

## KENYA

**A Constitutional Review process has been under way and a significant portion of civil society has now been allowed to participate. The Government has attempted to intimidate the opposition media with arrests and prosecutions. The administration of justice is riddled with political influence and inadequate funding, and lawyers are frequently denied access to clients. The continuing economic crisis and political instability has 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. Jomo Kenyatta served as president until his death in 1978, when he was succeeded by Daniel Arap Moi. The National Assembly has been dominated by the ruling Kenya Africa National Union (KANU).

The present Constitution came into force in December 1964, when the Republic was established. It requires a two-thirds majority of the unicameral National Assembly for any amendment. There have been numerous constitutional amendments under Moi's presidency. In 1986, control of the civil service was transferred to the President's office, and the President was given power to dismiss High Court judges. Also in 1986, the secret ballot for preliminary elections was replaced by public queue-voting. The secret ballot was reinstated in 1990 and the tenure of office of judges was restored in 1992. In 1991, the single-party rule ended, and the first multi-party elections were held in 1992, mainly as a result of domestic unrest and pressure from international aid donors. President Moi was last re-elected during the general elections of 29 December 1997. These elections, which took place at the presidential, parliamentary, and local levels, were marred by allegations of widespread fraud. The KANU adopted a number of strategies that undermined free and fair elections, such as a lopsided voter registration which excluded opposition voters and the appointment of the Electoral Commission's members by the President. President Moi's term ends in 2002 and he is not eligible for re-election.

The Constitution of Kenya provides for the separation of powers. 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 Cabinet initiates and directs national policies. It also implements laws passed by the legislature and performs tasks involving the appointment, tenure and dismissal of government officers. The President has extensive powers including the ability to declare a state of emergency.

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 from nominees of political parties in proportion to party strength, and two *ex officio* members, the Attorney-General and the Speaker. The President is responsible for the summoning of parliament at least once a year and can at any time dissolve it.

The country is divided into eight administrative regions which are further subdivided into districts. The central government appoints a commissioner for each district and region.

The worsening financial situation and continuous reshuffling of government ministers by President Moi has led to a growing lack of confidence in the Government and the development of political

instability. All government bodies have been subject to persistent allegations of corruption. In May 2000, a parliamentary committee-made up of opposition politicians and ruling party members-published a "list of shame" of corrupt leading politicians and civil servants. The report states that "corruption exists at every level of Kenyan society, but is strongest in the civil service, the provincial administration, the local authorities and the judiciary". Nevertheless, in July 2001, the Attorney General Amos Wako published a new anti-corruption bill that would grant amnesty to officials for economic crimes committed before December 1997. In August 2001, the bill was defeated by the Parliament, and it is not clear whether it will be introduced again to Parliament in for adoption.

## **THE CONSTITUTIONAL REVIEW PROCESS**

Following the December 1997 elections, a forum comprised of political and civil society members was appointed to redraft the Constitution, and on 8 December 1998, the Constitution of Kenya Review Commission Act came into law, setting down the basis for constitutional review and establishing organs to facilitate public involvement in the review of the Constitution. However, 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 interested civil society groups. This decision provoked controversy within Parliament and led to public demonstrations in Nairobi. The Ufungamano Initiative was established by religious leaders and other civil society activists as an alternative process to reform the Constitution.

In July 2000, the Constitution of Kenya Amendment Bill was passed, providing for the appointment of 15 commissioners to review the Constitution. In November 2000, the leader of the review team, Professor Yash Ghai, promoted the idea of a joint commission formed by the parliamentary-led commission and the Ufungamano Initiative. After lengthy negotiations preparations for the merger of the two constitutional review teams began in January 2001, and amendments were introduced to the Constitution of the Kenya Review Commission Act 2000 to accommodate the merger. However, President Moi questioned the credibility of the 12 experts proposed by the Ufungamano Initiative to join the unified commission. On 18 April 2001, the Law Society of Kenya declared the Constitutional Review Commission of Kenya to be holding office illegally, as according to the Constitution of Kenya Review Commission Act, in force since January 25 1999, the Commission should have finished its work by 25 January 2001. In June 2001, President Moi appointed the 12 members nominated by the Ufungamano initiative, with the result that civil society was now included in the constitutional review process. However, there have been allegations, mainly in the Kenyan press, of corruption among the commissioners in connection with luxurious expenditures.

There is continuing debate over the Constitution of Kenya Review Bill 2001 and the Constitution of Kenya Bill 2001, both documents being the result of the merger agreement between the parallel review groups. Members of the Parliament appear to disagree on the constitutional reform process. The holding of a referendum is compulsory under the Kenya Constitution Review Bill before the draft Constitution is taken to the parliament. However, the KANU has presented proposals, under which the referendum would take place only after the new constitution has been passed by the parliament.

## HUMAN RIGHTS ISSUES

The human rights situation in Kenya continued to deteriorate, with the Government taking steps to silence political opposition. The absence of adequate enforcement mechanisms and a lack of political will has led to a general culture of impunity for those who commit human rights abuses.

The Bill of Rights (Constitution of Kenya, Chapter V, Articles 70-83) provides for basic rights but then restricts these with qualifying limitations, known as clawback clauses. Colonial era laws have been re-enacted, such as the Preservation of Public Security Act (PPSA), which among other constitutional violations restricts freedom of expression and assembly. Although the derogation of the constitutional guarantees is clear, the Act has never been amended to remove these restrictions. Magistrates' courts are accused of suppressing fundamental freedoms, since most political detainees are prosecuted before them. Magistrates' courts also base their rulings on colonial-era legislation, such as Articles 56 and 57 of the Penal Code, which create the offence of sedition, and the PPSA, allowing for detention without trial.

While the Government has continued to criticise human rights NGOs publicly and to intimidate them, there has nevertheless been an increase in the number of civil society organisations.

### *International human rights mechanisms*

Kenya is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, 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, and the Convention on the Rights of the Child. On 8 September 2000, Kenya signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the Optional Protocol on the sale of children, child prostitution and child pornography. Kenya is also a member of the African Union (formerly Organisation of African Unity) and a party to the African Charter on the Rights and Welfare of the Child. In 1999, the Kenyan Government signed the Rome Statute for the creation of an International Criminal Court.

At its 56th session, the Commission on Human Rights considered the situation in Kenya under the confidential 1503 procedure. The Commission has since decided to discontinue consideration under that procedure.

The Special Rapporteur on Torture, Sir Nigel Rodley, visited Kenya in September 1999. In his report to the 56th session of the Commission, the Special Rapporteur stated that "a number of his official interlocutors acknowledged that there was a tradition in Kenya of physical rough treatment of suspects by the police". It was apparent to him that "such treatment routinely includes sustained beatings on all parts of the body with sticks, metal bars and lengths of rubber, leaving unmistakable signs of their use". These beatings were administered generally to obtain confessions or other information. The Special Rapporteur stated that "there is a general sense of impunity among those, notably members of the Criminal Intelligence Department, charged with investigating suspected criminal activities". The Special Rapporteur also reported that the police detained individuals for extended periods without bringing them before a magistrate. The Kenyan Government announced that the Special Rapporteur's recommendations would be implemented. In October 2000, the Criminal Law Amendment Bill on the treatment of detainees and police custody was published. This Bill incorporated the above recommendations and included a provision to establish the Standing Committee on Human Rights as an independent Human Rights Commission.

In October 2000, the Attorney General published the Bill establishing the Kenya Human Rights Commission to create a commission to promote and protect human rights in the country. The Commission will monitor the Government's compliance with its obligations under international treaties and conventions on human rights and will investigate, *inter alia*, extrajudicial killings by the police and deaths caused by politically instigated ethnic clashes. The Bill reportedly has been submitted to the parliament for approval.

The excessive use of force by the police is evidenced by the shooting of six unarmed, naked prisoners by prison wards in September 2000. The six were part of a group of eight prisoners on death row who attempted to escape from a Nyeri prison and were shot indiscriminately, according to the initial police report. However, human rights groups alleged that the prisoners had been beaten to death and that the authorities were trying to cover up the incident. According to Amnesty International, by the end of 2000, the report by the Commissioner of Prisons had not been made public, and no prison officers were suspended from duty pending investigations. The eight men had been sentenced to death for robbery with violence after trials which were not conducted in accordance with international standards at Magistrates' Courts, where the defendants do not have the right to legal aid.

Convicted persons continued to be sentenced to the death penalty. However, even though no one has been executed for more than 10 years in Kenya, there are currently approximately 1,000 people on death row. Prison conditions remain harsh with severe overcrowding and lack of adequate clothing, food and medication. No local or international human rights organisation has been allowed access to prisons. Family members and attorneys may visit prisoners at the discretion of the government, although the law provides for this right.

In Kuria, a self-styled vigilante group, known as the *Sungu-Sungu*, was formed by the village court, the *Iritoongo*, to police the district. Suspects are arrested, put in cells at camps belonging to the chiefs and are tried by the *Iritoongo*, often having to pay heavy fines. The *Sungu-Sungu* team illegally exercised police and judicial powers throughout 1999, and there have been allegations that it has tortured suspects and detainees.

#### *Freedom of assembly and expression and freedom of the media*

The initial exclusion of civil society groups from the constitutional reform process led to increased political protest and calls for a more democratic society. Police have sometimes 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 assaulting members of the political opposition and dispersing protests.

On 26 November 2000, at the Tumsifu Centre in Kisumu, Western Kenya, a group of 50 youths violently disturbed a public hearing on the Kenyan Constitution, organised by the Ufungamano initiative, attacking the panellists and members of the audience.

There have been additional incidents where the police have broken up similar meetings. On 31 March 2000, the police arrested eleven human rights activists while they were performing a play before a group of children as part of a civic education program in the Ogiek community. In all these cases, the police have defended their actions by claiming that the organisers of the rallies failed to obtain the relevant permit. However, the organisers claim that they gave advance notification in conformity with the 1997 amendments to the Public Order Act.

On 25 November 2000, President Moi speaking at a fund-raising rally, ordered the police not to interfere with political meetings, including those organised by the opposition. However, a month earlier, he had banned all rallies by *Muugano wa Magenzi* (Movement for Change), a party group formed in September 2000 that was calling for political change. On 27 November 2000, President Moi called *Muugano wa Magenzi* "a revolutionary movement bent on unleashing chaos in the country", and said its activities were legally questionable.

Two journalists from *The People*, a newspaper owned by a leading opposition politician, were charged with publishing on 17 January 2000 secret military information issued by the army following rumours of a mutiny. Nobody was charged from the *East African Standard*, a newspaper associated with the ruling party, for publishing a similar story on the military code.

On 22 October 2000, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain, sent an urgent appeal to the Kenyan Government concerning the arrest and detention of Johann Wandetto, sentenced on 15 February 2000 to 18 months in prison in connection with an article published on 6 March 1999 in *The People*. In the article, Wandetto had reported on the alleged disarmament of the elite presidential guards by a militia in the West Pokot region. No reply had been received by the time the Special Rapporteur presented his report to the 57th session of the United Nations Commission on Human Rights.

The Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswami, as well as the Special Rapporteur on the freedom of opinion and expression, intervened in the case of the publisher of the *Post on Sunday*. Tony Gachoka was convicted of contempt of court on 20 August 1999 after he published articles alleging corruption in the judiciary. In addition to concerns related to the status of three judges hearing the case, who specifically had been mentioned in the article as being involved in the corruption scandal, it was noted that the defendant was denied the right to give oral evidence and to call witnesses in his defence. He was also denied the right to appeal (see *Attacks on Justice, 1999-2000*). The Special Rapporteur has since requested an invitation to visit the country.

### *Women's rights*

Women in Kenya continued to face serious obstacles to the exercise of their freedoms. Domestic violence against women remains widespread, and the spread of HIV/AIDS has created a large orphan population. Women are seriously underrepresented in Kenya's politics and government.

Female genital mutilation continues to be practised. Following a landmark Rift Valley court decision on 12 December 2000, two young girls successfully obtained a court order restraining their father from having them forcibly circumcised. President Moi has issued two presidential decrees banning female genital mutilation, and the Government prohibits state-controlled hospitals from engaging in the practice. However, legislation which would give the presidential decree legal effect has not been adopted.

## **THE JUDICIARY**

The Kenyan legal system is primarily based upon English common law with customary law, Hindu law and Islamic law being applicable in certain disputes. There is no jury system. 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 that an increase in the number of judicial officers was being considered in order to address the inadequacies of the judicial system. On 22 June 2001, the Law Society of Kenya (LSK) said the overload threatened justice and called upon the Government to appoint more judges and magistrates in order to clear a backlog of court cases.

### *Court structure*

The Court of Appeal and the High Court are superior courts of record and are established by Chapter IV, Part 1 of the Constitution of Kenya. The Court of Appeal sits at the head of the court system and has jurisdiction to hear such 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. There are approximately 60 High Court judges and 11 Court of Appeal judges. The Chief Justice is a member of both the Court of Appeals and the High Court, an arrangement that violates the principle of judicial review. 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. The fact that the High Court serves as a constitutional Court on an *ad hoc* basis has been criticised by the ICJ Kenya section in its 1999 Rule of Law report.

Section 65 of the Constitution provides that parliament may establish subordinate courts which have such jurisdiction as may be conferred by law. Magistrate Courts are the main subordinate courts and include the Resident Magistrate Courts and District Magistrate Courts. Both the Resident and District Magistrate Courts are divided into three classes, which determines the severity of the punishment they are allowed to impose, and both are appointed by the Judicial Service Commission. Appeals are brought to the more senior categories of the courts; appeals from the Resident Courts are sent to the High Court, while those from the District Magistrate Courts must first appeal to the Residents Courts. A wide range of tribunals have also been created to deal with specialised issues. In December 2000, Kenya launched a family Court specifically to deal with, among other issues, will adoption, custody of children and burial disputes. The launch of the family Court Division of the nation's High Court was performed by the Chief Justice, Bernard Chunga. This brings to three the number of judicial divisions under the Government's ongoing reform program. The other divisions deal with commercial and criminal law. Experts claim that there are approximately 6,627 family-related cases pending before Kenyan courts.

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 such power. This makes it possible for the executive to establish special courts which exercise judicial power.

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 full 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 and are subject to police brutality, and a detainee's right to have access to legal counsel is frequently denied. Defendants have the right to government-provided legal counsel only in murder and treason cases, and defence lawyers are frequently denied access to government-held evidence, as the government can plead the State Security Clause as a basis for withholding evidence. These cases violate the provisions protecting the fundamental rights and freedoms of the individual as enshrined 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 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, often stifling criticism and limiting the accountability of the Government. He has argued in a number of cases that citizens must notify his office before initiating private prosecution.

### *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. Constitutional security of tenure was removed by the Moi government in 1988 but was restored in 1990 after the suspension of military assistance by the United States. 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 (JSC). 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 demonstrates that the judiciary is not free from executive influence, as members of the Judicial Service Commission are appointed by the President. 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 the President in Kenya clearly exacerbates the deficiencies in the selection process. There is not sufficient guarantee against appointment for improper motives and therefore judicial impartiality is undermined.

In 2000, the Chief Justice announced the establishment of an administrative Judiciary Inspection Unit, aimed at evaluating the performance of magistrates. This unit may recommend disciplinary measures in respect of errant and under-performing magistrates, but it lacks hiring and dismissal powers, which belong to the Judicial Service Commission. The importance of this Unit resides in its enhancement of administrative efficiency and its supervision of magistrates nationally.

According to a recently published survey by the International Bar Association, women account for some 49 per cent of judicial officers in Kenya .

#### *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 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 such a 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 the tribunal. It should be noted that the Constitution is not clear on the legal character of the recommendations made by the tribunal to the President. Since 1963, in some cases judges who acted independently of the executive branch have been allegedly punished with transfers from their court to outlying areas in the country.

According to Professor Makau Mutua "such tenuous tenure protections are heightened in Kenya where judges, once they are removed from the bench, are prohibited from practising law before its courts. This increases the pressure on judges to do the state's bidding, because employment as a practising lawyer is forbidden upon removal or retirement from the judiciary".

The status of magistrates is governed by the Judicial Service Commission regulations and the Magistrates' Courts Act, which are neither guided by nor based on the principle of judicial independence. According to Kenyan scholars, magistrates are treated by the JSC as civil service employees in need of strict supervision and do not enjoy security of tenure.

The inadequacies of the selection process demonstrated clearly by the process of appointing 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 foreign origin on a contract basis, thereby bypassing life tenure and clearly making the position of Chief Justice subject to executive

influence. There is widespread agreement among observers of the Kenyan judiciary that the institution of the contract judge, not provided in the Constitution, is corrosive and undermines judicial independence.

Furthermore, the absence of criteria governing appointment, or any review process, allows the President to appoint a Chief Justice purely on a discretionary basis. The previous Chief Justice, although having experience as an advocate, was not a practising lawyer 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. It has been alleged that the Chief Justice issues "circulars" to judges instructing them on how to rule in particularly sensitive matters.

In February 2000, the Chief Justice issued an internal circular calling upon judicial officers to make full disclosure of their individual wealth as well as that of their spouses and unmarried children. Judicial officers were said to have largely ignored this instruction.

#### *Court invasions*

In June 2000, more than 100 Maasai "supporters" of Cabinet Minister Julius Sunkuli, dressed in traditional regalia and armed with knives and sticks, stormed the High Court building to protest his arraignment on vandalism charges.

Similarly, on 17 July 2000, more than 200 Kipsigis "supporters", chanting and brandishing traditional weapons, stormed the High Court building to protest the arraignment of Cabinet Minister Kipngeny arap Ngeny on theft of more than 100 Kshs. million from the Kenya Posts and Telecommunications Company. The "supporters" had been transported from Kericho, about 100 km from Nairobi, in buses belonging to a public university.

University students also stormed courthouses twice in 2000. On 2 April, approximately 80 students mobbed Kibera Magistrates Court, calling for the release of a Nairobi university student. On 2 November 2000, some 100 students stormed Kibera courts again, protesting charges against three students for stoning cars during a riot.

On 22 September 2000, a huge public mob invaded Kibera law courts and fought with prison guards. The mob wanted to beat a theft suspect whom they alleged was a well-known thug in the neighbourhood.

The ICJ Kenya section wrote to the Chief Justice protesting these invasions, as they interfere with the independence of the judiciary and increase the risk of physical violence in the courts. The Chief Justice replied that the matter "was receiving necessary consultation, and action will be taken as deemed appropriate".

#### *The embattled Kenyan judiciary: a divided Court of Appeal*

On 29 June 2001, Judge Kwach of the Court of Appeal accused his two colleagues, Judge P.K. Tunoi and Judge A.B. Shah of "putting the integrity of the Kenyan highest court into question". Judge Kwach was apparently unhappy with Justices Tunoi and Shah after they changed their position in a case pitting Express Kenya Ltd against a local businesswoman. Kwach alleged his colleagues had attempted to persuade their fellow Justices not to go ahead with their decision to grant an award of 4.8 million Kenyan shillings. Kwach took the unusual step of prefacing his judgement with a critical commentary on the purpose of the judicial oath. He said that the integrity and independence which the Court of Appeal had enjoyed up to that point "was now water under the bridge" because of the conflicting judgements which were issued in the same case, and because of the reasons for these conflicting judgements. Judge Tunoi retorted that Justice Kwach's conduct was "unbecoming". On 4 July 2001, Chief Justice Bernard Chunga addressed a news conference attended by all appellate judges. In this highly unusual public statement, the Court of Appeal offered an apology to all Kenyan citizens for the public confrontation which had occurred between the Justices.

The former Law Society of Kenya Chairman, Gibson Kamau Kuria said that "the Court of Appeal has lost integrity and a commitment to the rule of law" and backed Kwach's attack on his two colleagues as "right and courageous" adding that "his view was shared among a silent majority of senior advocates".

In his paper of 14 September 2000, Ahmednasir Abdullahi, a law professor at the University of Nairobi discusses the practice of the courts in completely disregarding legal precedents. He also cites several cases in which a Kenyan court may "set forth the applicable law, find exactly how that law applies to the case and then rule to the contrary for no apparent reason. Often such decisions are tailor-made for specific parties in a case rather than sound decisions based on established law".

## LAWYERS

### *Legal education*

Legal education in Kenya begins at the Faculty of Law of the University of Nairobi or at the newly established Faculty of Law of the Moi University. Following the university education, those pursuing a career as an advocate have to attend a 12-month course at the Kenya School of Law and then to do an internship at a law firm. Upon completion of the traineeship stage, students receive a Certificate of Compliance from the law firm, along with a Certificate of Good Conduct from two other advocates, which they submit for admission to the Roll of Advocates.

Kenyan scholars stress the need to reform the legal education system in the country, as it is based on foreign models, is controlled and influenced by the elite, focuses on private practice and commercial legal interests and favours a teaching style that is highly theoretical and of limited practical value. Students often choose to obtain their university degree abroad, leading to admission to the Law Society of Kenya of many advocates who may have a strong theoretical legal education but know little of the reality of law in the Kenyan environment. Kenyan commentators also note that the substantial rise in the number of advocates in Kenya, as well as the weakness in the Kenyan judiciary, has led to major delays in the courts. The increasing competitiveness among advocates has led them to "create" cases and bring inappropriate cases to courts.

### *The Law Society of Kenya*

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 number of lawyers currently exceeds 3,000.

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.

In June 2001, a draft Bill to introduce changes into the Law Society of Kenya Act was circulated to lawyers for scrutiny. Proposed changes would streamline the Law Society's election provisions and empower the Council for Legal Education to be more closely involved in formal legal training.

### *The legal profession in practice*

The Special Rapporteur on Torture, following his mission to Kenya, 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. This constitutes a violation of Articles 7 and 8 of the UN Basic Principles on the Role of Lawyers. Article 7 states that "governments shall ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention". Similarly, Article 8 stipulates that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality".

The unavailability of legal aid, with approximately only ten per cent of those accused of a 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**

**Aggrey Muchelule {Chief Magistrate}**: In April 2000, the Chief Magistrate was transferred from Mombasa to Meru after freeing key suspects on bail in a case involving 6,2 tons of hashish. Chief Justice Chesoni (deceased) had ordered the suspects to be held. The Chairman of the Law Society of Kenya (Mombasa Branch) characterised the move as a "retribution" for the bail ruling and threatened to seek judicial review of the transfer order.

**Ahmed Nassir {lawyer and law lecturer}**: In October 2000, Mr. Nassir accused the judiciary of mediocrity during a Law Society planning workshop. His criticism was carried in the print media. Mr. Nassir had indicated that his worst students invariably became magistrates and that judges were

unskilled in legal philosophy with the result that their judgements were "mediocre, lacked legal argument and were shorter than train tickets 'good for this train only'." During the subsequent week, Justice Tom Mbaluto of the High Court Commercial Division in Nairobi, refused to hear Mr Nassir and had him thrown out of his court when Mr. Nassir appeared before him to argue a private matter.

In May 2001, a group of lawyers led by Richard Stein, from a British law firm representing Kenyans killed or injured by live bombs left behind by British soldiers based in Kenya, was barred from entering the British Army training Field at Archer's Post by British and Kenyan soldiers. The British army has used this area for military exercises since the Second World War, and after Kenyan independence signed an agreement with the government to continue using the camp for military activities. The British army stopped using live ammunition some years ago. However, they have failed to clean up the area properly. The lawyers were seeking information for their case regarding exploding military devices, and were thus denied access to evidence. The Kenyan community has sought compensation from the Kenyan Government, but has failed due to a one-year statute of limitation which has expired. The Kenyan plaintiffs subsequently sued the British Government seeking damages.

The Kenyan branch of the International Federation of Women Lawyers (FIDA) which has been helping an alleged rape victim bring charges against a Minister of the State in the Office of the President, experienced an attempted break-in by police. On 29 August 2000, five armed police officers allegedly tried to force their way into the FIDA office in Nairobi, but security guards at the gate were able to fend them off. A few weeks before the attempted break-in, three FIDA staff members had received anonymous death threats as a result of their work. A Catholic priest and human rights defender, Father John Kaiser, who brought the rape case to public attention, was murdered five days before the attempted break-in. Since Father Kaiser's death, the girl allegedly raped by the Minister of State has dropped the charges against him.

On 21 September 2000, the Special Rapporteur on the Independence of judges and lawyers, Param Kumaraswami, sent a communication to the Kenyan Government regarding the threats made against the FIDA. On 26 October 2000, the Government denied any involvement and stated that the police was already investigating the matter. The Government also stated that if any police officers were found to be involved, they would be prosecuted in their individual capacity. The attempt at forced entry and harassment and intimidation of FIDA staff constitutes a violation of Article 16a of the UN Basic Principles on the Role of Lawyers, which states that "Governments shall ensure that lawyers are able to perform all of their judicial functions without intimidation, hindrance, harassment or improper interference".