

Kenya

Corruption in the Kenyan judiciary is reported to be widespread, and the administration of justice suffers generally from inadequate funding and political influence. The extent of executive influence was illustrated with the appointment of a noted government supporter to office of Chief Justice. The continuing economic crisis and political instability further undermined the judiciary and led to a deteriorating human rights situation. These factors contribute to a climate of impunity.

Kenya achieved independence from the United Kingdom in 1963. Since then it has only had two presidents, Jomo Kenyatta and Daniel arap Moi, and the National Assembly has been dominated by the Kenya Africa National Union (KANU).

The Constitution of Kenya provides for the separation of powers between the arms of government. The President is the head of state and appoints a Cabinet of ministers from among the members of the National Assembly to aid and advise the government of Kenya. The Cabinet is collectively responsible to the National Assembly in the execution of its office. The current President, Daniel arap Moi, has been in power since 1978, and is serving his last term which ends in 2002.

The legislative power of Kenya is vested in the parliament which consists of the President and the National Assembly. The National Assembly consists of 210 popularly elected members, 12 members nominated by the President and two ex officio members. The President is responsible for the summoning of parliament at least once a year and can at any time dissolve it.

The worsening financial situation and continuous reshuffling of government ministers by President Moi led to a growing lack of confidence in the government and the development of political instability. All government bodies were subject to persistent allegations of corruption.

There was continuing controversy surrounding President Daniel arap Moi's proposal for a review of the Constitution. In June 1999 the President announced that the review was to be carried out solely by the National Assembly and not by an independent body consisting of the National Assembly and other interest groups. However, on 11 November 1999, the National Assembly voted, by a margin of 185-0, for a constitutional amendment affirming the supremacy of the National Assembly and limiting the power of the presidency to control the management of the assembly.

Human Rights Background

The human rights situation in Kenya continues to deteriorate with the worsening economic crisis and as the government actively attempts to silence any political criticism or opposition. The absence of adequate enforcement mechanisms and a lack of political will leads to a general culture of impunity for violators of human rights.

The Constitution of Kenya, in Chapter V, protects the fundamental rights and freedoms of the individual. This chapter protects, inter alia, the right to life and liberty, the freedoms of expression, assembly, association and movement and prohibits slavery, discrimination, and inhumane and degrading treatment. These rights are subject to such limitations to ensure that

the enjoyment of those rights and freedoms does not prejudice the rights and freedoms of others or the public interest.

Kenya is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The Special Rapporteur on Torture, Mr Nigel Rodley, visited Kenya in September 1999 (E/CN.4/2000/9/Add.4). He concluded from his mission that there was widespread and systematic physical abuse of suspects, amounting to torture, by the police. These beatings were administered generally to obtain confessions or other information. The Special Rapporteur further stated that there "is a general sense of impunity among those, notably members of the Criminal Intelligence Department, charged with investigating suspected criminal activities." Those alleging torture or abuse by police must lodge their complaint at the same police station where they allege the torture took place. The police and other security forces also commit a large number of extra-judicial killings. The Kenyan Human Rights Commission reported that 167 people were killed by police between January and September 1999, with at least 24 being subjected to torture.

The Special Rapporteur also reported that the police frequently detained individuals for extended periods without bringing them before a magistrate. The Constitution provides that a person is to be brought before a court as soon as reasonably practicable, and where he has not been brought before a court within 24 hours, or within 14 days for a capital offence, the onus of proving that the detention was reasonable shall rest with those asserting such. The Penal Code provides that robbery with violence is a capital offence, and it appeared to the Special Rapporteur that a large number of cases were classified in that manner to enable arbitrary detention for extended periods.

The elimination of all civil groups from the constitutional reform process led to increased political protests and calls for a more democratic society. Police responded to these protests with mass arrests and physical violence, including the use of tear gas and, on occasion, live ammunition. There were also increased reports of state supported gangs to assault political opposition and disperse protests.

The Public Order Act allows public meetings upon notification to the police. The police can only prevent a meeting from occurring if there is another meeting scheduled for the same area. The police continue to ignore these provisions and disrupt meetings with force that they claim are illegal. President Moi has called for the denial of permits to politicians who use public demonstrations to abuse other politicians.

The extent of executive influence over the judiciary has resulted in a system where the government can violate fundamental human rights with impunity. Actions cannot be taken to uphold the Rule of Law without facing reprisals from the government. The judicial system can then be used to further political objectives and to persecute opponents of the ruling political party, without fear of judicial condemnation.

The Judiciary

The Kenyan legal system is primarily based upon English common law with tribal law, hindu and sharia law being applied in certain disputes. The Constitution is the supreme law of the land and can only be modified by a vote of sixty five percent of all the members of the National Assembly. The legal system suffers greatly from inefficiency, corruption and a lack of adequate funding. The Kenyan Government announced on 5 April 2000 at the 56th Session of the Commission on Human Rights that the court registries were in the process of being computerised, and an increase in the number of judicial officers was being considered in order to address the inadequacies of the judicial system.

The Court of Appeal and the High Court are superior courts of record and are established by Chapter VI, Part 1 of the Constitution of Kenya. The Court of Appeal sits at the head of the court system and has jurisdiction to hear appeals from the High Court as may be conferred upon it by law. The High Court has unlimited original jurisdiction in civil and criminal matters and such other jurisdiction as may be conferred on it by law. As a result of the Kwach Committee report (see Attacks on Justice 1998) a criminal division of the High Court was established in March 2000. The High Court has sole jurisdiction to hear election petitions and constitutional references. There are approximately 60 High Court judges and 11 Court of Appeal judges.

Section 65 provides that parliament can establish subordinate courts which have such jurisdiction as may be conferred by law. Magistrate Courts are the main subordinate courts and are divided into District Magistrate Courts of three classes, appeals being brought to the more senior categories of the courts. A wide range of tribunals have also been created to deal with specialised issues. Islamic and hindu law can also be applied for those of that faith, generally for personal issues such as marriage or divorce.

Although legislative power is vested in the legislature by Section 30, and executive power is vested in the President by Section 23 of the Constitution of Kenya, the Constitution does not explicitly vest the judicial power in the judiciary. The structural separations in the Constitution imply the vesting of judicial power in the judiciary, but the lack of a direct provision to that effect theoretically enables the legislature or executive to usurp the exercise of that power. It is then possible to establish a separate branch of courts, directly under the control of the other arms of government, to exercise judicial power in particular cases or in general.

Section 77 of the Constitution provides that those charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This section also provides for the presumption of innocence, the allocation of adequate facilities and time for the preparation of a defence, and the right to legal representation of one's own choice.

The lack of independence of the judiciary allows the government to violate these rights with impunity. People are detained for long periods without being charged or brought to trial, are subject to police brutality, and a detainee's right to have access to legal counsel is frequently denied. These cases violate the provisions protecting the fundamental rights and freedoms of the individual in the Constitution and do not come within the public interest exception. These actions also violate the Kenyan Penal Code.

The Attorney General

By virtue of Section 26(3) of the Constitution the Attorney General has absolute discretion to institute and undertake, take over and continue, or discontinue at any stage before judgement, any criminal proceeding. Subsection (8) of that section provides that in exercising his functions the Attorney General shall not be subject to the direction or control of any other person or authority. Section 109 of the Constitution vests the power of appointing the Attorney General in the President.

The Attorney General is also an ex officio member of parliament, and is the government's principal legal adviser. The placing of such a wide discretionary power to institute criminal proceedings in a member of the government clearly creates a conflict of interests. The Attorney General has used his power to discontinue private prosecutions against government officials, stifling criticism and limiting the accountability of the government.

Judges

The Constitution does not explicitly guarantee the independence of the judiciary or provide adequate safeguards to ensure judicial independence. The judiciary is subject to executive interference and is widely perceived by the public to be corrupt. This has resulted from improper selection procedures and the provision of insufficient funds to ensure the adequate and impartial operation of the judicial system.

Judicial Selection

The procedures for selection and removal and the conditions of service for superior court judges are guaranteed by the Constitution. The Chief Justice of Kenya is appointed directly by the President, and all other judges in the superior courts are appointed by the President acting in accordance with the advice of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice as chairman, the Attorney General, two other judges of a superior court designated by the President and the chairman of the Public Service Commission. The Attorney General and the chairman of the Public Service Commission are appointed by the President. The criteria for appointment is experience in advocacy for seven years.

This selection process clearly indicates that the judiciary is not free from executive influence. The legal structure creates a selection process in which the main role is played by the President. The President is solely responsible for the selection of all participants in the appointment process and can exercise considerable influence over their decision making. Furthermore the consolidation of power in Kenya in the President clearly exacerbates the deficiencies in the selection process. There is not a sufficient guarantee against appointment for improper motives and therefore judicial impartiality is undermined.

Conditions of Service and Removal

Judges serve until seventy four years of age and can only be removed from office for inability to perform the functions of their office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour. The Chief Justice is responsible for determining the remuneration of members of the judiciary. The President is responsible for the ultimate removal of judges, and he acts upon a recommendation provided by a tribunal specially constituted for the matter.

Section 62(5) of the Constitution of Kenya provides that the President shall appoint the tribunal consisting of a chairman and four other members that have held judicial office, who are qualified to hold judicial office, or upon whom the President has conferred the rank of senior counsel. The members of the tribunal are selected by the President. The President can suspend a judge, upon the recommendation of the Chief Justice, where a question of removal has been referred to a tribunal.

The inadequacies of the selection process are shown clearly if one looks at the appointment of the Chief Justices of Kenya. As stated previously, the appointment of the Chief Justice is solely a presidential responsibility. The Chief Justice is responsible for the administration of the judiciary and has the power to transfer cases and judges within the judicial system.

Since 1963, the President has frequently appointed judges of a foreign origin on the basis of a contract, thereby bypassing life tenure and clearly making the position of Chief Justice subject to executive influence. Furthermore, the absence of governing criteria for appointment, or any review process, allows the President to appoint a Chief Justice purely on a discretionary basis. The previous Chief Justice, although having seven years experience as an advocate, was not a practising advocate or sitting judge at the time of appointment, and had been previously dismissed twice from judicial office on disciplinary grounds.

The current Chief Justice, Bernard Chunga, was previously Deputy Public Prosecutor, and was active in that role in prosecuting critics of the government. The Presidential control over the selection process clearly undermines the independence of the judiciary and allows the President to directly assert control over the judiciary. It also creates a climate in which the judiciary exercises its powers in accordance with the President's wishes, or otherwise faces administrative retribution from the President or his direct appointee, the Chief Justice.

The inadequacies of the judicial system are highlighted by the case of Tony Gachoka, the editor and publisher of the Post on Sunday. Mr Gachoka was convicted of contempt of court on 20 August 1999 after he published articles alleging corruption in the judiciary. The case was heard by the full bench of the Court of Appeal exercising its discretion to invoke its original trial court jurisdiction and sentenced Mr Gachoka to six months imprisonment as well as fining him 1,000,000 Kenyan shillings. Some of the judges hearing the case had been mentioned in Mr Gachoka's articles as being involved in the corruption scandal. During the trial Mr Gachoka was not permitted to give oral evidence or call witnesses in his defence. As the case was heard by the highest court of appeal, the full court of the Court of Appeal, Mr Gachoka was deprived of the ability to appeal the decision.

Lawyers

Lawyers in Kenya are represented by the Law Society of Kenya. The Law Society is established by an act of parliament and governed by a ruling council elected annually by the members of the Law Society. All practising lawyers within Kenya are required to become members of the society.

The Law Society of Kenya is mandated to maintain and improve the standards of conduct of the legal profession, to conduct continuing legal education of its members, and to assist the government and the judicial system in all matters regarding legislation and the administration of law in Kenya. In the latter role the Law Society has been active in the promotion of human rights and in participating in the constitutional reform process.

The Special Rapporteur on Torture, from his mission to Kenya (E/CN.4/2000/9/Add.4), reported that lawyers are frequently denied access to clients even when they are in possession of a court order. During the mission, the Attorney General of Kenya acknowledged that, based on Chapter V of the Constitution of Kenya, lawyers have a legal right to free and immediate access to their clients at any time. This right was routinely ignored by police or prison officials and detainees were not informed of their right to have access to legal counsel. The UN Basic Principles on the Role of Lawyers provides that it is a primary responsibility of government to ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or interference.

The unavailability of legal aid, with approximately only 10% of those accused of crime being represented by counsel, was also of concern. This problem was particularly serious in the north of the country. All persons are entitled to have the assistance of a lawyer in defending themselves in criminal proceedings. Governments have a positive duty to ensure effective and equal access to lawyers and to allocate sufficient funding to legal services for poor or other disadvantaged persons.

Cases

Babu Achieng (Chief Magistrate in Nakura): Justice Achieng was murdered on 15 January 1998 by unidentified persons. (see Attacks on Justice 1998). On 7 September 1999, three men were charged with Justice Achieng's murder. The accused denied the charge and alleged that they had been tortured by the police, displaying injuries to various parts of their bodies.