, the International Convention on Civil and Political Rights (ICCPR)²¹, the African Charter²², the Grand Bay (Mauritius) Declaration and Plan of Action²³, the UN Basic Principles on the Independence of the Judiciary,²⁴ the Bangalore Principles of Judicial Conduct²⁵ and the Commonwealth (Latimer House) Principles of the three Branches of Government²⁶.

CONTEMPORARY CHALLENGES TO JUDICIAL INDEPENDENCE

I. Political interference

Political interference on the Judiciary is not foreign in the country. It is appreciated that such interferences take different forms including failure to appoint Judges recommended by the Judicial Service Commission, limitations of funding which in turns impacts on the work of the Courts and outward attack on individual judges while they are discharging their Constitutional mandate. For instance, former president H.E. Mr. Uhuru Kenyatta failed to appoint at least 41 judges recommended for appointment by the Judicial Service Commission in 2019.²⁷ He would later appoint 34 Judges but failed to appoint six judges without justifiable reason.²⁸ H.E Uhuru Kenya, following the nullification of the 2017 presidential elections, went on to publicly attack the Judiciary and, more specifically, the Supreme Court, terming the judges as 'mikora' (thieves) and saying that they could not deter the will of the people.²⁹

Most recently, H.E. President William Samoei Ruto President William Ruto made utterances alleging collusion between corrupt individuals and judges to file cases hindering government

¹⁸ Article 160(5) of the Constitution of Kenya 2010

¹⁹ The Judicial Service Act 2011, Sets out provision for judicial services and administration of the Judiciary and makes further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff. Further, the Judicial Service Act provides for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice.

https://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/Judicial_Service_Act_2011.pdf

²⁰ Universal Declaration of Human Rights Article 10 <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>

²¹ International Convention on Civil and Political Rights

<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf>

²² The African Charter on Human and People's Rights

https://www.achpr.org/public/Document/file/English/banjul_charter.pdf

²³ The Grand Bay (Mauritius) Declaration and Plan of Action section <https://www.achpr.org/legalinstruments/detail?id=44>

²⁴ <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>

²⁵ https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

²⁶ <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf>

²⁷ <https://www.voanews.com/a/africa-kenyas-judiciary-puts-executive-spot-over-appointment-judges/6190732.html>

²⁸ <https://www.citizen.digital/news/president-uhuru-kenyatta-defends-his-decision-to-reject-6-judges-11783123>

²⁹ <https://www.standardmedia.co.ke/ureport/article/2001253810/kenyans-respond-after-president-uhuru-kenyattas-attack-on-the-supreme-court>

projects aimed at improving the lives of Kenyans, such as healthcare and housing³⁰. On the other hand, Deputy President Rigathi Gachagua on 14 January 2024 said he is seeking the removal of Justice Esther Maina from office, accusing her of tainting his image by unceremoniously declaring his fortune proceeds of crime in a past court ruling³¹. On 22nd January 2024, the President and the Chief Justice held talks following the outward attack on the Judiciary; the same was opposed by a significant position of persons and institutions as it was termed to be a way for the Executive to interfere with judicial independence.³² Although the examples mentioned are not exhaustive, they demonstrate that the Executive, in most cases, will be at the forefront of mounting unnecessary political pressure and interference in the Judiciary.

Recommendation

There is a need that the other two branches of Government namely the Executive and Legislature adhere to the doctrine of separation of powers and refrain in totality in interfering in any way with the workings of the Judiciary in the discharge of its Constitutional mandate.

II. Legislative Pressures

Undermining Judicial Independence through Constitutional Amendments: The Building Bridges Initiative (BBI) process was initiated by President Uhuru Kenyatta and former Prime Minister Raila Odinga in March 2018. The main objective was to promote unity and address longstanding challenges facing the country, including issues related to governance, representation, and inclusivity³³. Part of the recommendations made was to establish the Judiciary Ombudsman who would have been appointed by the President with the approval of the Senate.³⁴ One of the key challenges was the overlap of the mandate of the Judicial Service Commission and the Judiciary Ombudsman.³⁵ The creation of such an office would have seen the Executive 'interference' with the working of the Judiciary.

Funding and Budgetary Control: The control of the Judiciary's budget by the legislative branch can be used as a tool to exert influence. If the Judiciary is not given adequate financial autonomy, it may face challenges in carrying out its functions independently.

Legal Reforms: Legislative changes in the legal framework can impact the Judiciary's ability to act independently. For instance, changes in procedural laws or laws governing the conduct of judges might be designed to constrain the Judiciary's discretion or limit its powers.

Recommendations

By implementing the following recommendations, Kenya can strengthen its commitment to judicial independence and the rule of law, promoting a legal system that is fair, transparent, and accountable.

³⁰ <https://icj-kenya.org/news/separation-of-powers-and-judicial-independence-must-be-protected/> Source ICJ Kenya

³¹ Source Citizen TV News and The Star Newspaper <https://www.the-star.co.ke/news/realtime/2024-01-15-present-your-evidence-on-corrupt-judges-lsk-president-tells-dp-gachagua/>

³² <https://www.the-star.co.ke/news/2024-01-22-president-ruto-meets-cj-koome-to-resolve-executive-judiciary-standoff/>

³³ Petition No. 12 of 2021 (consolidated with Petitions 11 & 13 of 2021 – Building Bridges Initiative – BBI full Supreme Court Judgement.

³⁴ <https://judiciary.go.ke/jsc-statement-on-bbi-proposal-on-appointment-of-judiciary-ombudsman/>

³⁵ Ibid.

Establish clear guidelines for legislative interaction with the Judiciary to avoid undue influence. In addition, educate the public about the importance of judicial independence in a democratic society. Equally, it is important to promote a free and independent media that can act as a check on government power, including legislative interference with the Judiciary. It is prudent to encourage the involvement of civil society organizations in monitoring and advocating for judicial independence.

III. Threats to Legal Profession Independence

On 2 January 2024, The President claimed that unnamed individuals with vested interests in the health sector colluded with corrupt judicial officers to stall the new Social Health Insurance Fund program. Such sweeping allegations undermine public confidence in the Judiciary and individual Judges and Judicial Officers.³⁶

Recommendations

By addressing these recommendations, Kenya can work towards creating a legal environment that is resilient, ethical, and well-prepared to face emerging threats. ICJ Kenya recommends that the concept of Judicial Accountability should be adequately canvassed and the Judiciary leadership and the Judicial Service Commission ought to strengthen the complaints and reporting mechanisms. Further, it is important to strengthen Whistleblower protection mechanisms so as to ensure protection of persons with information to share. It is imperative to establish mechanisms to protect legal professionals who report unethical behavior within their organizations. Additionally, strengthen ethical guidelines and codes of conduct for legal professionals, emphasizing integrity and confidentiality.

INDEPENDENCE OF PROSECUTORS.

Effective 1st June 2011, The ODPP was accordingly established³⁷ with the DPP being empowered to exercise powers including the power to institute and undertake criminal proceedings against any person before any court³⁸ in respect of any offence alleged to have been committed³⁹ and take over and continue any criminal proceedings commenced in any court that have been instituted or undertaken by another person or authority.⁴⁰ Subsequently, Parliament enacted the ODPP Act⁴¹ to give effect to the provisions of Articles 157 and 158 of the Constitution and for connected purposes.

The pivotal role of the prosecution in any criminal justice system demands the prosecution service to provide neutral, non-political, non-arbitrary decisionmaking about the application of criminal law and policy to real cases⁴². Prosecutors play a crucial role in upholding the rule of law, ensuring that individuals accused of crimes are held accountable for their actions in a democratic society. This includes protecting citizens' fundamental rights, such as the right to a fair trial, freedom of expression, and protection against arbitrary detention.

³⁶ <https://icj-kenya.org/news/statement-condemning-president-william-rutos-attack-on-the-judiciary-separation-of-powers-and-the-rule-of-law/>

³⁷ Article 157(1) of the Constitution

³⁸ Except proceedings before Court Martials.

³⁹ Article 157(6) (a) of the Constitution.

⁴⁰ Article 157(6) (b) of the Constitution

⁴¹ Act No. 2 of 2013.

⁴² Waters, T. (2008) 'Design and reform of public prosecution services' in Promoting Prosecutorial Independence, Accountability and Effectiveness: Comparative research, Sofia: Open Society Institute, p. 25.

The need for prosecutors in nation states to be both independent and accountable in carrying out their role is increasingly recognized in international instruments such as the United Nations (UN) Guidelines on the Role of Prosecutors,⁴³ but these tend to stop short of imposing binding commitments on nation states.

Prosecutorial independence and accountability are key to the public confidence not only on the criminal justice system but on the general justice system thus having a key impact on the governance and development of the State as the free, fair, impartial and accountable exercise of the State powers of prosecution ensures that criminals are held accountable for their actions and the innocent are not unnecessarily intimidated thereby promoting investor confidence.

CHALLENGES

Lack of Independence

Withdrawal of cases due to by the ODPP due to executive pressure. For instance; The Kimwarer and Aror dam scandal in Kenya refers to a corruption case involving the construction of two dams: Kimwarer and Aror. The project was initiated by the Kenyan Government to improve water supply and irrigation in the Rift Valley region. However, allegations of corruption and mismanagement surfaced, leading to investigations and legal proceedings.

The scandal involved claims of inflated costs, irregularities in the tendering process, and the misappropriation of funds meant for the dam projects. Several high-profile individuals, including government officials, were implicated in the scandal. The Government ended the prosecution of the above case with questions left unanswered from the office of the ODPP⁴⁴.

Recommendation:

In Kenya, as in any other country, several measures can be taken to enhance the independence of prosecution. Here are some recommendations:

Strengthen and clarify the legal framework that governs the prosecution service to ensure its independence. This may involve enacting or amending laws to clearly define the roles and responsibilities of the prosecution service. To establish transparent and merit-based procedures for the appointment of prosecutors. This process should be free from political interference and include input from legal professionals and stakeholders. Additionally, mechanisms for the fair and transparent removal of prosecutors should be defined.

In addition, create external oversight bodies such as an independent prosecution service inspectorate⁴⁵, an independent prosecutorial complaints assessor, or an ombudsman office to monitor and review the work of the prosecution service. Such bodies will provide an additional layer of accountability and transparency. Equally, there is need to engage more with civil society, legal professionals and other stakeholders to foster transparency and accountability in the prosecution process. Regular consultations and feedback mechanisms can help build public trust in the

⁴³ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba, 27th August – 7 th September 1990.

⁴⁴ <https://www.pd.co.ke/news/arror-kimwarer-dams-case-fall-exposes-dpp-underbelly-214740/>

⁴⁵ <http://erepository.uonbi.ac.ke/bitstream/handle/11295/154203/Owiti%20Prosecutorial%20independence%20and%20accountability%20in%20post-2010%20Kenya%20the%20law%20and%20its%20application%20in%20practice.pdf?sequence=1&isAllowed=y>

independence of the prosecution. Further, to align the legal framework and practices with international best standards for prosecutorial independence, drawing on guidelines provided by organizations such as the United Nations and regional bodies.

Conclusion

Judicial and Prosecutorial independence cannot be emphasised enough in any democratic setting, it is the cornerstone, so to speak of the efficient and smooth running of Justice Institutions. As mentioned above, there are Constitutional and legislative frameworks that guarantee for such independence and the same should be respected and adhered to by the other arms of the Government.

ICJ Kenya submits that for the safeguard of constitutionalism and democracy as such, it is only prudent that these institutions remains independent and accountable.