

CONCLUSIONS AND RECOMMENDATIONS

Deep-seated patterns of corruption in the administration of justice have been a serious impediment to the rule of law in Kenya. The ICJ has noted various efforts by the government, the judiciary and civil society to eliminate this practice.

The so-called “radical surgery” carried out on the judiciary led to the removal and resignation of allegedly corrupt judges and magistrates following the political changes in 2002. However, the manner in which the anti-corruption measures were conducted violated principles of due process and security of tenure. The mission found that the implementation of the policy and subsequent events have in practice undermined, rather than strengthened, the independence of the judiciary in Kenya.

The controversies and difficulties surrounding the removal of judges and magistrates underline a broader need for comprehensive judicial and legal reforms in Kenya to establish an independent and accountable judiciary. It will be essential to establish clear and transparent criteria and procedures for the appointment and dismissal of judges and magistrates. Furthermore, the ICJ mission found that broader aspects of judicial independence and accountability must be addressed in order to strengthen the judiciary. Legal and judicial reform as well as necessary anti-corruption policies must be comprehensive, addressing all actors in the administration of justice.

The following paragraphs set out the ICJ’s recommendation for the establishment of an independent and accountable judiciary in Kenya.

Constitutional framework of the judiciary

1. The ICJ endorses Chapter 13 of the Draft Constitution of Kenya 2004, on the Judicial and Legal System, which would serve as an appropriate framework for an independent judiciary and the protection of human rights by the judiciary. The ICJ urges that this be adopted as part of a much needed new Kenyan Constitution.
2. In case of further delays in the adoption of the Draft Constitution 2004, the current draft provisions on the Judicial and Legal System (Chapter 13) should be introduced as a separate parliamentary bill and enacted into law as soon as possible.

Judicial independence and accountability

3. The anti-corruption programme should consist of simultaneous and inter-related reforms in all parts of the administration of justice in Kenya. This must include the executive branch as well as the legal profession.
4. The Law Society of Kenya and legal civil society organizations

should assess the state of corruption within the legal profession through an independent committee with the power to make recommendations on how to prevent such practices in the future.

5. The principles of judicial independence and accountability should be strictly observed in the discipline and removal of judges and magistrates. The process of disciplining and removing judges and magistrates should scrupulously comply with the principle of security of tenure and due process.

6. An independent complaints procedure that can receive complaints on alleged misconduct and unethical behavior of judges and magistrates and other judicial staff should be established. The public should have access to such complaint procedure.

7. The procedures for complaints against judges and magistrates and relevant disciplinary procedures should be regulated by law. In the meantime the Judicial Service Commission should promulgate clear rules and procedures for receiving and handling substantiated complaints against magistrates and other judicial officers under their disciplinary control. The procedure must ensure guarantees of a fair hearing and expeditious resolution of any complaints, with recourse to judicial appeal.

8. The High Court should resolve as soon as possible the legal

challenges mounted against the tribunals currently hearing the cases of the judges from the High Court and the Court of Appeal. Once these tribunals resume their work, they should resolve these cases without undue delay and in a fair, resolute and impartial manner.

9. The judiciary is accountable to public scrutiny, including the media and civil society. Contempt of court proceedings should not be used against the legitimate criticism by the media. The Madrid Principles on the Relationship between the Media and Judicial Independence should guide the relationship between an independent judiciary and the press.

On judicial ethics and the right to freedom of association

10. Governmental and judicial authorities should fully respect the right of judges to freedom of association and expression in accordance with international human rights law and guidelines on judicial independence. They should refrain from statements threatening the exercise of these rights.

11. To prevent further confrontation, a regular dialogue should be established between the Chief Justice, the Judicial Service Commission and the Kenyan Judges' and Magistrates' Association.

12. The members of the judiciary should strictly observe the new Judicial Service Code of Conduct and Ethics. The Code should be regularly reviewed to ensure that it satisfies the Bangalore Principles on Judicial Conduct.
13. The judiciary should set up clear implementation mechanisms to monitor and ensure compliance with the code. Such mechanism should establish clear and transparent rules and procedures.
14. The judiciary, the executive arm of the administration of justice and the legal profession should develop an educational programme that will institutionalize awareness and compliance with judicial ethics and accountability.

On appointment and promotion in the judiciary

15. The appointment and promotion procedures for both judges and magistrates need to be improved to allow clear, transparent and objective criteria to be applied and verified for all judicial positions, including the position of Chief Justice.
16. In addition to nominal qualifications required by law, additional criteria should be required of candidates for judicial positions. These should include those pertaining to academic qualifications, integrity, ability and experience, and other objective criteria based on proper professional qualifications. These criteria should be applied to all appointments and promotions, including the position of the

Chief Justice.

17. The judiciary should adopt a policy for the progressive attainment of gender equity and remove discriminatory factors in all judicial appointments in the country.
18. Clear procedures in the nomination, selection and appointment of members of the judiciary should be established. All judicial vacancies, including those of the higher courts, should be advertised with clear deadlines for application. A consultative process must be set up where other stakeholders, such as the Legal Society of Kenya and other organizations, may provide nominations according to previously set criteria. A "vetting procedure" is recommended through the publication of final nominations that would invite any substantiated submissions from the public and other interested parties.
19. Appointments as acting judges or magistrates or on a temporary basis compromise international standards on the independence of the judiciary. Any such practice should be immediately discontinued.

On the Judicial Service Commission

20. The Judicial Service Commission should be reformed as a matter of urgency with respect to its composition, mandate and functioning.
21. Composition and mandate foreseen in the draft Constitution

2004 would provide for a much improved and appropriate framework for a truly independent and representative body. It should serve as the model for any efforts to improve the functioning and composition of an independent JSC.

22. The current JSC should take a more active role in strengthening judicial independence through its advisory role on the appointment of judges, as well as by making recommendations on remuneration, appointment, discipline and removal of all judicial officers.
23. The JSC should establish, in consultation with major legal stakeholders, a consultative procedure in the implementation of these expanded functions, including clear roles of stakeholders in vetting proposed judicial appointments.
24. The JSC should establish a clear public complaint mechanism and should establish transparent and fair standards and procedures for disciplinary proceedings against magistrates and other persons over whom it exercises disciplinary control.
25. A fully functioning support administration in the form of a secretariat, independent from other civil service institutions, would enhance the capacity of the JSC to fulfill its functions. The secretariat should be provided with sufficient resources for its operations.

On the Magistracy

26. The law should expressly guarantee security of tenure for magistrates in Kenya. Magistrates should be treated as full judicial authorities and all other principles of judicial independence and accountability, including tenure; qualifications and appointments, discipline and removal and judicial ethics should apply to magistrates as they apply to judges.
27. The work conditions of magistrates should be adequately enhanced with regard to remuneration, promotion and training. The two-week training required for new magistrates should be reviewed and upgraded. The judiciary should adopt a clear programme to upgrade the training of new magistrates, and with the co-operation of parliament, to re-structure the magistracy in to areas and render them more accessible to the public. The number of magistrates should be increased in line with the Strategic Plan of the Judiciary, urgently filling the 245 open positions.

Administrative and financial autonomy

28. The judiciary and the executive branches of government must fully uphold the strict separation of powers and implement the guidelines on the relationships between the different branches of government as provided by the Commonwealth Latimer Principles.

29. The financial autonomy of the judiciary needs to be increased in order to ensure its independence. The budget allocation and management of funds should be de-linked from the Treasury and the executive.

30. The budget allocation for the judiciary must be substantially increased from its current 1% of the state budget to meet the requirements for human resources, capital development and equipment necessary for judicial operations in the administration of justice. The judiciary should also develop a sound programme for its financial management that will be accountable to an independent and competent auditing body.

31. The Kenyan judiciary should be de-linked through statutory enactment from the mainstream public service commission determining terms and conditions of judicial service of judges and magistrates.

On judicial education

32. Continuing judicial education should be developed on an institutional and long-term basis. It should be required for all members of the judiciary in the country. Appropriate training for judicial support staff should also be made available.

33. The continuing judicial programme should be guided by the Commonwealth Latimer Principles and the Bangalore Principles of Judicial Conduct in

respect of its objectives, organization and control, and funding.

34. Any continuing judicial programme should support opportunities for the judiciary to develop new fields of legal specialization. Members of the judiciary should be able to attend specialized legal seminars for this purpose.

35. Judges and magistrates should be encouraged to engage in external activities related to writing, lecturing and participation in other activities concerning the law and administration of justice.

On access to justice

36. Access to justice with regard to the formal justice system needs to be further improved. To this end, the judiciary and legal service organizations should consider undertaking a comprehensive study on the improvement of access to justice in Kenya.

37. Physical accessibility for legal professionals and the public is insufficient and needs to be greatly improved to ensure compliance with obligations under international human rights law, such as the right to a public trial.

38. Current efforts to simplify the rules of procedures are welcome and should involve the widest consultation possible among the legal stakeholders and the interested public.

On the judicial reform process

39. The judicial and legal reform process should have, as its principal objective, the entrenchment of judicial independence and judicial accountability in all aspects of the reform process, and be undertaken in accordance with international and regional standards.
40. The Government, Justice, Law and Order Sector Reform Programme (GJLOS) should systematically incorporate accepted international and regional principles on judicial independence and accountability in its support for judicial reform in Kenya.
41. The co-ordinated approach currently adopted by the GJLOS programme should not perpetuate the current dominance of the executive branch over the judiciary. The judiciary should be provided an equal platform in decision-making in the programme.
42. The participation of civil society organizations should be more substantive and not relegated to the operational phases of the programme as service providers. Civil society organizations should remain independent voices and vigilant monitors in the promotion of the rule of law in the country.