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**International  
Legal Assistance  
Consortium**

# **Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya**

**February 2010**

A Report of the International Legal Assistance Consortium and  
International Bar Association Human Rights Institute

Supported by the Law Society of Kenya



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# List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
CIPEV	Commission of Inquiry into Post-Election Violence
DPP	Director of Public Prosecutions
ECK	Electoral Commission of Kenya
FIDA	Federation of Women Lawyers - Kenya
GDP	Gross Domestic Product
GJLOS	Governance, Justice, Law and Order Sector-Wide Reform Programme
HRC	United Nations Human Rights Committee
IBAHRI	International Bar Association Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ-K	International Commission of Jurists - Kenya
IIEC	Interim Independent Electoral Commission
ILAC	International Legal Assistance Consortium
IMF	International Monetary Fund
IREC	Independent Review Commission on the General Elections held in Kenya on 27 December 2007
JSC	Judicial Service Commission
JTI	Judicial Training Institute
KANU	Kenya African National Union
KEPSA	Kenya Private Sector Alliance
KMJA	Kenya Magistrates and Judges Association
KNDR	Kenya National Dialogue and Reconciliation
KPU	Kenya People's Union
KWJA	Kenya Women Judges Association
LSK	Law Society of Kenya
NARC	National Rainbow Coalition
NESC	National Economic and Social Council of Kenya
NLAA	National Legal Aid and Awareness Project
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement-Kenya
PNU	Party of National Unity
TJRC	Truth, Justice and Reconciliation Commission
UN	United Nations
UNDP	United Nations Development Programme

# Executive Summary

The dispute over the results of the Kenyan presidential election in December 2007 led to unprecedented violence, ethnic animosity and mass displacement in what was previously considered a peaceful and stable country. Between 27 December 2007 and 29 February 2008, 1,133 men, women and children lost their lives, 3,561 people sustained serious injury and over 300,000 individuals were displaced from their homes.<sup>1</sup> Although the causes of the crisis were diverse, the tendency to violence among members of the public was exacerbated by a perception that government institutions and officials, including the judiciary, were not independent of the presidency and lacked integrity.<sup>2</sup>

In the aftermath of the violence, the attention of Kenyans, Kenya's partners in Africa and the wider international community turned to instituting a programme of fundamental reforms to deliver sustainable peace, stability and justice through rule of law and respect for human rights. This was the stated goal of the Kenyan National Dialogue and Reconciliation (KNDR) process that was initiated, through the mediation of former UN Secretary General Kofi Annan and the Panel of Eminent African Personalities, in January 2008.<sup>3</sup> By Agenda Item Four of the National Dialogue, the coalition government committed itself to addressing long-term issues that may have constituted underlying causes of the prevailing social tensions, instability and cycle of violence, including the need for constitutional, legal and institutional reform.<sup>4</sup>

In October 2009, the International Bar Association's Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC) undertook a needs-assessment mission to Kenya in order to examine the current functioning of the judicial system and to identify and prioritise ways in which support might be provided to the ongoing process of justice sector reform. The delegation consulted widely, holding a total of 35 meetings with government officials, members of the judiciary, lawyers and lawyers' organisations, legal academics, international and regional donor organisations and representatives of civil society. The IBAHRI and ILAC are grateful to all those agencies, organisations and individuals that contributed to the information presented in this report. The discussions that were held were both frank and informative.

In the opinion of the IBAHRI and ILAC, if recurrent conflict in Kenya is to be avoided, there is a clear, present and incontrovertible need for judicial reform. Public confidence in the judicial system

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1 Report of the Commission of Inquiry into Post-Election Violence (CIPEV), published in October 2008 at 308 and 334. Available online at: <http://www.communication.go.ke/media.asp?id=739>. Of the total deaths, there were 11 children, 74 females and 1,048 males killed. Ibid, at 309.

2 Ibid, at 28-29 and 460-461.

3 Kofi Annan Foundation, The Kenya National Dialogue and Reconciliation: One Year Later, Overview of Events, 18.3.2009. Available online at: [http://kofiannanfoundation.org/sites/default/files/Microsoft%20Word%20-%20Overview%20of%20events%20note\\_0.pdf](http://kofiannanfoundation.org/sites/default/files/Microsoft%20Word%20-%20Overview%20of%20events%20note_0.pdf).

4 Kenyan National Dialogue and Reconciliation, Annotated agenda and timetable, 1.2.2008. Available online at: [http://www.dialoguekenya.org/docs/Signed\\_Annotated\\_Agenda\\_Feb1st.pdf](http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf).

has virtually collapsed.<sup>5</sup> Partiality and a lack of independence in the judiciary, judicial corruption and unethical behaviour, inefficiency and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accessing the court system have, amongst other factors, all served to perpetuate a widely held belief among ordinary Kenyans that formal justice is available to only a wealthy and influential few.

Some progress is being made. Both the Government of Kenya and the Kenyan judiciary have acknowledged the need to restore public confidence in the judicial system and have taken steps in this direction. Certain policy initiatives on the reform of the judiciary have been included in the government's Medium Term Plan (2008-2012) of Vision 2030. The government has also appointed a multi-disciplinary Task Force on Judicial Reforms that has identified a broad range of reforms that need to be implemented within the judiciary.<sup>6</sup> The judiciary has itself published a 2009-2012 Strategic Plan which stipulates strategic objectives and activities aimed at addressing a variety of internal challenges.<sup>7</sup>

Under the leadership of Chief Justice Gicheru, the Kenyan judiciary has also instituted various administrative and technical reforms with the aim of improving the institutional capacity and efficiency of the judiciary. For example, in September 2008 the judiciary established a Judicial Training Institute (JTI) with a mandate to provide induction courses and continuing professional development for all judicial officers and other staff. Annual open days have been organised with the aim of enabling the public to interact with judiciary staff and learn about court processes, whilst Court Users Committees have been established to enable all actors in the criminal justice system to meet and resolve operational difficulties. A Principal Judge has recently been appointed in order to improve judicial administration in the High Court and a recruitment campaign is underway to increase the number of magistrates. A Practice Direction has been issued on the expeditious disposal of cases and a number of specific initiatives aimed at automating judicial operations are currently at the early stages of implementation.<sup>8</sup>

These and other related developments within the judiciary are welcomed by the IBAHRI and ILAC. They are necessary to improve the overall quality and efficiency of the Kenyan judicial system and are therefore deserving of international support and assistance directed to ensuring effective implementation. Nevertheless, the limitations of such measures must also be acknowledged. In the opinion of the IBAHRI and ILAC, such isolated reforms will not alone be fundamental enough to transform the Kenyan judiciary into a strong, credible and independent institution. Problems of corruption, political influence and patronage in the appointment of judges and in the constitution of the Judicial Service Commission, as well as the general lack of independence of the judiciary from the executive, cannot be addressed administratively but require a radical transformation of the relationship between the judiciary and the executive. If public trust in Kenya's judicial system is to be fully restored, administrative and technical reforms must be accompanied by institutional reform directed towards establishing the Kenyan judiciary as an independent institution for the fair administration of justice. Such change will require, ultimately, the enactment of a new Constitution.

5 A Gallup Poll conducted in April 2009 revealed that just 27 per cent of Kenyans expressed confidence in the judicial system. *Gallup, Lacking Faith in Judiciary, Kenyans Lean Toward The Hague*, 8.5.2009. Available online at: <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>.

6 The Task Force on Judicial Reforms presented its proposals to the Ministry of Justice, National Cohesion and Constitutional Affairs in August 2009.

7 The Judiciary Strategic Plan 2009-2012 was published on 20 March 2009.

8 Practice Direction on the expeditious disposal of cases issued by the Chief Justice in Gazette Notice 8167 of 5 September 2008. For the full text of the Practice Direction see the *JTI Bulletin*, July 2009. For a summary of the key directions see the Report of the Task Force on Judicial Reforms 2009, section 5.9.



The IBAHRI and ILAC note that the window for reform is closing, and closing fast. With the next electoral cycle scheduled for 2012, succession politics and electoral political conflicts will soon arise. There is a danger that attention will then move away from the reform agenda. The IBAHRI and ILAC therefore urge the coalition government to expedite its judicial reform programme. The parties are encouraged to consult regularly, to work together to develop consensus on important issues and to demonstrate genuine progress on the implementation of institutional and structural reforms within the justice sector. Only through an unambiguous display of political will to strengthen the rule of law may Kenya satisfy both its international obligations and the popular aspirations and demands of its people.



# Chapter One – Introduction

## 1.1 The mission

This is the report of a needs-assessment mission sent by the International Bar Association’s Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC) to the Republic of Kenya in October 2009. Acting upon the invitation of the Law Society of Kenya, the mission’s mandate was to examine the current functioning of the judicial system in Kenya and to identify and prioritise ways in which support might be provided to the ongoing process of justice sector reform.

Within this framework, the main topics examined by the mission were: (i) the independence and needs of the judiciary; (ii) case and court management; (iii) trial practice; (iv) the needs of bar associations and members of the legal profession; (v) access to legal aid; (vi) the right of adequate defence; (vii) legal issues related to crimes targeting women, particularly crimes of sexual violence committed during the post-election period; (viii) the role of Islamic courts; (ix) problems related to corruption and perceptions of corruption in the judiciary; and (x) implementation of the reform agenda, including (a) efforts to establish a Special Tribunal; (b) alternative options available to deal with crimes committed during post-election violence if a Special Tribunal is not established; and (c) adoption of laws related to the justice sector. A copy of the mission’s Terms of Reference is provided in Annex A.

The IBAHRI/ILAC appointed a team of legal experts to conduct the assessment. The team comprised of the Honorable Justice Georgina Wood, Chief Justice of the Republic of Ghana (Ghana); the Honorable Justice Lawrence Mchome, Justice of the High Court of the Republic of Tanzania (retired) (Tanzania); Mr Christian Ahlund, Executive Director of ILAC (Sweden); Ms Stephanie Case, Programme Lawyer at the International Bar Association’s Human Rights Institute (Canada); Ms Rithika Moore-Vaderaa, Member of the Bar Council of Ireland (Ireland); and Mr Paul Richmond, Member of the Bar Council of England and Wales (United Kingdom), who also compiled this report.

The delegation arrived in the Kenyan capital, Nairobi, on Sunday 4 October 2009 and departed on Sunday 11 October 2009. During this time the assessment team held a total of 35 meetings with government officials, members of the judiciary, lawyers and lawyers’ organisations, legal academics, international and regional donor organisations and representatives of civil society. A list of interlocutors is provided in Annex B. The team also consulted relevant legislation and various past reports on judicial reform in Kenya.

The delegation received full cooperation from the Government of Kenya and observed a willingness on the part of all of the interlocutors to maintain and develop further the dialogue between the IBAHRI/ILAC and themselves. The delegation would like to express its gratitude to all those

agencies, organisations and individuals that contributed to the information presented in this report. The delegation is particularly grateful for the assistance and cooperation of both the Law Society of Kenya and the Honorable Justice J E Gicheru, Chief Justice of the Republic of Kenya.

This report does not purport to present an exhaustive analysis of the functioning of the judicial system of Kenya. The IBAHRI and ILAC are mindful that both the deficiencies of the legal system and the legislative and administrative reforms that are needed in order to enable it to function in accordance with accepted international standards have been the subject of numerous previous reports, studies, workshops, colloquia and seminars. Rather, the ambition of this report is to outline the major obstacles facing the judicial system and assess where international and regional expertise may be most constructively applied in order to provide assistance to the ongoing process of judicial system reform.

# Chapter Two – Background Information

## 2.1 Geography and demographics

Kenya is located in Eastern Africa and is bordered by Somalia, Ethiopia, Sudan, Uganda, Tanzania and the Indian Ocean. Its land covers 224,960 square miles, ranging from low plains and arid savanna land to central highlands and mountains. The country is administratively divided into eight provinces: Nairobi, Coast, Central, Western, Eastern, North-Eastern, Nyanza and Rift Valley Province.<sup>9</sup>

Kenya has an estimated population of 39 million people (July 2009 est) divided into 42 ethnic groups.<sup>10</sup> The major ethnic groups include Kikuyu (22 per cent), Luhya (15 per cent), Luo (12 per cent), Kalenjin (12 per cent), Kamba (11 per cent), Kisii (six per cent), Meru (six per cent) and Maasai/Samburu (two per cent). The official language is English and the national language is Swahili. Each ethnic group also has a unique language. These can be divided into four major linguistic groups: Khoisan, Bantu, Nilotic and Cushitic.<sup>11</sup>

Kenya has a rich diversity of religious affiliations with 80 per cent of the population being Christian, ten per cent Muslim, nine per cent believing in traditional African religions and one per cent identifying as Hindu/Sikh/Baha'i/Jewish.<sup>12</sup>

## 2.2 Social and economic context

Life expectancy in Kenya is currently 57.8 years, with an infant mortality rate of 54.7 deaths per 1,000 births.<sup>13</sup> According to the United Nations Development Programme (UNDP) statistical update for 2009, the Human Development Index for Kenya is 0.541, which gives the country a rank of 147 out of 182 countries, with a high poverty index (the country ranks 92 out of a total of 135 countries for which the index has been calculated).<sup>14</sup>

Approximately 75 per cent of the work force is engaged in agriculture, mainly as subsistence farmers. Tea exports account for two-thirds of the country's total agricultural exports and fresh flower exports have also become a major source of foreign capital in the last few years. Coffee continues to contribute to the economy and tourism also provides one of the country's major sources of foreign exchange.<sup>15</sup> The unemployment rate is estimated at 40 per cent.<sup>16</sup>

9 US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

10 CIA World Factbook, Kenya. Available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

11 UK Foreign & Commonwealth Office, Country Information: Kenya (2009). Available online at: [www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=all](http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=all).

12 US Department of State, Background Note: Kenya (2009). Available online at: [www.state.gov/r/pa/ei/bgn/2962.htm](http://www.state.gov/r/pa/ei/bgn/2962.htm).

13 CIA World Factbook, Kenya. Available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

14 UNDP, Human Development Report 2009 – Kenya. Available online at: [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_KEN.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_KEN.html).

15 *Government of Kenya: Online Portal – Economy*. Available online at: [http://www.information.go.ke/index.php?option=com\\_content&task=view&id=56&Itemid=182](http://www.information.go.ke/index.php?option=com_content&task=view&id=56&Itemid=182).

16 CIA World Factbook, Kenya. Available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

Against a background of several years of sustained economic growth, on 30 October 2006, the National Economic and Social Council of Kenya (NESEC) officially launched Vision 2030, a long-term strategic development plan intended to enable Kenya to become a middle-income globally competitive and prosperous country with a high quality of life by 2030. The Vision singles out three pillars for the realisation of this goal. The first pillar aims to ensure that Kenya achieves and sustains an average economic growth rate of over ten per cent per annum every year until 2030. The second pillar seeks to build a just and cohesive society, with equitable social development, and a clean and secure environment. The third pillar aims at producing a democratic political system that nurtures issue-based politics, the rule of law, and protects all the rights and freedoms of every individual and society.<sup>17</sup> It is intended that the Vision will be implemented through a series of five year medium-term rolling plans, with the first one covering the period 2008-2012.<sup>18</sup>

However, the economic vision now hangs in the balance. As a result of the post-election violence in early 2008, coupled with the effects of the global financial crisis on remittance and exports, Kenya's Gross Domestic Product (GDP) growth decreased to 1.7 per cent in 2008, down from seven per cent the previous year. The average annual inflation rate has also risen from 9.8 per cent in 2007 to 26.2 per cent in 2008, the highest level since 1994.

As of September 2009, the World Bank's portfolio in Kenya consisted of 16 active operations, with total commitments of over US\$1.4 billion.<sup>19</sup> On 29 May 2009, the Executive Board of the International Monetary Fund (IMF) approved a US\$209 million loan to Kenya under a programme designed to support developing countries affected by external shocks beyond their control.<sup>20</sup>

## 2.3 Contemporary political history

### *1960-1964: Independence*

Kenya gained independence from the United Kingdom on 12 December 1963 and formed a Republic exactly one year later. Jomo Kenyatta, an ethnic Kikuyu and head of the Kenya African National Union (KANU), became Kenya's first President in December 1964.<sup>21</sup>

### *1964-1990: Daniel Arap Moi and one party rule*

In 1966, a small but significant leftist opposition party, the Kenya People's Union (KPU), was formed. Led by Jaramogi Oginga Odinga, a former Vice-President and Luo elder, the KPU was banned shortly

17 Speech by H E Hon Mwai Kibaki, C G H, M P, President of the Republic of Kenya on the official launch of the Vision 2030, Kenyatta International Conference Centre, Nairobi, 30.10.2006. Available online at: <http://www.statehousekenya.go.ke/speeches/kibaki/oct06/2006301001.htm>.

18 A copy of the Vision 2030 Medium Term Plan for 2008-2012 is available online at: <http://www.scribd.com/doc/18345790/Vision-2030-Medium-Term-Plan-20082012>.

19 The largest share of commitments is in infrastructure (US\$770 million) including transport (US\$460 million), energy (US\$160 million and water and sanitation (US\$150 million), followed by agriculture and rural development (US\$360.6 million). Other project sectors include education, health, private sector development, public sector governance, and economic policy. In addition, the Bank is financing five projects with a regional focus (covering more than three countries) with a total commitment of US\$320 million for Kenya in transport and trade, agriculture, environment and telecommunications infrastructure. The World Bank. Kenya. Available online at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/KENYAEXTN/0,,menuPK:356516~pagePK:141159~piPK:141110~theSitePK:356509,00.html>.

20 International Monetary Fund, 'IMF Approves \$209 Million Loan to Kenya' (1 June 2009). Available online at: <http://www.imf.org/external/pubs/ft/survey/so/2009/CAR060109A.htm>.

21 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/about-the-fco/country-profiles/sub-saharan-africa/kenya?profile=history&pg=3>.

after formation and its leader detained. Kenya remained a de facto one-party state for the remainder of Kenyatta's rule.<sup>22</sup>

At Kenyatta's death in August 1978, Vice-President Daniel Arap Moi, a Kalenjin from Rift Valley province, became interim President. By October of that year, Moi had become President formally after he was elected head of KANU and designated its sole nominee for the presidential election.<sup>23</sup>

In June 1982, the National Assembly amended the Constitution, declaring Kenya to officially be a one-party state. Two months later, young military officers in league with some opposition elements attempted to overthrow the government in a violent but ultimately unsuccessful coup.<sup>24</sup> During the late 1980s, opposition groups were suppressed. Kenya's human rights record deteriorated, drawing criticism from the international community.<sup>25</sup>

### *1990-2002: Multi-party elections*

In response to public protests and international pressure, Parliament repealed the one-party section of the Constitution in December 1991. In December 1992, Kenya held its first multiparty election in more than 25 years.<sup>26</sup> With multiple parties contesting the election, the influence of regional ethnic affiliations on voting increased.<sup>27</sup> Divisions in the opposition contributed to Moi's retention of the Presidency in 1992, and again in December 1997. Following the 1997 election, Kenya experienced its first coalition government as KANU was forced to garner the support of a few minority parties.<sup>28</sup>

Although Kenya appeared to be democratising, the 1990s marked a period of increased election-related violence. High ranking political figures, civil servants, and others close to the heart of the government organised and used violent gangs to intimidate and displace opposition party voters in order to secure political power.<sup>29</sup> The reports of two government inquiries – the Kiliku Parliamentary Committee and Akiwumu Commission – implicated various politicians as the organisers of the violence and killing. However, no one was ever punished. This led to a culture of impunity whereby those who maimed and killed for political ends were never brought to justice.<sup>30</sup>

### *2002-2006: Kibaki becomes President*

In 2002, President Moi stepped down from office, as required by the 1991 Constitution. Uhuru Kenyatta, son of Jomo, secured the leadership of KANU and stood for the Presidency. However, a coalition of opposition parties formed the National Rainbow Coalition (NARC). In December 2002, the NARC candidate, Mwai Kibaki, a Kikuyu from central province who had served as a member of parliament since Kenya's independence, was elected the country's third President, with 62 per cent of

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22 Ibid.

23 US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

24 Ibid.

25 BBC News, Special Report Kenya: a political history, 24.12.1007. Available online at: [http://news.bbc.co.uk/1/hi/special\\_report/for\\_christmas/\\_new\\_year/kenyan\\_elections/41737.stm](http://news.bbc.co.uk/1/hi/special_report/for_christmas/_new_year/kenyan_elections/41737.stm).

26 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=history&pg=3>.

27 D Posner, *Institutions and Ethnic Politics in Africa* (Cambridge: Cambridge University Press, 2005) at 266.

28 US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

29 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 25-26. Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf).

30 Ibid.

the vote. The NARC also gained a substantial majority in the parliamentary elections, winning 59 per cent of the parliamentary seats, and thereby ending four decades of KANU rule.<sup>31</sup>

In 2003, internal conflicts disrupted the NARC Government. In November 2005 these conflicts came into the open when the government submitted its draft Constitution to a public referendum. Key government ministers organised the opposition to the draft Constitution, with the result that it was ultimately rejected by 58 per cent of voters.<sup>32</sup> This prompted Kibaki to dismiss his entire government and start with a new team, which excluded all those ministers who had voted against the draft.<sup>33</sup>

### *2007: Presidential elections and post-election violence*

In 2007, two principal leaders of the movement to defeat the draft Constitution emerged as the main opponents to President Kibaki. The Honorable Raila Odinga and the Honorable Kalonzo Musyoka stood as presidential candidates for the Orange Democratic Movement (ODM) party and the smaller Orange Democratic Movement-Kenya (ODM-K) party, respectively. In September 2007, President Kibaki and his allies formed a new coalition, the Party of National Unity (PNU).<sup>34</sup>

On 27 December 2007, Kenya held presidential, parliamentary and local government elections. Initial results in the presidential election indicated that Odinga was leading Kibaki by at least 200,000 votes.<sup>35</sup> However, a delay in announcing the presidential contest raised doubts about the overall conduct of the election.<sup>36</sup> Despite growing concerns, on 30 December 2007 the chairman of the Electoral Commission of Kenya (ECK) declared incumbent Mwai Kibaki as the winner of the presidential election by a margin of 231,728 votes.<sup>37</sup> This unanticipated reversal ignited suspicions of ballot-rigging. There followed reports of irregularities in the vote tabulation process, as well as turnout in excess of 100 per cent in some constituencies.<sup>38</sup> The leadership and members of the ODM refused to submit to the jurisdiction of the courts to resolve the dispute, rejecting the judiciary as an impartial and independent arbiter. Violence erupted in sections of Nairobi and opposition strongholds in Nyanza, Rift Valley and Coast provinces as supporters of Odinga and supporters of Kibaki clashed with police and each other. Some of the violence assumed an ethnic dimension with the Kikuyu perceived as pro-Kibaki and the Luo as Odinga supporters.<sup>39</sup> Women and girls of all ages and backgrounds were particularly targeted for acts of sexual violence.<sup>40</sup> The post-election crisis left 1,133 Kenyans dead, 3,561 people seriously injured and over 300,000 individuals displaced from their homes.<sup>41</sup>

31 Commonwealth Secretariat, Country Profile: Kenya. Available online at: [www.thecommonwealth.org/YearbookInternal/139182/politics/](http://www.thecommonwealth.org/YearbookInternal/139182/politics/); UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=politics&pg=7>.

32 US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

33 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=politics&pg=7>.

34 Ibid; US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

35 Commonwealth Secretariat, Country Profile: Kenya. Available online at: [www.thecommonwealth.org/YearbookInternal/139182/politics/](http://www.thecommonwealth.org/YearbookInternal/139182/politics/).

36 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=politics&pg=7>.

37 Ibid.

38 US Department of State, Background Note: Kenya (2009). Available online at: <http://www.state.gov/r/pa/ei/bgn/2962.htm>.

39 Commonwealth Secretariat, Country Profile: Kenya. Available online at: [www.thecommonwealth.org/YearbookInternal/139182/politics/](http://www.thecommonwealth.org/YearbookInternal/139182/politics/).

40 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 244, 249, 250-252. Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf).

41 Ibid.



## *2008: Power-sharing agreement between Kibaki and Odinga*

In order to resolve the crisis, negotiation teams representing the PNU and ODM began talks under the auspices of former United Nations (UN) Secretary-General Kofi Annan and the Panel of Eminent African Personalities (Benjamin Mkapa of Tanzania and Graca Machel of Mozambique). On 28 February 2008, President Kibaki and Raila Odinga signed a power-sharing agreement – the Agreement on the Principles of Partnership of the Coalition Government – which provided for the establishment of a post of Prime Minister (to be filled by Odinga) and two Deputy Prime Minister positions, as well as the division of an expanded list of cabinet posts according to the parties' proportional representation in parliament.<sup>42</sup> The parties also agreed to enact the National Accord and Reconciliation Act 2008 in order to give legal force to the power-sharing agreement and lay a foundation for moving the country out of the crisis.<sup>43</sup> The National Accord and Reconciliation Act 2008 was enacted by the National Assembly on 18 March 2008 and on 17 April 2008, a new 42-member Grand Coalition Cabinet was sworn-in with Odinga as Prime Minister.<sup>44</sup>

## *2008-2009: Agenda for reform*

The political settlement led by Kofi Annan also established a reform agenda designed to address the underlying causes of the post-election violence. The Kenya National Dialogue and Reconciliation (KNDR) framework identified four main agenda items for the purpose of addressing the causes of the crisis, reconciling communities, and preventing future conflicts in the country. These four agenda items were as follows:

- Agenda Item I: Immediate action to stop violence and restore fundamental rights and liberties;
- Agenda Item II: Immediate measures to address the humanitarian crisis, promote reconciliation, and healing;
- Agenda Item III: How to overcome the political crisis; and
- Agenda Item IV: Long term issues, including constitutional, legal and institutional reforms; land reforms; tackling youth unemployment, tackling poverty, inequity and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability.

Early progress was made in fulfilling the agenda for reform with the establishment of several independent commissions of inquiry mandated to investigate the election process and the post-election violence. These bodies of inquiry included the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC); the Commission of Inquiry into Post-Election Violence (CIPEV); and the Truth, Justice and Reconciliation Commission (TJRC).<sup>45</sup>

42 BBC News, Deal offers fresh hope for Kenya, 29.01.2008. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/7269769.stm>.

43 BBC News, Key Points: Kenya Power Sharing Deal 28.02.2008. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/7269476.stm>.

44 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=politics&pg=7>.

45 International Centre for Transitional Justice, Kenya (2008). Available online at: [www.ictj.org/en/where/region1/648.html](http://www.ictj.org/en/where/region1/648.html).

## *Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC)*

The IREC was established to inquire into all aspects of the 2007 general elections. The IREC was mandated to identify weaknesses in the constitutional and legal framework of the electoral system, assess the independence of the Election Commission and its ability to discharge its mandate, as well as to analyse the role of political parties, media and civil society in creating the current electoral environment. In addition, the IREC was tasked with investigating the organisation and conduct of the 2007 elections and the integrity of the results with special attention to the presidential election.<sup>46</sup> In its report, the IREC recommended certain improvements to the electoral process and constitutional reforms to the electoral system, an overhaul of the Election Commission, new voter registration systems and an integrated and secure tallying and data transmission system.<sup>47</sup> Senior diplomats, including Kofi Annan, have called for the immediate implementation of the recommendations, in order to ensure that an improved system is in place for the 2012 elections.<sup>48</sup>

## *Commission of Inquiry into Post-Election Violence (CIPEV)*

The CIPEV, chaired by the Honorable Mr Justice Phillip Waki, was established to investigate the facts and events that occurred during the post-election violence, examine the conduct of state security agencies in handling the violence, and make recommendations regarding these and any other matters.<sup>49</sup> The report of the Commission, published on 15 October 2008, detailed violence that was both spontaneous and planned against individuals targeted because of their ethnicity and/or political beliefs. The Kenyan police were heavily criticised for failing to anticipate, prepare for or contain the violence and for using excessive force to suppress demonstrations. The report recommended a series of reforms and the establishment of a Special Tribunal of international and Kenyan judges to investigate and prosecute those most responsible for the violence. The Waki report contained a strict timeline for setting up the tribunal and putting it to work, which, if breached, would require the mediator, Kofi Annan, to pass a sealed envelope with the names of the chief suspects to the International Criminal Court (ICC).<sup>50</sup>

When the report was published, both President Kibaki and Prime Minister Odinga pledged to implement its recommendations. However, many politicians subsequently proved reluctant to establish a Special Tribunal.<sup>51</sup> The Waki Commission had set a deadline of 30 January 2009 to pass the necessary legislation but on 12 February 2009, the Kenyan parliament voted against a constitutional amendment bill establishing the proposed tribunal. On 24 February 2009, Kofi Annan granted the government of Kenya more time to re-introduce the bill. However, on 9 July 2009, following further inaction, Kofi Annan handed the list of those suspected of orchestrating the violence to the ICC. This list, drawn up by the Waki Commission, has not been made public. In a move widely seen as a means

46 Independent Review Commission. *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (2008). Available online at: [www.communication.go.ke/Kriegler\\_IREC/FinalReport\\_consolidated.pdf](http://www.communication.go.ke/Kriegler_IREC/FinalReport_consolidated.pdf).

47 Ibid.

48 United Nations, *United Nations Humanitarian Update* (September 2008), Vol 36. Available online at: <http://ochagwapps1.unog.ch/rw/rwb.nsf/db900sid/SHIG7K6C73?OpenDocument>.

49 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008). Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf).

50 Ibid; The report of the UN Special Rapporteur on extrajudicial, summary or arbitrary execution, Mr Philip Alston following his mission to Kenya in February 2009 provided further evidence of the necessity for urgent reform of Kenya's justice and security architecture. UN Doc A/HRC/11/2/Add.6 (26.5.2009).

51 BBC News, Timeline Kenya. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/1026884.stm>.

of protecting themselves from justice, Kenya's cabinet ministers announced on 30 July 2009 that they would not set up a Special Tribunal but would use local courts instead.<sup>52</sup> Kenyan Prime Minister Raila Odinga responded that since the public had no confidence in the judiciary, there would first need to be judicial reform.

On 30 September 2009, after the government missed a further deadline to set up a local tribunal, the ICC's Chief Prosecutor Luis Moreno-Ocampo announced that he would prosecute those suspected of bearing the most responsibility for the post-election violence.<sup>53</sup> Justice Minister Mutula Kilonzo responded that the ICC could hold its trials in Kenya and suspects would be arrested.<sup>54</sup> However, during his visit to Kenya in early October 2009, Kofi Annan reiterated that he foresaw the need for a three-tier approach towards bringing those responsible for the post-election violence to justice: (i) a Truth, Justice and Reconciliation Commission; (ii) a Special Tribunal, as recommended by the Waki Commission, or another effective local mechanism; and (iii) the International Criminal Court. Kofi Annan remarked that the establishment of an effective national judicial mechanism is 'absolutely essential... It is not either the ICC or a local mechanism. It must be both'.<sup>55</sup>

### *Truth, Justice and Reconciliation Commission (TJRC)*

The TJRC Bill was signed into law by the President on 29 November 2008. The TJRC is to investigate crimes committed during the period from 1963 to February 2008. It has nine commissioners, three of whom have been appointed by the Panel of Eminent African Personalities to serve as international experts.<sup>56</sup> The international experts include representatives from Ethiopia, Zambia and the United States.<sup>57</sup> On 22 July 2009, President Kibaki appointed Bethuel Kiplagat to chair the TJRC and on 3 August 2009 the commissioners were sworn in. The Commission is currently establishing its secretariat.<sup>58</sup>

The TJRC's objectives, as stated in the TJRC Bill, are to promote peace, healing, reconciliation, justice and national unity. It will investigate past human rights violations and issues such as corruption, irregular and illegal acquisition of public land, ethnic tensions, marginalisation, economic crimes, misuse of public institutions for political objectives, and political violence around the election. The TJRC will serve for a period of two years. The government has confirmed that the Commission will not conduct national prosecutions of perpetrators of post-election violence but rather will deal solely with its mandate of correcting historical injustices and bringing about national reconciliation.<sup>59</sup>

Despite some early progress with the establishment of these and other independent commissions of inquiry, there is now increasing concern, both within and outside Kenya, about the pace of reform.<sup>60</sup>

As negotiations on many key elements remain ongoing, the political will of the grand coalition

52 BBC News, Kenya shuns special poll tribunal, 30.07.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8177525.stm>.

53 BBC News, ICC vows Kenya poll riots trial, 30.09.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8283612.stm>.

54 BBC News, Kenya backs poll violence trials, 2.10.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8286733.stm>.

55 Remarks by H E Kofi Annan on conclusion of his visit to Kenya, 4-7 October 2009. Delivered at the Serena Hotel, Nairobi – 7th October 2009. Available online at: <http://www.reliefweb.int/rw/RWB.NSF/db900SID/SNAA-7WM857?OpenDocument>.

56 BBC News, Kenya set to get truth commission, 24.10.2008. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/7688505.stm>.

57 AllAfrica.com, Kenya Names Kenya Truth Commission, 22.7.2009. Available online at: <http://allafrica.com/stories/200907220761.html>.

58 Press statement on agenda 4 reforms meeting by President Mwai Kibaki and Prime Minister Raila Odinga, 5.10.2009. Available online at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SODA-7WJLSD?OpenDocument>.

59 Remarks by H.E. Kofi Annan on conclusion of his visit to Kenya, 4-7 October 2009. Delivered at the Serena Hotel, Nairobi – 7th October 2009. Available online at: <http://www.reliefweb.int/rw/RWB.NSF/db900SID/SNAA-7WM857?OpenDocument>; Press statement on agenda 4 reforms meeting by President Mwai Kibaki and Prime Minister Raila Odinga, 5.10.2009. Available online at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SODA-7WJLSD?OpenDocument>.

60 UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at:

<http://www.fcdo.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/kenya?profile=all>.

government to implement the reform programme is being called into question.<sup>61</sup> During his recent visit, Kofi Annan called on Kenya to speed up reforms. He said that despite the slow progress, the much-needed reforms are still possible and it is vital that they be carried out well ahead of the next round of elections in 2012.<sup>62</sup> For its part, the coalition government maintains that it is committed to implementing all aspects of the reform agenda.<sup>63</sup>

## 2.4 Constitutional arrangements

### *The Constitution*

The independence Constitution was enacted on 12 December 1963. The Constitution has been re-issued with amendments in 1979, 1982, 1986, 1988, 1991, 1992, 1997 and 2001. A new draft Constitution (the Wako draft) was defeated by popular referendum in 2005.<sup>64</sup>

Following the disputed presidential election in December 2007, two pieces of legislation were enacted to lead Kenyans to a new Constitution. The Constitution of Kenya (Amendment) Act 2008, passed on 22 December 2008, sets out the purposes, organs and mechanisms of constitutional review. The Constitution of Kenya Review Act 2008, passed on 29 December 2008, seeks to facilitate the completion of the review of the Constitution of Kenya by, inter alia, providing a legal framework for the review and establishing organs charged with responsibility for facilitating the review process. The Review Act required a Committee of Experts to finalise its work on a new draft Constitution within twelve months from the date of appointment of the committee. On 17 November 2009, the Committee of Experts on Constitutional Review published a harmonised draft Constitution of Kenya (the harmonised draft Constitution).<sup>65</sup> The draft must be approved by the National Assembly and will then be put to a referendum conducted by an Interim Independent Electoral Commission (IIEC) in March 2010. However, while the constitutional review process continues, the independence Constitution, as amended, remains in force.

### *The government*

There are three arms of government: the legislature, the executive and the judiciary.

#### THE LEGISLATURE

Section 30 of the Constitution provides that the legislative power of the republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.<sup>66</sup> The National Assembly consists of 210 elected members duly elected in national elections,<sup>67</sup> 12 nominated members appointed by the President but selected by the parties in proportion to their parliamentary vote

61 See, for example, the periodic reports of the Kenya National Dialogue Reconciliation (KNDR) Monitoring Project, prepared by South Consulting. Available online at: <http://www.dialoguekenya.org/mreport.aspx>.

62 BBC News, Annan urges faster Kenya reform, 4.10.2009. Available online at: <http://news.bbc.co.uk/1/hi/8288201.stm>.

63 Press statement on agenda 4 reforms meeting by President Mwai Kibaki and Prime Minister Raila Odinga, 5.10.2009. Available online at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SODA-7WJLSD?OpenDocument>.

64 CIA World Factbook – Kenya. Available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

65 Harmonised Draft Constitution of Kenya. Available online at: <http://www.scribd.com/doc/22666676/Harmonised-Draft-Constitution-of-Kenya-Rel-17-11-2009>.

66 Constitution of Kenya, section 30.

67 Elections were last held on 27 December 2007 and are next due to be held in December 2012.

and two ex officio members (the Speaker and the Attorney-General<sup>68</sup>).<sup>69</sup> Members of the National Assembly serve a maximum term of five years. Legislative power is exercisable through bills passed by the National Assembly.<sup>70</sup>

Acts are introduced into Parliament as bills which must be published in the *Kenya Gazette* 14 days before their introduction. The bill then has its first reading, a formal reading of the title of the bill, followed by a second reading, during which the general principles of the bill can be debated. After this, the bill is referred to a Committee of the National Assembly for debate and a detailed discussion of its provisions. If the Committee reports favourably to the Assembly, then the bill will have its third and final reading, during which any debate is restricted to a general statement or reiteration of objections. If approved, the bill must then receive Presidential assent before it can become an Act of Parliament.<sup>71</sup>

#### THE EXECUTIVE

The executive consists of the President, the Prime Minister, the Vice-President, ministers and assistant ministers, who are all members of the National Assembly.

President Mwai Kibaki was elected President on 30 December 2002. Under the Constitution, the President is the Head of State and Commander-in-Chief of the armed forces of the republic.<sup>72</sup> Executive authority is vested in the President,<sup>73</sup> and he has authority to constitute and abolish offices, make appointments and terminate any office.<sup>74</sup> The President is assisted in the discharge of his functions by a Vice-President, who is appointed by the President.<sup>75</sup> Vice-President Stephen Kalonzo Musyoka was appointed Vice-President on 10 January 2008.

The post of Prime Minister was created by the National Accord and Reconciliation Agreement.<sup>76</sup> Raila Odinga was named Prime Minister on 13 April 2008 and was sworn in on 17 April 2008. Under section 4 of the National Accord and Reconciliation Act 2008, which was given constitutional power through a simultaneous amendment of the Constitution, the Prime Minister is empowered to 'coordinate and supervise the execution of the functions and affairs of the government of Kenya including those of Ministries'.<sup>77</sup>

The executive acts through a cabinet comprising the President, the Vice-President, Prime Minister, two Deputy Prime Ministers and the other ministers. The ministers are appointed by the President and are charged with responsibility for a particular department or ministry.<sup>78</sup> The function of the cabinet is to aid and advise the President in the Government of Kenya.<sup>79</sup>

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68 Constitution of Kenya, sections 36 and 37.

69 Constitution of Kenya, section 31.

70 Parliament of Kenya, *The Legislative Process* (2006). Available online at: [www.parliament.go.ke/parliament/intro\\_legislative.php](http://www.parliament.go.ke/parliament/intro_legislative.php).

71 GlobalLex, *Researching Kenyan Law* (2006). Available online at: [www.nyulawglobal.org/globalex/Kenya.htm#\\_The\\_Legislature](http://www.nyulawglobal.org/globalex/Kenya.htm#_The_Legislature).

72 Constitution of Kenya, section 4.

73 Constitution of Kenya, section 23.

74 Constitution of Kenya, section 24.

75 Constitution of Kenya, section 15.

76 Constitution of Kenya, section 15A.

77 National Accord and Reconciliation Act 2008, section 4.

78 Constitution of Kenya, section 16.

79 Constitution of Kenya, section 17.

Chapter IV of the Constitution provides for the third arm of government, the judiciary. The judiciary consists of the courts and all officers of the courts, including the Chief Justice (the Honorable Justice J E Gicheru since February 2003), the Attorney-General (the Honorable S Amos Wako since May 1991), judges and magistrates. The structure and organisation of the courts and judiciary is examined fully in Chapter Three.

APPOINTMENTS, TENURE, AND REMOVAL

*(i) Judges*

Chapter IV of the Constitution sets out the rules for appointment,<sup>80</sup> tenure<sup>81</sup> and removal<sup>82</sup> of judges of the Court of Appeal and the High Court. The Chief Justice is appointed directly by the President.<sup>83</sup> Judges of the Court of Appeal and puisne judges of the High Court are appointed by the President, upon the recommendation of the Judicial Service Commission.<sup>84</sup> Judges of the Court of Appeal are appointed from puisne judges of the High Court.<sup>85</sup> A person may be appointed a Judge of the High Court if he/she (i) is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; (ii) is, or has been, an advocate of the High Court of Kenya of not less than seven years standing; or (iii) holds, and has held for a period of, or for periods amounting in the aggregate to, not less than seven years, one or other of the qualification specified in paragraphs (a), (b), (c) and (d) of section 12(1) of the Advocates Act (Chapter 16, Laws of Kenya), which provides for the professional and academic qualification for admission as an advocate of the High Court of Kenya.<sup>86</sup> The security of tenure of judges of the Court of Appeal and High Court is guaranteed under the Kenyan Constitution.<sup>87</sup> These judges vacate their office only upon reaching the retirement age prescribed by Parliament, which is currently 74 years of age.<sup>88</sup> Judges of the Court of Appeal and High Court may only be removed from office for inability to perform the functions of their office, whether arising from physical or mental infirmity, or for misbehaviour.<sup>89</sup> Such removal may only be carried out by the President of the Republic on the recommendation of a tribunal appointed for the purpose of considering such removal.<sup>90</sup>

*(ii) Magistrates*

The power to appoint, discipline and remove magistrates from office is vested solely in the Judicial Service Commission (JSC), without any requirement of Presidential approval.<sup>91</sup> The Judicature Act for Magistrates provides some nominal criteria for qualification as a magistrate. Magistrates are required

80 Constitution of Kenya, sections 61 and 64(3).

81 Constitution of Kenya, section 62(1) and 62(2).

82 Constitution of Kenya, section 62(3), 62(9) and section 64(3).

83 Constitution of Kenya, section 61(1).

84 Constitution of Kenya, section 61(2).

85 Constitution of Kenya, section 64(4).

86 Constitution of Kenya, section 61(3).

87 Constitution of Kenya, sections 62 and 64(3).

88 Constitution of Kenya, section 62(1).

89 Constitution of Kenya, section 62(3).

90 Constitution of Kenya, section 62(4).

91 Constitution of Kenya, section 69(3)(b).

to vacate their office upon attaining 55 years of age.<sup>92</sup> The Constitution of Kenya does not guarantee security of tenure for magistrates.

## 2.5 Kenya's international legal obligations regarding due process and fair trial

Kenya is a State Party to several international human rights treaties, including the United Nations International Covenant on Civil and Political Rights (ICCPR).<sup>93</sup> The ICCPR stipulates in Article 14(1) that 'all persons shall be equal before the courts and tribunals' and that 'in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The United Nations Human Rights Committee (HRC), the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal 'is an absolute right that may suffer no exception'.<sup>94</sup>

At the regional level, Kenya is a State Party to the African Charter on Human and Peoples' Rights (ACHPR).<sup>95</sup> Article 7(1) of the ACHPR provides that 'every individual shall have the right to have his cause heard', a right that comprises 'the right to be presumed innocent until proved guilty by a competent court or tribunal' and 'the right to be tried within a reasonable time by an impartial court or tribunal'. This article must be read in conjunction with Article 26 of the Charter, which establishes that the States Parties 'shall have the duty to guarantee the independence of the Courts'. The African Commission on Human and Peoples' Rights has said that Article 7 'should be considered non-derogable' since it provides 'minimum protection to citizens'.<sup>96</sup>

The most comprehensive universal standards on the independence of the justice system are set out in the UN Basic Principles on the Independence of the Judiciary (1985),<sup>97</sup> the UN Basic Principles on the Role of Lawyers (1990),<sup>98</sup> and the UN Guidelines on the Role of Prosecutors (1990).<sup>99</sup>

Many of the guarantees in these three instruments are echoed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in 2003.<sup>100</sup> In the Commonwealth, the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (1998)<sup>101</sup> and the Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government (2003)<sup>102</sup> are also applicable to Kenya. The Bangalore Principles on Judicial Conduct,<sup>103</sup> adopted by an international gathering of Chief Justices in 2001, set out other important standards for

92 Interview with a Chief Magistrate and a Senior Resident Magistrate.

93 Date of accession: 1.5.1972.

94 Communication No 263/1987, *M Gonzalez del Rio v Peru* (Views adopted on 28.10.1992), UN Doc CCPR/C/46/D/263/1987 at para 5.2.

95 Date of accession: 23.1.1992.

96 *African Commission on Human and Peoples' Rights, Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, Communication No 218/98, decision adopted during the 29th Ordinary Session, 23.4.2001-7.5.2001 at para 7.

97 Adopted by consensus by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 later endorsed by the UN General Assembly in resolution 40/32 (29.11.1985) and welcomed by the UN General Assembly in resolution 40/146 (13.12.1985).

98 Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 and welcomed by the UN General Assembly in resolution 45/121 (12.12.1990) and resolution 45/166 (18.12.1990).

99 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990.

100 Adopted as part of the African Commission on Human and Peoples' Rights' activity report at the 2nd Summit and meeting of heads of state of the African Union, 2003.

101 Adopted at a meeting of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, 1998.

102 Adopted by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, 2003.

103 Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices, 2002.

the ethical conduct of Judges.

Kenya has also signed and ratified both the 2003 UN Convention against Corruption<sup>104</sup> and the 2003 African Union Convention on Combating Corruption.<sup>105</sup>

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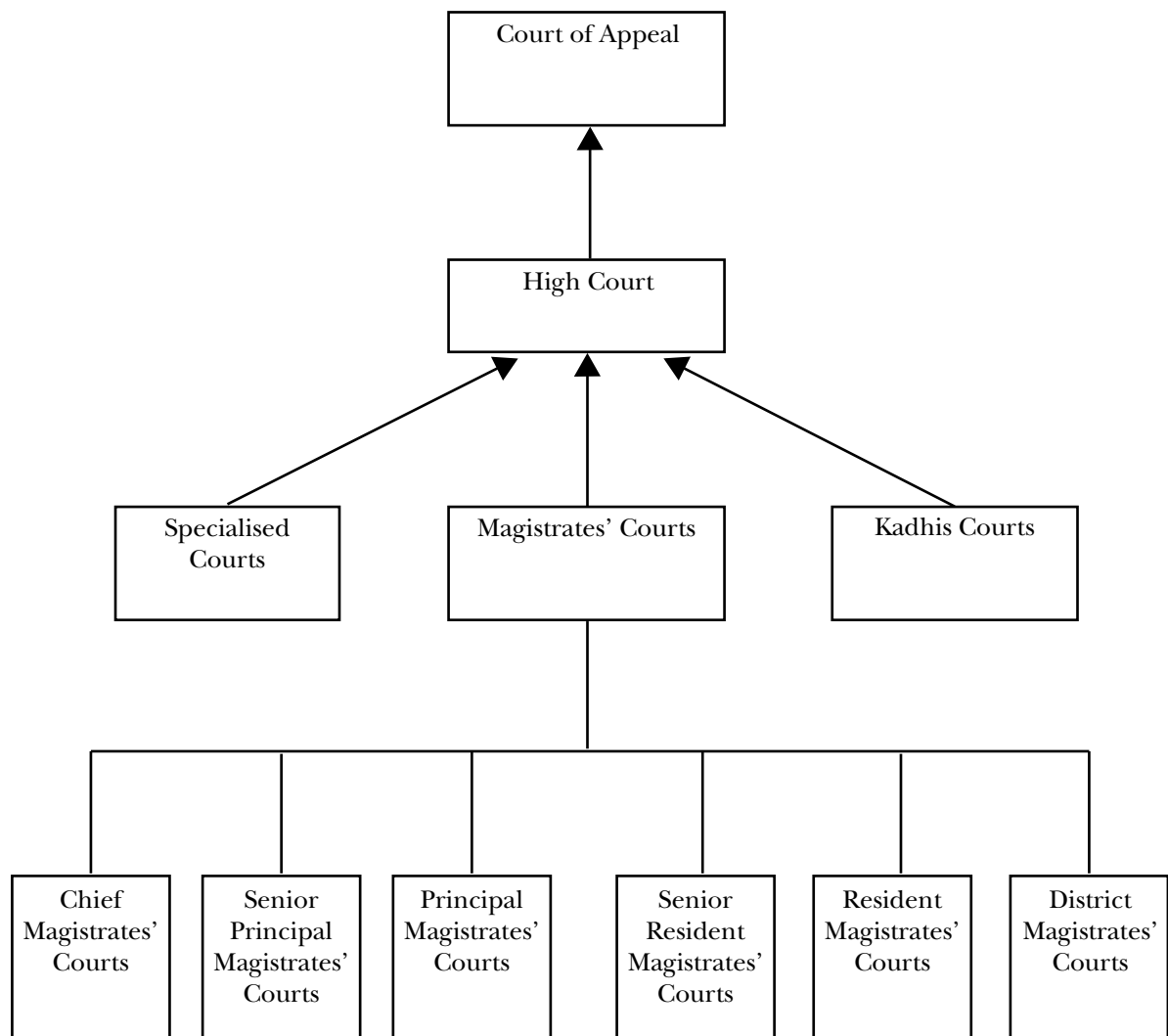
104 Date of ratification: 9.12.2003.

105 Date of ratification: 3.2.2007.



# Chapter Three – The Judicial System

## The Court Structure



### Notes:

1. Appeal from all Magistrates' Courts lies to the High Court.
2. In the hierarchy of Magistrates' Courts, the District Magistrates' Courts are the lowest while the Chief Magistrates' Courts are the highest.

### 3.1 Structure and organisation of the courts and judiciary

Chapter IV of the Constitution entitled ‘The Judicature’ sets out the structure of the court system in Kenya. The powers and duties of the courts and judiciary are further elaborated upon in the Judicature Act (Chapter 7, Laws of Kenya) and the Magistrates’ Courts Act (Chapter 10, Laws of Kenya). The Court system consists of the Court of Appeal, the High Court, magistrates’ courts and Kadhis courts.

#### *The Supreme Court*

There is presently no Supreme Court of Kenya established to hear and determine appeals from the Court of Appeal. However, section 201 of the harmonised draft Constitution makes provision for the establishment of a Supreme Court with appellate jurisdiction to hear and determine appeals from the Court of Appeal and the Constitutional Court, which is to be established under section 203 of the harmonised draft Constitution.<sup>106</sup> Section 201 further provides that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes arising from the process of the impeachment of the President.<sup>107</sup> If established, all other courts will be bound by the decisions of the Supreme Court.<sup>108</sup>

#### *The Court of Appeal*

The Court of Appeal is established under section 64 of the current Kenyan Constitution as the superior court of record.<sup>109</sup> The Court of Appeal has jurisdiction to hear appeals from the High Court in both civil and criminal cases.<sup>110</sup> The judges of the Court of Appeal are the Chief Justice and not less than two, but not more than eleven, Judges of Appeal.<sup>111</sup> There are currently ten Judges of Appeal.<sup>112</sup> For the purpose of any final determination by the Court other than a summary dismissal of an appeal, the Court of Appeal is constituted by not less than three judges and the majority decision binds the Court.<sup>113</sup> The Court of Appeal is situated in Nairobi but Judges of Appeal periodically travel on circuit to Mombasa, Kisumu, Nakuru, Nyeri and Eldoret. The decisions made by the Court of Appeal are binding on all other courts.<sup>114</sup>

#### *The High Court*

The High Court is established under section 60 of the Constitution.<sup>115</sup> It has unlimited original jurisdiction in respect of both civil and criminal matters (offences of murder and treason only), and has jurisdiction to hear appeals from subordinate courts on all matters. The High Court is also the final arbiter in matters concerning the interpretation of the Constitution,<sup>116</sup> and is further

<sup>106</sup> Draft Constitution of Kenya, section 201(4)(b).

<sup>107</sup> Draft Constitution of Kenya, section 201(4)(a).

<sup>108</sup> Draft Constitution of Kenya, section 201(9).

<sup>109</sup> Constitution of Kenya, section 64.

<sup>110</sup> The procedure in respect of applications for a certificate of fitness or leave to appeal in criminal matters and applications for leave to appeal in civil matters is addressed in rules 38 and 39 et seq. respectively of the Court of Appeal Rules issued under section 5 of the Appellate Jurisdiction Act (Chapter 9, Laws of Kenya).

<sup>111</sup> Constitution of Kenya, section 64(2) [lower limit] and website of the Judiciary of Kenya, available online: [http://www.judiciary.go.ke/about/structure\\_content.php?content=2](http://www.judiciary.go.ke/about/structure_content.php?content=2) [upper limit]

<sup>112</sup> Website of the Governance, Justice, Law & Order Sector (GJLOS) Reform Programme. Website no longer available.

<sup>113</sup> Appellate Jurisdiction Act (Chapter 9, Laws of Kenya), section 5.

<sup>114</sup> Website of the Judiciary of Kenya, available online at: [http://www.judiciary.go.ke/about/structure\\_content.php?content=2](http://www.judiciary.go.ke/about/structure_content.php?content=2).

<sup>115</sup> Constitution of Kenya, section 60.

<sup>116</sup> Constitution of Kenya, section 67(1).

empowered to hear and determine election petitions.<sup>117</sup> The High Court comprises of the Chief Justice and not less than eleven, but not more than 50, puisne judges.<sup>118</sup> The judiciary currently has 45 High Court judges.<sup>119</sup> The High Court in Nairobi has the following specialised divisions: Family Division, Criminal Division, Civil Division, Commercial Division and Constitutional and Judicial Review Division. There are 15 High Court stations in the country. These are: Nairobi, Milimani, Kisumu, Kisii, Bungoma, Kakamega, Nakuru, Eldoret, Kitale, Embu, Nyeri, Mombasa, Malindi, Meru and Machakos with sub-registries in Kericho and Busia.

### *Magistrates' courts*

The Constitution provides that Parliament may establish subordinate courts and confer jurisdiction upon them.<sup>120</sup> Established under the Magistrates' Courts Acts (Chapter 10, Laws of Kenya), the magistrates' courts have been created as the primary subordinate courts. They determine more than 90 per cent of legal disputes in the country, both criminal and civil matters. Jurisdiction is determined on a territorial and pecuniary basis. The judicial officers of the magistrates' courts are designated as, in order of seniority: Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate, Resident Magistrate and District Magistrate. There are 105 magistrates' courts in the country.<sup>121</sup> The magistracy currently has 280 magistrates in office.<sup>122</sup>

### *Kadhis courts*

Kadhis courts are established under section 66 of the Kenyan Constitution. Their operations are regulated under the Kadhis Courts Act (Chapter 11, Laws of Kenya). The jurisdiction of Kadhis courts extends to 'the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.'<sup>123</sup> The judicial officers of the Kadhis courts are designated as Chief Kadhi, Deputy Chief Kadhi, Principal Kadhi, Senior Kadhi, Kadhi 1 and Kadhi 2. The power to appoint, discipline and remove Kadhis is vested in the Judicial Service Commission.<sup>124</sup> There are 15 Kadhis courts nationwide.<sup>125</sup> Appeal from the Kadhis court lies to the High Court, which sits with a Chief Kadhi or two other Kadhis as assessors.<sup>126</sup>

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117 Constitution of Kenya, section 44.

118 Constitution of Kenya, section 60(2) [lower limit] and website of the Judiciary of Kenya. Website no longer available..

119 Website of the Governance, Justice, Law & Order Sector (GJLOS) Reform Programme. Available online at: <http://www.gjlos.go.ke/gjinner.asp?pcat2=&pcat=agencies&cat=judiciary>.

120 Constitution of Kenya, section 65.

121 There are 105 magistrates' courts in the country stationed at the following district or divisional levels: City Court in Nairobi, Nairobi Law Courts, Milimani Commercial Courts Nairobi, Kibera, Makadara, Ukwala, Bondo, Siaya, Nyando, Nyamira, Keroka, Ogembo, Homa Bay, Migori, Oyugis, Rongo, Ndhiwa, Tamu, Kisii, Maseno, Kehancha, Winam, Mumias, Butere, Butali, Hamisi, Bungoma, Sirisia, Kimilili, Vihiga, Busia, Kakamega, Kabarnet, Sotik, Bomet, Kapsabet, Iten, Narok, Kajiado, Kapenguria, Maralal, Nakuru, Molo, Naivasha, Eldama-ravine, Kericho, Eldoret, Kitale, Nanyuki, Nyahururu, Lodwar, Kilgoris, Othaya, Karatina, Mukurweini, Kigumo, Kangema, Kandara, Gatundu, Limuru, Githunguri, Kikuyu, Wanguru, Kerugoya, Gichugu, Baricho, Nyeri, Muranga, Thika, Kiambu, Kwale, Hola, Wundanyi, Mombasa, Kilifi, Kaloleni, Malindi, Lamu, Voi, Taveta, Embu, Runyenjes, Siakago, Chuka, Nkubu, Maua, Tigania, Tawa, Kitui, Kilungu, Mwingi, Nunguni, Yatta, Makueni, Kangundo, Makindu, Meru, Machakos, Isiolo, Garissa, Marsabit, Wajir, Moyale and Mandera.

122 Judiciary Strategic Plan 2009-2012, p 38.

123 Constitution of Kenya, section 66, para 5.

124 Constitution of Kenya, section 69(3) (d).

125 There are 15 Kadhis Court stations in the country, namely: Mombasa, Garissa, Lamu, Marsabit, Bungoma, Kisumu, Isiolo, Eldoret, Wajir, Nairobi, Nyeri, Nakuru, Kwale, Hola and Malindi.

126 Website of the Judiciary of Kenya. Available online at: [http://www.judiciary.go.ke/about/structure\\_content.php?content=5](http://www.judiciary.go.ke/about/structure_content.php?content=5).

### *Specialised courts*

In addition to these courts, Kenya has specialised Children's Courts to deal with matters relating to children (including cases concerning parental responsibility, children's institutions, custody and maintenance, orders for protection of children, as well as criminal offences under the Children's Act), anti-corruption courts to deal with matters relating to corruption and integrity, and traffic courts to deal with motoring offences. An appeal from the specialised courts lies to the High Court.

### *Tribunals*

Although strictly lying outside the court system, tribunals are established under various laws made by Parliament to deal with specific disputes that arise in the course of the regulation and administration of certain matters. There are over 60 quasi-judicial tribunals in Kenya. The most active tribunals are the Industrial Court (established to settle labour disputes), the Land Disputes Tribunal (established to deal with disputes relating to land issues such as the division of land and boundaries of land), the Rent Restriction Tribunal (established to hear and resolve disputes between landlords and tenants of residential houses) and the Business Premises Tribunal (established to hear and decide cases involving landlords and tenants of business premises).

### *The Judicial Service Commission*

Under section 69 of the Constitution, the Judicial Service Commission is empowered to appoint, discipline and remove the Registrar and Deputy Registrar of the High Court, magistrates of subordinate courts and Kadhis of Kadhi courts. It has only a limited advisory role with regard to the selection of judges to the High Court and Court of Appeal, who are appointed by the President.<sup>127</sup> The Judicial Service Commission comprises the Chief Justice as chairman, the Attorney-General, two persons designated by the President from among the puisne judges of the High Court and the judges of the Court of Appeal and the chairman of the Public Service Commission.<sup>128</sup>

### *Court administration*

The Courts are administered by the Chief Justice, Registrar of the High Court and the Chief Court Administrator. They are assisted in the regions by the Resident Judges, Deputy Registrars, Chief Magistrates of Court Stations and Executive Officers.<sup>129</sup> The judiciary is supported by 2,557 paralegal staff distributed throughout the country.<sup>130</sup>

## **3.2 Judicial Reform Initiatives in Kenya**

### *1960-1998: Early proposals for judicial reform*

The seeds of the present-day judicial reform programme in Kenya were planted prior to, and in the years following, independence when numerous committees were appointed to study various aspects

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<sup>127</sup> Constitution of Kenya, section 61.

<sup>128</sup> Constitution of Kenya, section 68.

<sup>129</sup> Report of the Task Force on Judicial Reforms 2009, section 6.1.

<sup>130</sup> Website of the Governance, Justice, Law & Order Sector (GJLOS) Reform Programme. Website no longer available.

of the civil service which, until the early 1990s, included the judiciary. The most relevant committee reports issued during this period were the following:

- Flemming Commission Report, 1960
- Pratt Commission Report, 1963
- Miller-Craig Commission Report, 1967
- Ndegwa Commission Report, 1971
- Waruhiu Committee Report, 1979/80
- Ramtu Committee Report, 1985
- Mbithi Committee Report, 1990/1991
- Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary, 1991-1992 (The Kotut Report)

Of these initiatives, the recommendations contained within the Reports of the Waruhiu Committee, the Mbithi Committee and the Committee to Inquire into the Terms and Conditions of Service of the Judiciary are most notable for their relevance and specificity.

#### *The Waruhiu Committee Report 1979/1980*

The Waruhiu Committee devoted Chapter XII of its report to the judiciary, where it recorded three key recommendations. On the independence of the judiciary, the Committee proposed that the independence of the judiciary ought to be maintained and that the judiciary ought not be treated as an appendix of the office of the Attorney-General. The Government accepted this recommendation in Sessional Paper No 10 of 1980 and this need is now partly captured in the current Constitution. On the terms of service of judicial officers, the Committee recommended that judges and magistrates ought to be on permanent and pensionable terms of service as a step towards enhancing their security of tenure. This was accepted by the government and was implemented. On the localisation of the judiciary, the Committee proposed the intensification of the training and recruitment of local lawyers to take over from the expatriate magistrates and judges. The Committee also proposed a training programme for clerical staff, executive officers and court interpreters.

#### *The Mbithi Committee Report 1990/1991*

The Mbithi Committee addressed the judiciary in Chapter XI of its report. In that chapter, the Committee recommended the decentralisation of the judicial service to provincial level and district level to aid administration of justice; the computerisation of record-keeping in the courts; and the strengthening of the Kenya School of Law to enable it to offer specified and enhanced professional training to paralegal staff.

### *The Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary Committee, 1991-1992 (The Kotut Report)*

The Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992, commonly referred to as 'the Kotut Committee', was appointed to inquire into ways and means of establishing a structure of salaries, conditions of service and related benefits for the judiciary separate from those of the civil service. The Committee made several recommendations on the structure of the judiciary, recruitment and development of judicial personnel including paralegal staff, and the structure and other terms and conditions of service of judicial officers. The implementation of these recommendations was charged to the Akiwumi Committee. The Committee was responsible for the formulation of the Judicial Service Staff Regulations, and the publication of Gazette Notice No 3801 of 8 May 1995, signed by the President, by which the judiciary ceased to be a part of the civil service with respect to the terms and conditions of service of its staff.

### *1998-2007: A more structured approach to judicial reform*

A more structured approach to reform of the justice sector was introduced in 1998, when the Chief Justice, the Honorable Justice Zachaeus Chesoni, appointed a committee chaired by a Judge of the Court of Appeal, the Honorable Justice Kwach, to review and report on the administration of justice in Kenya.

### *The Report of the Committee on the Administration of Justice, 1998 (The Kwach Report)*

The Committee on the Administration of Justice, popularly known as 'the Kwach Committee', was appointed on 7 January 1998 to review the administration of justice in Kenya. In its report presented later that year, the Committee cited 'corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering' as common problems in the judiciary. The Committee examined and made several far-reaching recommendations on strategies for the improvement of the administration of justice. Amongst its recommendations, the Kwach Report included proposals to amend the Constitution to allow for the removal of incompetent judges; increase judicial personnel, and improve employment terms and conditions; develop and implement a code of conduct for judicial personnel backed by an inspectorate unit; improve facilities within the judiciary; overhaul the Judicial Service Commission; reorganise case handling and management systems; simplify court procedures and introduce alternative dispute resolution (ADR) mechanisms; and split the High Court into four divisions, namely the Family, Commercial, Civil and Criminal Divisions. Upon receipt of the report in late 1998, the Chief Justice appointed another committee to investigate modalities of implementing the Kwach Commission's recommendations for improving the judiciary.<sup>131</sup> Unfortunately, the Chief Justice passed away shortly thereafter and the next Chief Justice, the Honorable Justice Bernard Chunga, did not fully implement the findings of this report before resigning when the new government came to power.<sup>132</sup>

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<sup>131</sup> US Department of State Country Report on Human Rights Practices 2000. Available online at: <http://www.state.gov/g/drl/rls/hrrpt/2000/af/841.htm>.

<sup>132</sup> The Hon. Mary A Ang'awa (resident Judge of the High Court of Kenya), A View from Kenya, American Bar Association, Fall 2009, Vol. 36, No 1. Available online at: [http://www.abanet.org/irr/hr/winter09/angawa\\_iqbal\\_winter09.html](http://www.abanet.org/irr/hr/winter09/angawa_iqbal_winter09.html). See also BBC News, Kenya's Chief Justice resigns, 26.2.2003. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/2800413.stm>.

Following the political transition in 2002, the new government prioritised the problem of judicial corruption through the implementation of a process often referred to as ‘the radical surgery’, which sought to identify and remove corrupt judges. In 2003, the new Chief Justice, the Honorable Justice Gicheru, appointed a committee chaired by High Court Judge Aaron Ringera, to investigate the nature, level and impact of corruption in the judiciary and to recommend strategies for its detection and prevention. The Committee was also required to investigate and identify corrupt members of the judiciary and to recommend disciplinary measures against them.

### *The Report of the Integrity and Anti-Corruption Committee of the Judiciary, 2003 (The Ringera Report)*<sup>133</sup>

The Integrity and Anti-Corruption Committee, also referred to as ‘the Ringera Committee’, was appointed on 18 March 2003 and presented its report on 30 September 2003. The report noted that judicial corruption was rampant. It cited credible evidence of corruption on the part of five out of nine Court of Appeal judges (56 per cent), 18 out of 36 High Court judges (50 per cent) and 82 out of 254 magistrates (32 per cent).<sup>134</sup> Prior to informing the accused of the allegations against them, however, a ‘List of Shame’ was published in the media, naming the judges and magistrates implicated in the report. The Acting Chief Justice publicly advised those named on the List to resign quietly within two weeks or be suspended without pay or privileges and face tribunals. Fifteen judges resigned but two Court of Appeal judges and six High Court judges decided to face tribunals. Most prominently, Justice Waki, a Judge of the Court of Appeal, challenged the allegations against him and secured his reinstatement in late 2004. Of the 82 magistrates implicated, 70 were ‘retired’ by the JSC in the public interest. The process of publicly naming individual judges and magistrates as corrupt without giving them prior notice of charges against them was widely criticised, as was the pressure placed on them to resign from office. These actions were seen to compromise judicial independence, including security of tenure, and undermine the right to due process.<sup>135</sup>

### *Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS)*

On 11 November 2003, the Government of Kenya launched one of its most ambitious governance reform programmes, that is, the Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS). GJLOS sought a sector-wide approach to dealing with problems affecting the justice, law and order sector institutions. The programme covered four key ministries and up to 32 department and agencies. GJLOS was supported by nine countries and eight international organisations.<sup>136</sup> The programme was coordinated by the Programme Co-ordination Office housed at the Kenyan Ministry of Justice and Constitutional Affairs, while programme funds were managed by a financial management agent chosen by the government and the basket-fund donors.<sup>137</sup> When the programme

<sup>133</sup> Report of the Integrity and Anti-Corruption Committee of the Judiciary, 30.9.2003. Available online at: [http://www.marsgroupkenya.org/Reports/Government/Ringera\\_Report.pdf](http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf).

<sup>134</sup> Ibid, at p 46.

<sup>135</sup> ICJ Report, Kenya: Judicial Independence, Corruption and Reform, April 2005. Available online at: <http://www.icj.org/IMG/pdf/kenyareport.pdf>. See also The Hon Mary A Ang’awa (resident Judge of the High Court of Kenya), A View from Kenya, American Bar Association, Fall 2009, Vol 36, No 1. Available online at: [http://www.abanet.org/irr/hr/winter09/angawa\\_iqbal\\_winter09.html](http://www.abanet.org/irr/hr/winter09/angawa_iqbal_winter09.html).

<sup>136</sup> The development partners involved in the GJLOS Reform Programme included the governments of Canada, Denmark, Finland, Germany, The Netherlands, Sweden, The United Kingdom, and Norway, in addition to the United States Agency for International Development (USAID), The European Commission, World Bank, UNDP, UN-Habitat, UNICEF and the UN Office on Drugs and Crime.

<sup>137</sup> Statement by the Government of the Republic of Kenya on the Domestication and Implementation of the United Nations Convention against Corruption (UNCAC) – Presented during the first session of the Conference of States Parties to the United Nations Convention against Corruption, Dead Sea, Jordan, 10-14 December 2006. Available online at: [http://www.justice.go.ke/index.php?option=com\\_docman&task=doc\\_download&gid=3&Itemid](http://www.justice.go.ke/index.php?option=com_docman&task=doc_download&gid=3&Itemid).

was conceptualised, the donor community anticipated that GJLOS would lead to far reaching reforms in all the legal and justice sector institutions. However, in practice, although the programme has developed several judicial reform initiatives, implementation has been limited.<sup>138</sup> In September 2009, the donors decided to cease engagement with GJLOS, citing the overly-ambitious nature of the project goals and the absence of intended results as the major reasons for their withdrawal of funding.<sup>139</sup>

### *The Draft Constitution of 2004*

Perhaps the boldest effort at judicial reform to date was contained in the 2004 draft Constitution of Kenya (the Wako draft). Chapter 13 of the draft Constitution advanced various principles and guidance on the exercise of judicial functions and placed obligations on judicial officers and the state in the conduct and facilitation of judicial work. The draft also emphasised the independence of the judiciary and made this subject only to the Constitution. The judiciary's financial independence was secured by charging all its expenses to the Consolidated Fund.<sup>140</sup> Regarding the structure of the court system, the draft contemplated the establishment of a Supreme Court as the superior court of record. The draft constitution also contained elaborate provisions on the appointment of the Chief Justice and judges, including minimum criteria for such appointments. Although many of the provisions of Chapter 13 were non-contentious, the draft constitution as a whole was rejected following a public referendum held in 2005.

### *Report of the Sub-Committee on the Ethics and Governance of the Judiciary, January 2006 (The Onyango Otieno Report)<sup>141</sup>*

The Sub-Committee on the Ethics and Governance of the Judiciary, popularly known as 'the Onyango Otieno Committee', was established on 18 March 2005 to continue to investigate issues related to integrity in the judiciary and the due administration of justice. The Sub-Committee presented its report in November 2005 and it was made public in January 2006. Unlike the earlier Ringera Report on judicial corruption, the Onyango Otieno Committee Report refrained from naming individual judges as corrupt. The Sub-Committee made recommendations towards enhancing the integrity in the judiciary through, inter alia, substantive changes in the disciplinary procedures of the judiciary in order to make them more transparent and fair to the affected parties. The Sub-Committee also proposed measures to enhance the integrity of the litigation process for the efficient and effective delivery of justice.

The Onyango Otieno Report was followed by the Report of the Committee on Ethics and Governance of the Judiciary in October 2008 (The Kihara Kariuki Report). It too did not publish open accusations against judges or magistrates.

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138 Interview with GJLOS donors.

139 Interview with the European Commission.

140 Section 99(1) of the Constitution of Kenya provides that: 'all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and form a Consolidated Fund from which no moneys shall be withdrawn except as may be authorized by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly under section 101'.

141 Report of the Sub-Committee on the Ethics and Governance of the Judiciary, January 2006. Available online at: [http://www.marsgroupkenya.org/Reports/Government/Kenya\\_Judiciary\\_Ethics\\_and\\_Governance\\_Subcommittee\\_Report\\_January\\_2006.pdf](http://www.marsgroupkenya.org/Reports/Government/Kenya_Judiciary_Ethics_and_Governance_Subcommittee_Report_January_2006.pdf).



## *2008-2009: A turning point for judicial reform?*

The post-election crisis in late 2007 and early 2008 and the subsequent establishment of the Kenya National Dialogue and Reconciliation process marked a potential turning point for judicial reform in Kenya. Public confidence in the judiciary was greatly undermined following the outright rejection of the judiciary as an impartial and independent arbiter to resolve the dispute arising from the presidential election results. To address this situation, and as a measure to restore the rule of law, the grand coalition government resolved under Agenda Item IV of the National Dialogue and Reconciliation Agreement to undertake comprehensive reforms of the judiciary. The Kenya National Dialogue and Reconciliation process has prioritised a number of steps to reform the judiciary. They include the following:

- a) Constitutional review to anchor judicial reforms, including financial independence, transparent and merit-based appointment, discipline and removal of judges, strong commitment to human rights and reconstitution of the Judicial Service Commission;
- b) Enactment of the Judicial Service Commission Act, with provisions for peer review mechanisms and performance contracting; and
- c) Streamlining of the functioning of legal and judicial institutions through the adoption of a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes and activities in the justice sector.<sup>142</sup>

At the same time, several policy initiatives on the reform of the judiciary have been included in the Medium Term Plan (2008-2012) of Vision 2030.<sup>143</sup>

The judiciary has also devised its own blueprint for judicial reform. Launched on 20 March 2009, the Strategic Plan for the Judiciary 2009-2012 stipulates strategic objectives and activities for the reform of various aspects of the judiciary. In particular, the plan identifies the enactment of the Judicial Service Bill, improving human resource capacity within the judiciary and establishing a communication department as important objectives. The implementation of the Strategic Plan is a joint effort between the Office of the Chief Justice, the Judicial Service Commission, the Registrar of the High Court and other stakeholders.

In order to catalyse all of these reform initiatives, on 29 May 2009 the government appointed a multi-disciplinary Task Force on Judicial Reforms to identify the reforms that need to be carried out in the judiciary. The Task Force was chaired by the Honorable Justice William Ouko and comprised representatives of the judiciary, the Ministry of Justice, National Cohesion and Constitutional Affairs, the State Law Office, the Kenya National Commission on Human Rights, the Kenya Law Reform Commission, the Law Society of Kenya, the Kenya Section of the International Commission of Jurists (ICJ-K) and the Federation of Women Lawyers-Kenya (FIDA). The Task Force was mandated to consider and make recommendations on:

- the expansion, functions and independence of the Judicial Service Commission;
- the short- and long-term measures for addressing the backlog of cases;

<sup>142</sup> Kenya National Dialogue and Reconciliation Monitoring Project – Agenda Item 4 Long-Standing Issues and Solutions - Draft Report on status of implementation January 2009. Available online at: <http://www.dialoguekenya.org/docs/Agenda%20Item%20Four%20chapter.pdf>.

<sup>143</sup> Vision 2030 Medium Term Plan. Available online at: <http://www.scribd.com/doc/18345790/Vision-2030-Medium-Term-Plan-20082012>.

- financial autonomy, sufficiency and accountability for the judiciary;
- the nature and necessity or otherwise of regulations under section 68(3) of the Constitution of Kenya;
- finalisation of the Judicial Service Commission Bill;
- ways of dealing with corruption or perceived corruption in the judiciary; and
- other measures or proposals that are necessary to strengthen and enhance the performance of the judiciary in the short- and long-term, and to advise on how and when the proposed reforms/initiatives should be carried out.<sup>144</sup>

The Task Force presented an interim report to the Chief Justice, Minister for Justice, Constitutional Affairs and National Cohesion and the Attorney-General on 29 June 2009 and a final report on 10 August 2009. The main recommendations of the Task Force included:

- Measures to address the backlog of cases, including the hiring of additional personnel (the report recommended an increase in the number of judges of Appeal to 30 and puisne Judges to 120, the appointment of Commissioners of Assize and the recruitment of additional magistrates); standardisation of court processes; automation of court processes; establishment of weekend and 24 hour courts, introduction of Small Claims Courts; review of court procedures and processes; enhancement of legal aid, introduction of ADR: specific measures to address traffic cases (spot fines, better information management);
- Enhancing the operational autonomy and independence of the Judicial Service Commission through the enactment of the Judicial Service Bill;
- Introduction of permanent mechanisms to handle complaints against judicial officers;
- Better working environment to attract and retain high quality staff;
- Strengthening of judicial administration and processes; and
- Additional funding to the judiciary pegged at one per cent of the national budget in order to implement these changes over a period of time.

The Task Force Report included a timetable for implementation of its recommendations. According to this timetable, the final phase of reforms is scheduled to end on 28 February 2011. However, this timetable now appears ambitious.

The Task Force Report was due to be forwarded to the Cabinet for adoption and implementation on 15 October 2009. However, submission has now been deferred indefinitely after ODM-allied ministers rejected the report.<sup>145</sup> The major issue of contention appears to be the continued involvement of the Chief Justice as chair of the Judicial Service Commission, the body entrusted to oversee the implementation of the reforms recommended in the report.<sup>146</sup>

<sup>144</sup> Report of the Task Force on Judicial Reforms 2009.

<sup>145</sup> The Standard, Judiciary: ODM and PNU differ on way forward, 15.10.2009. Available online at: <http://www.eastandard.net/InsidePage.php?id=1144026428&cid=4#>.

<sup>146</sup> The Standard, Sharp axe of reforms on the necks of Wako and Gicheru, 19.10.2009. Available online at: <http://www.eastandard.net/InsidePage.php?id=1144026643&cid=4>.

# Chapter Four – The Judiciary

## 4.1 Introduction

As noted in Chapter Two, the Judiciary of Kenya consists of the courts and all officers of the courts, including the Chief Justice, the Attorney-General, judges and magistrates. This chapter, however, examines the major obstacles that confront the judiciary as a collective institution for the administration of justice. The majority of the delegation's observations are directly related to the degree of independence enjoyed by judges of the High Court and Court of Appeal. Some of the delegation's comments are applicable to magistrates also, although the particular obstacles faced by the magistracy are addressed separately in Chapter Five. This chapter concludes by assessing the extent of public confidence in the judiciary and the related issue of access to justice.

## 4.2 Major obstacles confronting the judiciary

### 4.2.1 Constitutional framework for judicial power

The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government. The different organs of the state have exclusive and specific responsibilities and by virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere.<sup>147</sup> In recognition of the importance of the separation of powers to the fair administration of justice, the United Nations Human Rights Committee has repeatedly recommended that states adopt legislation and measures to ensure that there is a clear distinction between the executive and judicial branches of government, so that the former cannot interfere in matters for which the judiciary is responsible.<sup>148</sup>

Principle 1 of the UN Basic Principles on the Independence of the Judiciary requires states to guarantee judicial independence 'in the Constitution or the law of the country'.<sup>149</sup> However, in Kenya the Constitution fails to entrench judicial power exclusively in the judiciary, nor does it unambiguously guarantee its independence. Whereas section 23(1) of the Constitution expressly vests executive power in the President as the head of the executive and section 30 of the Constitution similarly vests legislative power in Parliament, there is no similar entrenchment of judicial authority

147 The Human Rights Committee has referred to the principle of separation of powers when it noted that: 'lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy' (Concluding Observations of the Human Rights Committee on Slovakia, UN Doc CCPR/C/79/Add 79, para 3).

148 Concluding Observations of the Human Rights Committee on Romania, UN Doc CCPR/C/79/Add 111, para 10. See also the Committee's Concluding Observations on Peru, UN Doc CCPR/CO/70/PER, para 10; the Concluding Observations on El Salvador, UN Doc CCPR/C/79/Add 34, para 15; the Concluding Observations on Tunisia, UN Doc CCPR/C/79/Add 43, para. 14; and the Concluding Observations on Nepal, UN Doc CCPR/C/79/Add 42, para 18.

149 UN Basic Principles on the Independence of the Judiciary, Principle 1. See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle 4(a).

in the judiciary. This gives rise to a perception of a weak foundation of judicial authority and an imbalance of power between the three arms of government, with the judiciary rendered subordinate to the executive and legislature and subject to potential political influence and patronage. This problem of perception is exacerbated by the fact that there is no freestanding guarantee of judicial independence within the Constitution.<sup>150</sup>

The delegation received reports that, in practice, the executive branch does sometimes exert political pressure on judges and magistrates to decide cases other than in accordance with the law. The attention of the delegation was drawn to several controversial decisions of the High Court in which the Court allegedly absolved influential political figures facing corruption charges from criminal responsibility. The delegation received several reports suggesting that judges and magistrates are sometimes transferred to work in less desirable locations in Kenya after rendering decisions unfavourable to the executive. The IBAHRI and ILAC also recall that in January 2008, after the controversial announcement of the presidential election results, the opposition leader (now Prime Minister Odinga), refused to file a court challenge because he did not expect a fair hearing before an independent and impartial tribunal.

The delegation observes that the Report of the Task Force on Judicial Reforms 2009 does not engage with the adequacy of the constitutional framework with respect to the principles of judicial power and independence of the judiciary. However, the delegation is pleased to note that section 197 of the harmonised draft Constitution will, if enacted, vest judicial authority exclusively in the judiciary. Moreover, the delegation welcomes the fact that section 198 of the harmonised draft Constitution will, if enacted, guarantee the independence of the judiciary.<sup>151</sup> In the opinion of the delegation there is a pressing need to amend the Constitution so as to ensure that the structure and operation of state power is founded upon a true separation of its executive, legislative and judicial branches, with judicial power vested exclusively in the courts and tribunals and the institutional independence of the judiciary unambiguously guaranteed.

**The IBAHRI and ILAC therefore recommend that:**

- (1) The Constitution should be amended so as to vest judicial power exclusively in the courts and tribunals, as provided for in section 197 of the harmonised draft Constitution;**
- (2) The Constitution should be amended so as to incorporate an express guarantee of judicial independence, as provided for in section 198 of the harmonised draft Constitution.**

#### *4.2.2 Leadership of the judiciary*

There is a widely held view within Kenya that any wholesale reconstruction of the judiciary must begin with the appointment of a new Chief Justice. As a reflection of this view, the delegation was urged by several reliable and highly-regarded members of the legal community to recommend that Chief Justice Gicheru be invited to submit his resignation.

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<sup>150</sup> Sections 77(1) and 77(9) of the Constitution of Kenya briefly address judicial independence, but only in the context of one's right to a fair hearing, whether criminal or civil, before an independent and impartial tribunal.

<sup>151</sup> Draft Constitution of Kenya, sections 197 and 198 (published on 17 November 2009 by the Committee of Experts on Constitutional Review pursuant to section 32(1)(a)(i) of the Constitution of Kenya Review Act 2008).

The significant level of discontent with the current leadership of the judiciary appears to be premised on a variety of different factors. During the course of the IBAHRI/ILAC mission, the delegation heard complaints that the Chief Justice is inaccessible, both to those within the judiciary and outside, he is resistant to change, and is generally unwilling or unable to lead. Some of the interlocutors commented that, in their view, the Chief Justice himself has impeded the reform agenda. They cited in support the fact that although numerous commissions have been appointed and recommendations made, there have been few significant judicial reforms implemented since his appointment in 2003. For others, the overriding concern is that during his tenure, Chief Justice Gicheru has allegedly been responsible for ‘gate-keeping’, that is, using his position as the most senior judicial officer in Kenya to ensure that the political establishment is protected from legal challenge.<sup>152</sup> By way of example of an alleged gate-keeping arrangement, one interlocutor highlighted the appointment by the Chief Justice of what he termed ‘politically correct’ judges to the Constitutional and Judicial Review Division of the High Court. Another cited a practice whereby judges of the same court are encouraged to refer cases, as a matter of course, to the Chief Justice for directions. The delegation was informed that this practice, which has no statutory basis, involves High Court judges seeking the advice of the Chief Justice in cases where they are uncertain as to where influential political interests may lie.<sup>153</sup>

What remains at the forefront of critics’ minds, however, was the Chief Justice’s role in the declaration of the presidential election results in December 2007. As is well known, within minutes of the controversial announcement of the results, incumbent President Kibaki was sworn in as President for a second term by Chief Justice Gicheru. This act of swearing in the incumbent President so shortly after the announcement of the results has raised numerous questions regarding the independence and impartiality of the judiciary from the highest level. Some of these questions have been summarised in a report by the Kenya Section of the International Commission of Jurists (ICJ-K):

‘How could the Chief Justice be at hand so soon after the declaration of the results to swear in the president? The need for urgency in conducting the ceremony would have been apparent to the president and his supporters. Was it also apparent to the Chief Justice, and if so, what did he know? Was it his place to counsel moderation by, for example, refusing to conduct the swearing in ceremony until the next day? Would the Chief Justice have had his way if he had suggested that the swearing in ceremony be postponed? Would the violence that subsequently engulfed the country have been avoided if the swearing in had not taken place at the time it did, and would the space have remained open for challenging the results of the elections with the Electoral Commission?’<sup>154</sup>

As the ICJ-K Report itself recognises, the answers to these questions remain controversial. However, regardless of the answers, the fact remains that the perception of the independence and impartiality of Chief Justice Gicheru has, for many, been severely damaged by his perceived role in events that unfolded in relation to the swearing in of the President.

As previously noted, within Kenya there is a highly vocal call for Chief Justice Gicheru to either be invited to submit his resignation or be removed on the recommendation of a tribunal appointed

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<sup>152</sup> It was suggested to us that at least one reason for ‘gate-keeping’ by the Chief Justice may be that both the Chief Justice and President Kibaki are of Kikuyu ethnicity.

<sup>153</sup> Such a practice would clearly breach Principle 2 of the UN Basic Principles on the Independence of the Judiciary which provides that: ‘The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’

<sup>154</sup> International Commission of Jurists Kenya, Comments on the draft report of the task force on judicial reforms (undated).

by the President to consider such removal. However, the delegation is concerned that such action would not only represent an infringement of the security of tenure of judicial office, which is an essential component of an independent judiciary, but it would also establish a dangerous precedent for the future. Moreover, the delegation is mindful that removal of an individual does not reform an institution.

In the IBAHRI and ILAC's assessment, whilst issues of personality and managerial style cannot be ignored – and indeed there is clearly a need for the Chief Justice to demonstrate his leadership more effectively if public confidence in the judiciary is to be restored – the crux of the problem lies in the fact that authority over the judiciary is unduly concentrated in a single judicial officer. Ultimately it is the immense power of the Office of the Chief Justice, which is rarely delegated, that is responsible for the decline in the process of administration of justice in Kenya.

As both the administrative and judicial head of all the Courts of Kenya, the Chief Justice is responsible for carrying out the following tasks:

- a) Administration of the judiciary as an institution;
- b) Chairmanship of the Judicial Service Commission (JSC);
- c) Selection of judges to particular benches and divisions of the High Court;
- d) Advising the President on appointment and removal of judges; and
- e) Supervision of the Court of Appeal, the High Court and subordinate courts and paralegal personnel.

The powers of administration are presently so centralised that the Court of Appeal and divisions of the High Court and subordinate courts do not run independently. This has led to poor supervision of the courts, unsatisfactory personnel deployment, and inconsistent policy formulation on various aspects of court management.<sup>155</sup> Therefore, it is the opinion of the IBAHRI and ILAC that there is a pressing need to reconstitute the role of the Chief Justice in the court administration system and to introduce a more effective and efficient localised administration of the courts.

At the same time, the concentration of power in the Office of the Chief Justice creates a parallel problem with respect to the functioning of the JSC. There are obvious weaknesses in the position of the Chief Justice as the head of both the judiciary and the JSC. A Chief Justice is unlikely, as head of the JSC, to recommend his own removal from office. Moreover, there is a clear danger that as a Judge of the Court of Appeal and the High Court, the Chief Justice may be inadvertently partisan in his recommendations regarding his colleagues, the other judges. Conversely, the other judges on the JSC may refrain from criticising any recommendation by the chairman, who is the Chief Justice, due to his seniority in the hierarchy of the court system.<sup>156</sup> There is, therefore, a need to reconstitute the role of the Chief Justice in the JSC in such a way as to establish the Commission as a fully independent body.

Accordingly, consideration must be given to the role of the Chief Justice in both the administration of the courts and the appointment, discipline and removal of judges and magistrates. The IBAHRI

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<sup>155</sup> Judiciary Watch Report - Judicial Reform in Kenya, 1/2005. Publication of the Kenyan Section of the International Commission of Jurists (ICJ Kenya), No 3 in the Judiciary Watch Series.

<sup>156</sup> International Commission of Jurists Kenya, Judiciary Watch Report - Judicial Reform in Kenya, 1/2005, No 3 in the Judiciary Watch Series.

and ILAC share the view of the Eminent Panel of Commonwealth Jurists that while it is appropriate for the Chief Justice to retain overall responsibility for the judiciary and to actively provide judicial leadership at all times, this function should be limited to a general supervisory jurisdiction, with administrative responsibility for the functioning of the courts localised within each court.<sup>157</sup> Thus, if a Supreme Court is established, as proposed in section 201 of the harmonised draft Constitution, the Chief Justice should preside over and have direct administrative responsibility for the Supreme Court.<sup>158</sup> However, more immediately, the Presiding Judge of the Court of Appeal and the recently appointed Principal Judge of the High Court should each be empowered to exercise sole and direct responsibility for the administration of their respective courts. In particular, the Principal Judge of the High Court should be responsible for the selection of judges to particular benches and divisions of the High Court. The same principle of decentralised administrative responsibility should apply also to the magistrates' courts.

Although the composition, mandate and functioning of the JSC is addressed fully in section 4.2.3, it is appropriate to note here that the IBAHRI and ILAC also share the concern of the Eminent Panel of Commonwealth Jurists that, for the reasons already highlighted, the position of the Chief Justice as chairman of the JSC may be inhibiting the Commission from properly exercising its functions.<sup>159</sup> Therefore, the IBAHRI and ILAC consider that the Chief Justice should not be a member of the JSC and accordingly should not have any role in advising the President on the appointment and removal of judges.

**The IBAHRI and ILAC therefore recommend that:**

- (3) The role of the Chief Justice in the administration of the courts should be reconstituted as follows:**
  - (a) the Chief Justice should retain overall responsibility for the judiciary and provide judicial leadership;**
  - (b) the Chief Justice should preside over and have direct administrative responsibility for the Supreme Court, if established;**
  - (c) the Presiding Judge of the Court of Appeal should be empowered to exercise sole and direct responsibility for the administration of the Court of Appeal;**
  - (d) the Principal Judge of the High Court should be empowered to exercise sole and direct responsibility for the administration of the High Court. In particular, the Principal Judge of the High Court should be responsible for the selection of judges to particular benches and divisions of the High Court; and**
  - (e) The same principle of localised administrative responsibility should apply also to the magistrates' courts.**
- (4) The Chief Justice should not be a member of the JSC.**

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<sup>157</sup> Advisory Panel of Eminent Commonwealth Jurists – Report of Mission; Nairobi, Kenya, May 2002.

<sup>158</sup> Draft Constitution of Kenya, section 201.

<sup>159</sup> Advisory Panel of Eminent Commonwealth Jurists – Report of Mission; Nairobi, Kenya, May 2002.

### 4.2.3 Composition, mandate and functioning of the Judicial Service Commission

Under section 69 of the Constitution, the Judicial Service Commission is empowered to appoint, discipline and remove the Registrar and Deputy Registrar of the High Court, magistrates and Kadhis.<sup>160</sup> The JSC also has an advisory role with regard to the selection of judges to the High Court and Court of Appeal, who are appointed by the President.<sup>161</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa support the notion that judicial officers should be selected by a body independent from the executive and the legislature. However, the Principles and Guidelines do allow for other bodies, including other branches of power, to perform this function if certain criteria are complied with:

‘The process of appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the Judiciary.’<sup>162</sup>

As presently constituted, the JSC is not an independent body. The JSC is comprised of five members as follows: the Chief Justice as Chairman, the Attorney-General, a Judge of the Court of Appeal, a puisne Judge of the High Court, and the Chairman of the Public Service Commission.<sup>163</sup> Therefore, the JSC is comprised solely of persons appointed by the President. The Chief Justice, the Attorney-General and the Chairman of the Public Service Commission are direct presidential appointees, while the Judge of Appeal and the Judge of the High Court are appointed to high judicial office by the President on the non-binding recommendation of the JSC and subsequently designated by the President to serve on the JSC. The composition of the JSC therefore does not guarantee independence from the executive.

As already noted in section 4.2.2, there is also an obvious weakness in the position of the Chief Justice as the head of both the judiciary and the JSC. As the Chairman of the JSC, the Chief Justice is unlikely to recommend his own removal from office. There is also potential for the Chief Justice to unwittingly favour or disfavour his judicial colleagues in the High Court and Court of Appeal. Equally, other judges on the Commission may be unwilling or unable to criticise recommendations made by the Chief Justice, due to his seniority within the Court system. Furthermore, in the event of disciplinary action being taken against a judicial officer of the lower bench, the Chief Justice, being the Chair of the Commission, may be said to lack objective impartiality, since by virtue of his position as head of the judiciary he will also be the complainant.<sup>164</sup>

The presence of the Attorney-General on the JSC is also problematic. As a political appointee, legal advisor to the government and ex-officio member of the Cabinet and Parliament, his inclusion exposes the judiciary to the risk of executive interference. The fact that he is also the titular head of the legal profession does not remedy this deficiency. In addition, given that the judiciary has been de-linked from the civil service since 1993, the presence of the Chairman of the Public Service Commission on the JSC now appears unnecessary.

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<sup>160</sup> Constitution of Kenya, section 69.

<sup>161</sup> Constitution of Kenya, section 61.

<sup>162</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para 4(h). See also the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, Principle II.1.

<sup>163</sup> Constitution of Kenya, section 68(1).

<sup>164</sup> International Commission of Jurists Kenya, Judiciary Watch Report - Judicial Reform in Kenya, 1/2005, No 3 in the Judiciary Watch Series.



Applying Principle A paragraph 4(h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, as quoted above, the current composition of the JSC, although not to be encouraged, might be acceptable if other guarantees were put in place to ensure that the method of judicial selection safeguarded the independence and impartiality of the judiciary. However, as discussed further in sections 4.2.4 and 4.2.5 below, the procedures adopted by the JSC for appointing, promoting, disciplining and removing judicial officers have been widely criticised as lacking in transparency and accountability, and failing to safeguard against executive interference.<sup>165</sup>

The Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (Latimer House Guidelines) further stipulate that membership of any JSC should be representative, consisting of members drawn from various sections of society and stakeholders.<sup>166</sup> As presently constituted, however, the membership of the JSC fails to incorporate, for example, any judge or magistrate elected by members of the judiciary themselves, any member of the legal profession or any representative of civil society. The general feeling expressed by many is that such individuals could make a valuable contribution to the work of the JSC, by equipping the Committee with an external voice.

Aside from the issue of composition, equally problematic is that under the Constitution the mandate of the JSC is limited to advising the President on the appointment of judges and appointing, disciplining and removing the Registrar and Deputy Registrar of the High Court, magistrates and Kadhis. The JSC has no role in, for example, upholding judicial independence and accountability, recommending appropriate terms and conditions of service for judges, magistrates and other judicial officers or preparing and implementing programmes for the education and training of judges, magistrates and paralegal staff.

The JSC also lacks its own Secretariat to rely upon for its administrative tasks. Instead, the JSC is entirely dependent upon the Registrar of the High Court for administrative support. There is, therefore, an absence of any clear separation between the administrative arm of the judiciary, headed by the registrar, and the policy arm of the judiciary, namely the JSC.

Accordingly, the IBAHRI and ILAC are of the view that the composition, mandate and functioning of the Judicial Service Commission all require urgent reform in order to both protect judicial independence and enhance judicial accountability.

Regarding the composition of the JSC, the IBAHRI and ILAC take the position that the Committee should be restructured in order to establish it as an independent body free from the direction or control of any person or authority in the exercise of its functions. A more broad-based representative membership would also serve to introduce an enhanced level of transparency and accountability. The IBAHRI and ILAC have considered the proposals of the Task Force on Judicial Reforms 2009 in this regard, as set out at section 3.1 of its report, together with section 210 of the harmonised draft Constitution. The IBAHRI and ILAC make the following observations:<sup>167</sup>

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165 Advisory Panel of Eminent Commonwealth Jurists – Report of Mission; Nairobi, Kenya, May 2002.

166 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (Adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association), Principle II.1.

167 See Report of the Task Force on Judicial Reforms 2009, section 3.1; Draft Constitution of Kenya, section 210.

- (i) For the reasons already outlined, the IBAHRI and ILAC share the concern of the Eminent Panel of Commonwealth Jurists that the inclusion of the Chief Justice as chairman of the JSC may inhibit it from properly exercising its functions.<sup>168</sup> The IBAHRI and ILAC are of the view that the Chief Justice should not be a member of the JSC at all. Accordingly, the IBAHRI and ILAC disagree with the proposal of the Task Force on Judicial Reforms 2009 that the membership of the JSC should include the Chief Justice. Furthermore, the IBAHRI and ILAC consider that section 210(1)(a) of the harmonised draft Constitution is deficient in so far as, without expressly providing so, it would, if enacted, permit the Chief Justice, as a Judge of the Supreme Court, to be elected as both a member and the chairperson of the Commission;
- (ii) The IBAHRI and ILAC consider that the Attorney-General should cease to be a member of the JSC as his presence exposes the judiciary to the risk of executive influence. Accordingly, the IBAHRI and ILAC disagree with the proposal of the Task Force on Judicial Reforms 2009 that the membership of the JSC should include the Attorney-General. Furthermore, the IBAHRI and ILAC consider that section 210(1)(d) of the harmonised draft Constitution is deficient in so far as it expressly provides for the inclusion of the Attorney-General on the Commission;
- (iii) The IBAHRI and ILAC are unable to discern any justification for a representative of the Public Service Commission to be included as a member of the JSC. The judiciary is entirely independent of the mainstream civil service, and has been since 1993. Accordingly, the IBAHRI and ILAC disagree with section 210(1)(f) of the harmonised draft Constitution and support the proposal of the Task Force on Judicial Reforms 2009 that the membership of the JSC should not include any representation of the Public Service Commission;
- (iv) The IBAHRI and ILAC welcome the fact that under the terms of section 210 of the harmonised draft Constitution, all judicial members of the JSC will be elected by members of the relevant courts that they represent, and not just selected. The IBAHRI and ILAC consider, however, that this principle of elected representation should be extended to section 210(1)(e) of the harmonised draft Constitution which, as drafted, provides for two advocates to be merely ‘nominated’ by the statutory body responsible for the professional regulation of advocates;
- (v) The IBAHRI and ILAC are concerned that whereas the Report of the Task Force on Judicial Reforms 2009 provides for the membership of the JSC to include one person other than a judge nominated by the Kenya Magistrates and Judges Association (KMJA), section 210 of the harmonised draft Constitution makes no provision for any member of the subordinate courts to be included within the membership of the Commission. As drafted therefore, section 210 is deficient in that it denies both magistrates and Kadhis any representation on the JSC; and
- (vi) Finally, the IBAHRI and ILAC consider that, for gender balance, the JSC should additionally include one member elected by the Kenya Women Judges Association (KWJA).

Regarding the mandate of the JSC, the IBAHRI and ILAC consider that if the JSC is to effectively be able to manage the judiciary, then there is a need for its mandate to be strengthened and expanded considerably. In this respect, the delegation supports the proposals of the Task Force on Judicial Reforms 2009 on the revised functions of the JSC and section 211 of the harmonised draft Constitution without reservation.<sup>169</sup>

<sup>168</sup> Advisory Panel of Eminent Commonwealth Jurists – Report of Mission; Nairobi, Kenya, May 2002.

<sup>169</sup> See Report of the Task Force on Judicial Reforms 2009, section 3.2; Draft Constitution of Kenya, section 211.

In the opinion of the IBAHRI and ILAC there is also a need to ensure that the JSC is provided with adequate resources to enable it to operate effectively and independently. In this respect, the IBAHRI and ILAC support the proposal of the Task Force on Judicial Reforms 2009 that the JSC should be provided with its own full-time Secretariat. However, the JSC should also have its own budget allocation. This would ensure that the JSC's administrative support system is separate from the judicial administration over which the JSC has monitoring and disciplinary powers. In this regard, the IBAHRI and ILAC note that the draft Judicial Service Commission Bill 2009 does provide both for the establishment of an independent Secretariat and for the expenses of the JSC to be charged on and issued out of the Consolidated Fund.<sup>170, 171</sup> The IBAHRI and ILAC urge that the Bill should be enacted at the earliest opportunity.

**The IBAHRI and ILAC therefore recommend that:**

- (5) The composition of the Judicial Service Commission should be restructured in such a way as to ensure that it is fully independent from the executive and its membership is truly representative. An expanded membership of the JSC should consist of the following:**
  - (a) one Supreme Court Judge, other than the Chief Justice, elected by the judges of the Supreme Court, if a Supreme Court is established;**
  - (b) one Court of Appeal Judge, other than the Chief Justice, elected by the judges of the Court of Appeal;**
  - (c) a full-time chairperson who will be the judge of the highest court elected in accordance with either (a) or (b);**
  - (d) one High Court Judge, other than the Chief Justice, elected by the judges of the High Court;**
  - (e) one member from the subordinate courts elected by the KMJA;**
  - (f) one member elected by the KWJA;**
  - (g) two advocates, one of each gender, of at least 15 years' standing elected by the Law Society of Kenya;**
  - (h) one lay member elected by KEPSA.**
- (6) The functions of the Judicial Service Commission should be restructured, as provided for in section 211 of the harmonised draft Constitution of Kenya as follows:**
  - (a) to ensure and enhance the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice;**
  - (b) to recommend to the State President persons for appointment as judges;**
  - (c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their remuneration;**

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<sup>170</sup> See Report of the Task Force on Judicial Reforms 2009, section 3.1; Judicial Service Commission Bill 2009, clauses 7 and 20.

<sup>171</sup> Section 99(1) of the Constitution of Kenya provides that: 'all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and form a Consolidated Fund from which no moneys shall be withdrawn except as may be authorized by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly under section 101'.

- (d) to advise the State President on the membership of a tribunal referred to in section 207(5) (a) and (b) of the harmonised draft Constitution;
  - (e) to receive complaints against, investigate and remove from office or otherwise discipline, registrars, magistrates, other judicial officers and other staff of the judiciary, in such manner as may be specified by an Act of Parliament;
  - (f) to prepare and implement programmes for the continuing education and training of judges, magistrates, other judicial officers and other staff of the judiciary;
  - (g) to advise the national government on improving the efficiency of the administration of justice, and on access to justice, including legal aid;
  - (h) to ensure competitiveness and transparent processes for the appointment of judicial officers and other staff of the judiciary;
  - (i) to promote gender equality.
- (7) The Judicial Service Commission should be provided with its own Secretariat and this Secretariat should be adequately funded from its own budget allocation, as provided for in the draft Judicial Service Commission Bill 2009.

#### 4.2.4 Qualification and procedure for appointment of judges

The UN Basic Principles on the Independence of the Judiciary establish that: ‘Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law’.<sup>172</sup> The Universal Charter of the Judge stipulates that: ‘The selection and each appointment of a Judge must be carried out according to objective and transparent criteria based on proper professional qualifications’.<sup>173</sup> Similarly, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that: ‘The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability’.<sup>174</sup>

In Kenya, the minimum qualifications for appointment to the High Court and Court of Appeal are insufficient to ensure the appointment of appropriately qualified and experienced persons. Under sections 61(3) and 64(3) of the current Constitution, any person who is an advocate of the High Court of Kenya of not less than seven years standing is eligible for appointment to high judicial office. Moreover, there is no requirement that he or she has actually engaged in active legal practice. Further, there are no criteria to hold the office of Chief Justice, other than appointment by the President.

International, regional and commonwealth standards also provide that the process of selecting members of the judiciary should safeguard against appointments for improper motives. The UN Basic Principles on the Independence of the Judiciary stipulate that: ‘Any method of judicial selection shall safeguard against judicial appointments for improper motives’.<sup>175</sup> The Principles and Guidelines on

<sup>172</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>173</sup> Universal Charter of the Judge, Article 9.

<sup>174</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A.4(i).

<sup>175</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

the Right to a Fair Trial and Legal Assistance in Africa provide that: ‘The process for appointments to judicial bodies shall be transparent and accountable’.<sup>176</sup> The Commonwealth Latimer House Principles on the Three Branches of Government (Latimer House Principles) state that ‘Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process’.<sup>177</sup>

Under the current Constitution of Kenya, judges are appointed by the President on the recommendation of the JSC.<sup>178</sup> The process through which candidates for appointment are currently identified and then vetted by the JSC, however, is neither transparent nor accountable. Vacancies are not advertised and the criteria for appointments are not publicly known. The result is that the appointment process is perceived to be dominated by the executive with appointments being made on the basis of political, ethnic or sectarian considerations. The Public Complaints Standing Committee has reported that a key concern of the judiciary itself is executive interference in the appointment of judges, commenting that this issue constitutes ‘a substantial roadblock in the Judiciary’s progress on reforms, necessitating urgent resolution’.<sup>179</sup> During the mission, the delegation heard several interlocutors describe the process by which judges of the High Court and Court of Appeal of Kenya are appointed as akin to a ‘tap on the shoulder’. A senior politician informed the delegation that, in terms of judicial appointments, the JSC is sometimes bypassed as ministers are able to approach the President directly and request the appointment of specific individuals. The Law Society of Kenya also informed the delegation that lawyers with disciplinary findings against them have nevertheless been appointed to high judicial office.

The absence of any open, competitive and merit-based process for the appointment of members of the judiciary of Kenya not only denies many interested and qualified lawyers the opportunity to serve in the judiciary, but also serves to undermine public confidence in the quality of those named to judicial office.

The IBAHRI and ILAC have considered the proposals of the Task Force on Judicial Reforms 2009 concerning the revised qualification criteria for the appointment of judges and also the provisions of section 205 of the harmonised draft Constitution of Kenya.<sup>180</sup> The IBAHRI and ILAC are pleased to note that although the Report of the Task Force on Judicial Reforms 2009 did not unambiguously accommodate previous experience as a magistrate within the criteria for appointment of judges, section 205 of the harmonised draft Constitution has filled this lacuna.

**The IBAHRI and ILAC therefore recommend that:**

- (8) The qualification criteria for appointment to judicial office should be reorganised as follows, as provided for in section 205 of the harmonised draft Constitution of Kenya:**
  - (a) The Chief Justice and the judges appointed to the Supreme Court, if established, should possess at least 15 years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a Judge of the Court of Appeal or the High Court; or (ii) an advocate in practice;**

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<sup>176</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 4(h).

<sup>177</sup> Commonwealth Latimer House Principles on the Three Branches of Government, Principle IV (a).

<sup>178</sup> Constitution of Kenya, section 61.

<sup>179</sup> Public Complaints Standing Committee, Third Quarterly Report for Year 2008/2009 covering the period 1 January 2009 to 31 March 2009, p xi.

<sup>180</sup> Report of the Task Force on Judicial Reforms 2009, section 4.1; Draft Constitution of Kenya, section 205.

- (b) **Judges appointed to the Court of Appeal should possess at least ten years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a Judge of the Court of Appeal or the High Court; or (ii) an advocate in practice;**
- (c) **Judges appointed to the High Court should possess at least ten years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a professionally qualified magistrate; or (ii) an advocate in practice;**
- (d) **The Chief Justice and judges appointed to the Supreme Court, the Court of Appeal or the High Court should possess suitable academic qualifications in law and eminence in legal practice and high moral character and integrity, as determined by the Judicial Service Commission.**

In addition to the above recommendations concerning the qualification of judges, it is also imperative for the sake of restoring public confidence in the judiciary that an effective, efficient and transparent judicial appointment system is put in place. This can be achieved by restructuring the JSC and introducing an open and merit-based competitive selection process to ensure that judges appointed to the bench are jurists of integrity, learning and wisdom. The procedure for judicial appointments should involve the announcement of vacancies with a deadline for nominations, the publication of merit-based recruitment criteria, an interview of applicants by the restructured JSC, the vetting of shortlisted candidates and the announcement of appointees.

The IBAHRI and ILAC note that the report of the Task Force on Judicial Reforms 2009 recommends a revised procedure for the appointment of judges that encapsulates the essence of such a process as described above. The IBAHRI and ILAC also note that these proposals have been incorporated into and expanded upon in regulations 12-21 and 24-25 of the draft Judicial Service Commission [Appointment of Judges] Regulations 2009.<sup>181</sup> The IBAHRI and ILAC urge that the draft Judicial Service Commission [Appointment of Judges] Regulations 2009 should be implemented at the earliest opportunity.

**The IBAHRI and ILAC therefore recommend that:**

- (9) The draft Judicial Service Commission [Appointment of Judges] Regulations 2009 should be implemented at the earliest opportunity.**

#### **4.2.5 Removal and discipline of judges**

International, regional and commonwealth standards provide that judges may only be removed from office on certain grounds. The UN Basic Principles on the Independence of the Judiciary state: 'Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'.<sup>182</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also include strict criteria for removal: 'Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties'.<sup>183</sup> The Latimer House Guidelines provide: 'Grounds for removal of a Judge should be limited to: (A)

<sup>181</sup> Report of the Task Force on Judicial Reforms, section 4.1; Judicial Service Commission [Appointment of Judges] Regulations 2009, regulations 12-21 and 24-25.

<sup>182</sup> UN Basic Principles on the Independence of the Judiciary, Principle 18. See also Principle 19, which states that: 'All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct'.

<sup>183</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para 4(p).

inability to perform judicial duties; and (B) serious misconduct'.<sup>184</sup>

The Constitution of Kenya makes provision for the removal of judges under section 62. Under section 62(3) of the Constitution, a judge may be removed from office only for 'inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause)' or for 'misbehaviour'. During the mission, the delegation was not able to ascertain how the term 'misbehaviour' is interpreted in practice; however, this constitutional provision would appear to be at least capable of leading to the removal of members of the judiciary whose actions fall short of 'gross misconduct' or 'behaviour that renders them unfit to discharge their duties'.

International, regional and commonwealth standards also provide for procedural guarantees in removal and disciplinary proceedings. The UN Basic Principles on the Independence of the Judiciary state:

'A charge or complaint made against a Judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the Judge'.<sup>185</sup>

Furthermore, the UN Basic Principles sanction the obligation on passing legislation to enable judges to appeal disciplinary decisions. Principle 20 stipulates that: 'Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review'.<sup>186</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa contain the following provision:

'Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings'.<sup>187</sup>

The Latimer House Guidelines say: 'In cases where a Judge is at risk of removal, the Judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal'.<sup>188</sup>

Section 62(5) of the Constitution provides that a judge may only be removed from office if the Chief Justice represents to the President that the question of his or her removal ought to be investigated. Where the Chief Justice presents a petition to the President that the question of the removal of a judge ought to be investigated, the President is then required to appoint a tribunal to inquire into the matter and report to him on whether or not the judge in question ought to be removed.<sup>189</sup> Section 62(6) of the Constitution adds that where the question of removing a judge from office has been referred to a tribunal, the President, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office.<sup>190</sup>

Under current constitutional arrangements therefore, responsibility for determining that an allegation against a member of the High Court or Court of Appeal *prima facie* justifies the removal of

184 Latimer House Guidelines, Guideline VI.1, para (a) (i).

185 UN Basic Principles on the Independence of the Judiciary, Principle 17.

186 UN Basic Principles on the Independence of the Judiciary, Principle 20.

187 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para 4(q). Para (r) further provides that '[...] Complaints against judicial officers shall be processed promptly, expeditiously and fairly'.

188 Latimer House Guidelines, Guideline VI.1, para (a) (i).

189 Constitution of Kenya, section 62(5).

190 Ibid.

the judge from office is vested solely in the Chief Justice and the JSC has no role in this process. This is problematic since not only is the Chief Justice appointed directly by the President, but also there is no guidance under section 62(5) of the Constitution as to the criteria to be weighed by the Chief Justice before establishing a case for the removal of a judge; the matter is left entirely to the sole discretion of the Chief Justice. Moreover, there does not appear to be any obligation imposed on the Chief Justice to observe the principles of due process when exercising the power. Accordingly, the exercise of the power to institute removal proceedings against members of the judiciary is open to abuse.<sup>191</sup>

Once an investigation into alleged judicial misconduct is pursued, current arrangements for removal proceedings fall further short of international standards insofar as the tribunal appointed to inquire into whether or not a judge ought to be removed is not independent of the executive. Under section 62(5) (a) of the Constitution, the tribunal is comprised solely of members appointed by the President and by section 62(5) (b) of the Constitution it is tasked with reporting directly to the President.<sup>192</sup>

The procedure for disciplining, as opposed to removing, members of the judiciary is equally deficient. In short, the Constitution makes no provision for any disciplinary process concerning lesser forms of alleged misconduct by judges. There is no provision for any institutionalised complaints mechanism to receive and process complaints against judicial officers. The responsibility for determining whether to discipline members of the judiciary and, if so, in what manner, is left solely to the discretion of the Chief Justice, again without input from the JSC.<sup>193</sup> The IBAHRI and ILAC understand that the Chief Justice exercises this role through, for instance, ordering transfers, refusing to grant permission to attend workshops and refusing to grant leave. However, in the absence of any formal disciplinary procedure, the criteria and mechanisms by which these sanctions are imposed remain elusive.

Therefore, in order to enhance the credibility and independence of the judiciary, there is an urgent need to establish a more transparent complaint, disciplinary and removal process for judges. This process must incorporate appropriate safeguards to avoid the possible abuse of power and ensure a fair hearing for the affected parties. With these principles in mind, the IBAHRI and ILAC have considered the recommendations of the Task Force on Judicial Reforms 2009 on the discipline and removal procedures for judges, the draft Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 and section 207 of the harmonised draft Constitution.<sup>194</sup>

The IBAHRI and ILAC welcome the attempt made by section 207(1) of the harmonised draft Constitution to clarify the grounds for removal of a judge from office. However, the IBAHRI and ILAC consider that, as drafted, the grounds for removal in section 207(1) are potentially too broad. The IBAHRI and ILAC remind the drafters of the Constitution that, according to international standards, judicial officers may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

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191 Previous expert delegations have reported on a widely held belief among Kenyans that complaints regarding judicial misconduct of sufficient seriousness to warrant investigation are sometimes not pursued. See, for example, Advisory Panel of Eminent Commonwealth Jurists – Report of Mission; Nairobi, Kenya, May 2002.

192 Constitution of Kenya, sections 62(5) (a) and (b).

193 The JSC does have disciplinary, suspension and removal authority over magistrates and other members of the subordinate courts and can receive complaints from the public against magistrates (Constitution of Kenya, section 69(1) and (3)).

194 Report of the Task Force on Judicial Reforms, section 4.3; Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009; Draft Constitution of Kenya, section 207.



The IBAHRI and ILAC welcome the fact that, if enacted, section 207(4) of the harmonised draft Constitution will vest responsibility for determining that an allegation against a judge *prima facie* justifies the removal of the judge from office in the JSC, rather than the Chief Justice. The IBAHRI and ILAC further welcome the fact that, if enacted, section 207(5) of the harmonised draft Constitution will provide for any inquiry into whether or not a judge ought to be removed from office to be conducted by a tribunal that is independent of the executive.

The IBAHRI and ILAC welcome the proposal within the draft Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 to establish a Complaints Sub-Commission of the restructured JSC to continuously receive, evaluate and consider complaints against all judicial officers.<sup>195</sup> It appears that, once operational, the functions and powers of the Complaints Sub-Commission will represent a step towards bringing the process of disciplining and removing judges into line with international standards.

In this regard, the IBAHRI and ILAC note in particular that the Complaints Sub-Commission will be competent to receive complaints raising matters that, if substantiated, could warrant the imposition of a disciplinary sanction short of removal.<sup>196</sup> Further, if such complaint is found to be well-founded, the JSC will be empowered to refer the matter for appropriate administrative action.<sup>197</sup> The introduction of an institutionalised disciplinary mechanism will fill an important gap in current arrangements for monitoring judicial conduct. The IBAHRI and ILAC urge the JSC to ensure that all disciplinary proceedings are determined in accordance with established standards of judicial conduct, as provided for, for example, in the Bangalore Principles of Judicial Conduct.<sup>198</sup>

The IBAHRI and ILAC also note the proposal within the draft Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 for three-person Panels to be appointed by the JSC to exercise the functions of the Sub-Commission.<sup>199</sup> However, the IBAHRI and ILAC observe that since at least two members of each Panel will be drawn from the JSC itself, the independence of the Panels will depend on the JSC having first been restructured in accordance with the recommendations in this report.<sup>200</sup> The IBAHRI and ILAC urge the JSC to formulate clear rules of procedure for the Panels that have their foundations in the principles of due process and to guarantee that judicial officers who appear before the Panels are afforded all guarantees inherent within the right to a fair hearing.

The IBAHRI and ILAC welcome the proposal that the Complaints Sub-Commission be supported by the JSC Secretariat.

**The IBAHRI and ILAC therefore recommend that:**

**(10) The Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 should be implemented at the earliest opportunity.**

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<sup>195</sup> Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009, regulations 3 and 4.

<sup>196</sup> *Ibid*, regulation 8[1][a].

<sup>197</sup> *Ibid*, regulation 13[4].

<sup>198</sup> *Bangalore Principles of Judicial Conduct 2001*. Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

<sup>199</sup> Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009, regulation 5.

<sup>200</sup> *Ibid*.

#### 4.2.6 Financial autonomy

The judiciary must be seen to be financially independent and detached from operating under any other branch of government. However, in Kenya, the executive and legislature retain total control over whether the judiciary receives any allocation and, if so, how much.

The financial independence of the judiciary is not presently entrenched in the Constitution or otherwise provided for by legislation. Furthermore, both the allocation and management of funds to the judiciary continue to be controlled by the Treasury. Indeed, the delegation was informed that in the 2009/2010 budget, the development funds for the judiciary (ie, funds for the construction of courts) were in fact allocated to the judiciary through the Ministry of Public Works. The IBAHRI and ILAC also note that, in the districts, money deposited as bail is paid into the District Treasury Accounts.<sup>201</sup>

The IBAHRI and ILAC note that the Judicial Service Commission Bill 2009 seeks to legislate the financial autonomy of the JSC.<sup>202</sup> Once enacted, the provisions of this legislation will significantly enhance the financial independence of the judiciary. However, there is still a need to secure the financial autonomy of the judiciary by law, preferably within the Constitution. There is also a need to de-link the budget of the judiciary as a whole from the Treasury. Instead, if the judiciary is to function impartially and independently, the remuneration of judicial officers and other judicial staff and all expenses of the judiciary should be charged on, and issued out of, the Consolidated Fund. The IBAHRI and ILAC welcome the fact that, if enacted, section 198(3) of the harmonised draft Constitution will provide for an increased level of financial autonomy for the judiciary.

**The IBAHRI and ILAC therefore recommend that:**

- (11) The Judicial Service Commission Bill 2009 should be enacted at the earliest opportunity;**
- (12) The financial independence of the judiciary should be entrenched in the Constitution; and**
- (13) The remuneration and benefits of members of the judiciary should be charged on and issued out of the Consolidated Fund, as provided for in section 198(3) of the harmonised draft Constitution.**

#### 4.2.7 Judicial corruption

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour. For this reason, judges must conduct themselves according to ethical guidelines. At the international level, the Bangalore Principles of Judicial Conduct contain the set of values that should determine judicial behaviour. Principle 4.14 provides: 'A Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties'.<sup>203</sup>

Extraordinary levels of corruption persist within the Kenyan Judiciary. According to the East African Bribery Index 2009 prepared by Transparency International Kenya, overall the judiciary is the third

<sup>201</sup> Judiciary Strategic Plan 2009-2012, p 19.

<sup>202</sup> Judicial Service Commission Bill 2009, clause 20.

<sup>203</sup> Bangalore Principles of Judicial Conduct, Principle 4.14.

most bribery-prone public institution in Kenya (behind the police and Ministry of Defence).<sup>204</sup> In terms of the likelihood of encountering bribery, the judiciary tops the index, with the proportion of respondents who interacted with the judiciary and from whom a bribe was solicited or expected as a condition of service delivery standing at 86.1 per cent. The percentage of respondents who actually paid a bribe in their interaction with the judiciary was 57.8 per cent. 54.9 per cent of respondents only secured a judicial service upon payment of a bribe.<sup>205</sup> The extent of corruption within the judiciary was confirmed by various accounts during the course of the IBAHRI/ILAC mission.<sup>206</sup>

In order to address corruption within its ranks, in February 2005 the Kenyan Judiciary adopted a Judicial Service Code of Conduct and Ethics under section 5(1) of the Public Officer Ethics Act 2003. The judiciary also appoints an Ethics and Governance Sub-Committee on a bi-annual basis to address integrity issues and the Office of the Chief Justice is available to receive specific complaints of corruption with respect to individual judicial officers and staff. The delegation has not been provided with any data in relation to the number of complaints received or their outcome. However, the delegation was informed that these mechanisms have been of limited effect, as the statistics in the foregoing paragraph suggest.

In the opinion of the IBAHRI and ILAC, significant structural reform is necessary if the rule of law is to be upheld and the integrity of the judiciary restored. Anti-corruption measures must be implemented in a way that strengthens the independence of the judiciary, including the security of tenure and right of judges to due process. Whilst a more focused study would be necessary in order to develop a comprehensive reform matrix for the eradication of corruption within the Kenyan Judiciary, certain priorities are nevertheless clear.

It is essential that the judicial appointments procedure is reformed. The minimum qualifications for appointment need to be increased in order to ensure the appointment of appropriately qualified and experienced persons. It is also imperative that an effective, efficient and transparent judicial appointment system is put in place. This can be achieved through the restructuring of the JSC and the introduction of an open and merit-based competitive selection process.

There is also a need to raise awareness of judicial officers and staff on issues of integrity, accountability and professionalism. The Judicial Training Institute, in conjunction with the JSC and KMJA, should take a lead role in this area by designing and implementing relevant in-service training programmes.

At the same time, it is necessary to institutionalise accountability. The current process for receiving complaints against, investigating and disciplining judges who are responsible for unethical practices requires radical reform. There must be an independent body that is competent to continuously receive, evaluate and consider complaints from members of the public about judicial misconduct. The proposed Complaints Sub-Commission of the JSC would appear to fulfil this role. However, those found guilty of corrupt practices after a fair hearing must also be appropriately punished.

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204 Transparency International Kenya, East African Bribery Index 2009. Available online at:

<http://www.tikenya.org/documents/EABIReport09.pdf>. This ranking is based on an aggregate of likelihood, prevalence, impact, severity, frequency, share of bribery and average size of bribe.

205 The survey was conducted through random sampling of 3,500 households between 16 April and 15 May 2009. The margin of error attributed to sampling design and other random effects of this survey, considering a selected random sample of 3,500 respondents was kept at a maximum of +/- 1.67 per cent at 95 per cent confidence level.

206 See also the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, following his mission to Kenya in February 2009 (UN Doc A/HRC/11/2/Add.6, 26.5.2009), at para 31: 'I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to "lose" files, or to decide a case in a particular manner'.

There is also a need to ensure that the quality and efficiency of the justice system as a whole is improved. If court users can have confidence in the ability of the judicial system to provide a simple, fast and cost-effective remedy, then they themselves will be less likely to resort to paying bribes in the first place.

**The IBAHRI and ILAC therefore recommend that:**

**(14) In order to combat judicial corruption, the recommendations in this report regarding the qualification and procedures for appointment of judges, the training of judges, the removal and discipline of judges, the strengthening of public prosecutions and the enhancement of the quality and efficiency of the justice system should be implemented.**

#### *4.2.8 Public confidence and access to justice*

The preamble to the Bangalore Principles of Judicial Conduct provides that: ‘public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society’.<sup>207</sup> Principle 1.6 describes public confidence in the judiciary as: ‘fundamental to the maintenance of judicial independence’.<sup>208</sup>

In Kenya, public confidence in the judicial system has virtually collapsed. Six months after the contested presidential election led to widespread post-election violence, a Gallup Poll was conducted to obtain popular opinions on past grievances, satisfaction with the current leadership and the way forward. Conducted between June and July 2008 across all provinces in Kenya, the poll’s results suggested that confidence in the judicial system had declined from 55 per cent in 2007 to only 36 per cent in 2008.<sup>209</sup> When the poll was repeated in April 2009, just 27 per cent of Kenyans expressed confidence in the judicial system, half the percentage that had expressed confidence in 2007.<sup>210, 211</sup>

However, the dwindling level of faith among Kenyans in their judicial system has broader roots than the post-election crisis alone. The proportion of the population using the formal court system in Kenya has always been slight. Indeed, according to a survey conducted by the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme in 2006, even prior to the controversy surrounding the 2007 presidential election results the people of Kenya resolved only one quarter (26 per cent) of all disputes through the formal court system.<sup>212</sup> This suggests, as others have pointed out, that the vast majority of ordinary Kenyans have for some time been unwilling and/or unable to access justice through the formal judicial system.<sup>213</sup> The reasons for this phenomenon are diverse and have been extensively documented elsewhere.<sup>214</sup> However, for present purposes it suffices to note that partiality and a lack of independence in the judiciary, judicial corruption and unethical behaviour,

<sup>207</sup> Bangalore Principles of Judicial Conduct, preamble.

<sup>208</sup> Ibid, Principle 1.6.

<sup>209</sup> United Nations Country Team in Kenya, Kenya Humanitarian Update vol. 35, 04 - 10 Sep 2008. Available online at: <http://www.reliefweb.int/rwarchive/rwb.nsf/db900sid/FBUO-7JKDB3?OpenDocument&Click=>.

<sup>210</sup> Gallup, Lacking Faith in Judiciary, Kenyans Lean Toward The Hague, 8.5.2009. Available online at: <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>.

<sup>211</sup> Results were based on face-to-face interviews with approximately 1,000 adults, aged 15 and older, conducted in June 2007 and April 2009 in Kenya, and 2,200 adults, aged 15 and older, in August 2008 in Kenya. For results based on the 2007 and 2009 samples, Gallup say with 95 per cent confidence that the maximum margin of sampling error is ±5 percentage points. For results based on the 2008 sample, Gallup say with 95 per cent confidence that the maximum margin of sampling error is ±3 percentage points.

<sup>212</sup> Governance, Justice, Law and Order Sector (GJLOS) Reform Programme, National Integrated Household Baseline Survey Report, September 2006 at section 5.2.9. Website no longer available..

<sup>213</sup> See, for example, Connie Ngondi-Houghton, Access to justice and the rule of law in Kenya: A paper developed for the commission of the empowerment of the poor, November 2006 at p 33. Available online at: [http://www.undp.org/LegalEmpowerment/reports/National%20Consultation%20Reports/Country%20Files/15\\_Kenya/15\\_3\\_Access\\_to\\_Justice.pdf](http://www.undp.org/LegalEmpowerment/reports/National%20Consultation%20Reports/Country%20Files/15_Kenya/15_3_Access_to_Justice.pdf).

<sup>214</sup> Ibid.

inefficiency and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accessing the court system have, amongst other factors, all served to perpetuate a widely-held belief amongst ordinary Kenyans that formal justice is available to only a wealthy and influential few.

If the public's faith in the judicial system is to be restored, there is therefore a need to improve the performance of the judiciary across a broad range of areas that are crucial for public accountability and user satisfaction. Proper and timely implementation of the recommendations advanced in this report, together with those in the sections that follow, will be crucial to the realisation of this goal. Additionally, the IBAHRI and ILAC are of the view that it will be important for the judiciary to establish an effective communication strategy with the public. The Task Force on Judicial Reforms 2009 highlights that many court users do not understand the operations and procedures of the judiciary and as a result are unable or unwilling to access its services. Additionally, the Task Force has noted that the judiciary has not been proactive in engaging stakeholders to explain either the challenges that it is facing or the initiatives that it is undertaking in order to deliver a better service to the people.<sup>215</sup> Similarly, the Public Complaints Standing Committee has recognised, 'it is a matter of concern that the reform efforts in the Judiciary are not yet wide and deep enough to register in the public's mind as indicated by its continued unflattering perception of the Judiciary as an institution'.<sup>216</sup> The IBAHRI and ILAC consider that, although not sufficient on its own, a timely and effective public communication and outreach strategy is a necessary and important step towards building the image and credibility of the judiciary as a provider of justice for all.

During the course of its mission, the IBAHRI/ILAC delegation was informed about various public relations exercises that have recently been undertaken by the judiciary, with varying degrees of success. Annual Judiciary Open Days, providing members of the public with an opportunity to engage directly with judges, have been held since 2007. Established with the aim of educating the public on judicial processes, the Open Days have however generally descended into sessions for the public airing of private grievances. More constructive has been the establishment of Court Users' Committees. These appear to function well as an avenue for the public to receive information on the courts and to offer suggestions on the improvement of the performance of the judiciary in its delivery of justice. The publication of a Litigant's Charter in October 2007 has also helped to disseminate information about the court, its processes and the methods of accessing it, in a simple language understandable to its users. Nevertheless, there remains considerable scope for more to be done.

The IBAHRI and ILAC welcome the proposals of the Task Force on Judicial Reforms 2009 on measures to strengthen the effectiveness of the judiciary's communication strategy with the public. The IBAHRI and ILAC regard the proposals as positive and encourage their implementation. In order to further demystify the judiciary, consideration should be given to deploying court public relations officers within court buildings in order to provide litigants and members of the public who attend court proceedings with information on court procedures and processes and also directional information.

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<sup>215</sup> Report of the Task Force on Judicial Reforms 2009, section 10.1.

<sup>216</sup> Public Complaints Standing Committee, Third Quarterly Report for Year 2008/2009 covering the period 1 January 2009 to 31 March 2009, p xi.

**The IBAHRI and ILAC therefore recommend that:**

- (15) A Communications Department within the judiciary should be established with a mandate to create awareness and handle all the communication needs of the judiciary;**
- (16) Public education and information material containing written information on the services offered by the judiciary and the procedures for accessing them should be printed and distributed to members of the public;**
- (17) The judiciary should embrace the use of other communications media such as newspapers, radio and the internet. In particular, the judiciary should use radio broadcasts and other non-written media in order to facilitate increased access to justice for those who are illiterate;**
- (18) Court public relations officers should be deployed within court buildings in order to provide litigants and members of the public who attend court proceedings with information on court procedures and processes and also directional information.**

### **4.3 Conclusion**

In the opinion of the IBAHRI and ILAC, there is an urgent need to reform the judiciary as an institution for the administration of justice. Under current arrangements, the constitution fails to entrench judicial power exclusively in the judiciary or unambiguously guarantee its independence. The judiciary lacks any sense of financial autonomy and effective court administration is undermined by the centralisation of power within the office of the Chief Justice. The composition of the JSC renders it dependent upon the executive, whilst both the criteria and procedure for the appointment of judges remain less than transparent. There is an absence of any effective complaint or disciplinary mechanism to address judicial misconduct, and unethical behaviour on the part of some judicial officers continues to impede the fair and impartial dispensation of justice. For these, and other reasons, there is an overwhelming lack of public confidence in the judicial system as a whole.

Nevertheless, there is reason to be optimistic about the future. The Task Force on Judicial Reforms 2009 has formulated numerous constructive recommendations designed to strengthen and enhance the performance of the judicial branch in Kenya. The IBAHRI and ILAC have expressed reservations about the compatibility of some of the report's proposals with international standards and have also addressed certain issues not otherwise covered by the report. Overall, however, the IBAHRI and ILAC welcome the report as a positive initiative. The IBAHRI and ILAC also welcome the fact that the Law Reform Commission has already completed a draft Constitution of Kenya [Amendment] Bill 2009, Judicial Service Commission Bill 2009, Judicial Service Commission [Appointment of Judges] Regulations 2009 and Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009, with a view to implementing many of the Task Force's key proposals. The IBAHRI and ILAC urge those involved in the forthcoming debate surrounding this legislation, as well as the harmonised draft Constitution, to consider the observations contained in this IBAHRI/ILAC report and incorporate any necessary amendments prior to adoption and implementation.

# Chapter Five – Magistrates’ Courts and the Magistracy

## 5.1 Introduction

The Constitution provides that parliament may establish subordinate courts and confer jurisdiction upon them.<sup>217</sup> Established under the Magistrates’ Courts Act (Chapter 10, Laws of Kenya), the magistrates’ courts have been created as the primary subordinate courts in Kenya. Magistrates’ courts determine more than 90 per cent of the country’s caseload and are the first point of contact with the judicial system for most people facing criminal charges or involved in civil disputes.

There are 105 magistrates’ courts in the country.<sup>218</sup> The magistracy currently has 280 magistrates out of an establishment of 554.<sup>219</sup> With a population estimated at 39 million people, this equates to 139,285 people per magistrate.<sup>220</sup> The judicial officers of the magistrates’ courts are designated as follows, in order of seniority: Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate, Resident Magistrate and District Magistrate.

Under Kenyan law, magistrates exercise judicial authority and are part of the judicial branch of government.<sup>221</sup> Under international standards they are full judicial officers, subject to the same standards, and entitled to the same guarantees, of judicial independence and accountability as judges. The Bangalore Principles of Judicial Conduct define ‘judge’ as meaning any person exercising judicial power, however designated.

## 5.2 Major obstacles facing the magistrates’ courts and magistracy

### 5.2.1 Structure and organisation of the magistrates’ courts

Unlike its neighbouring Commonwealth countries such as Tanzania and Uganda, the magistrates’ court system in Kenya is not organised along strictly geographical or hierarchical lines. Section 3 of the Magistrates’ Courts Act 1985 establishes Resident Magistrates’ Courts with jurisdiction

<sup>217</sup> Constitution of Kenya, section 65.

<sup>218</sup> There are 105 magistrates’ courts in the country stationed at the following district or divisional levels: City Court in Nairobi, Nairobi Law Courts, Milimani Commercial Courts Nairobi, Kibera, Makadara, Ukwala, Bondo, Siaya, Nyando, Nyamira, Keroka, Ogembo, Homa Bay, Migori, Oyugis, Rongo, Ndhiwa, Tamu, Kisii, Maseno, Kehancha, Winam, Mumias, Butere, Butali, Hamisi, Bungoma, Sirisia, Kimilili, Vihiga, Busia, Kakamega, Kabarnet, Sotik, Bomet, Kapsabet, Iten, Narok, Kajiado, Kapenguria, Maralal, Nakuru, Molo, Naivasha, Eldama-ravine, Kericho, Eldoret, Kitale, Nanyuki, Nyahururu, Lodwar, Kilgoris, Othaya, Karatina, Mukurweini, Kigumo, Kangema, Kandara, Gatundu, Limuru, Githunguri, Kikuyu, Wanguru, Kerugoya, Gichugu, Baricho, Nyeri, Muranga, Thika, Kiambu, Kwale, Hola, Wundanyi, Mombasa, Kilifi, Kaloleni, Malindi, Lamu, Voi, Taveta, Embu, Runyenjes, Siakago, Chuka, Nkubu, Maua, Tigania, Tawa, Kitui, Kilungu, Mwingi, Nunguni, Yatta, Makeni, Kangundo, Makindu, Meru, Machakos, Isiolo, Garissa, Marsabit, Wajir, Moyale and Mandera.

<sup>219</sup> Judiciary Strategic Plan 2009-2012, p 38.

<sup>220</sup> As discussed further in section 8.2.3, the delegation considers that the number of magistrates is insufficient for the size of the population of Kenya.

<sup>221</sup> Judicature Act.

throughout Kenya. Resident Magistrates' Courts are duly constituted when presided over by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate or Resident Magistrate.<sup>222</sup> Resident Magistrates' Courts have jurisdiction in both criminal and civil matters. In criminal proceedings, they exercise jurisdiction conferred on them by the Criminal Procedure Code or any other written law.<sup>223</sup> In civil matters, the pecuniary jurisdiction of each Resident Magistrates' Court is determined by the seniority of the presiding magistrate. The relevant jurisdictional thresholds are as follows (figures in parenthesis refer to the value of the claim that may be determined): Chief Magistrate (KSH 3,000,000 or less); Senior Principal Magistrate (KSH 2,000,000 or less); Principal Magistrate (KSH 1,000,000 or less); Senior Resident Magistrate (KSH 800,000 or less; and Resident Magistrate (KSH 500,000 or less).<sup>224</sup>

Section 7 of the Magistrates' Courts Act 1985 establishes District Magistrates' Courts. There are three classes of District Magistrates' Courts, namely first, second and third class District Magistrates' Courts. District Magistrates' Courts are established for every administrative district but the Chief Justice may designate two or more districts as one district.<sup>225</sup> They have jurisdiction throughout the district in respect of which they are established.<sup>226</sup> They are presided over by District Magistrates. In criminal proceedings, District Magistrates' Courts exercise the jurisdiction conferred on them by the Criminal Procedure Code or any other written law.<sup>227</sup> In civil matters, section 9 of the Magistrates' Courts Act provides that District Magistrates' Courts have jurisdiction to determine proceedings where the claim in question concerns either a claim under customary law or the value of the dispute does not exceed either KSH 5,000 or KSH 10,000 in the case of first class District Magistrates' Courts.<sup>228</sup>

In the opinion of the IBAHRI and ILAC, the organisation of the magistrates' courts in Kenya is cumbersome for both litigants and lawyers. The jurisdiction of the Resident Magistrates' Courts does not appear to distinguish between geographical areas. The jurisdiction of the District Magistrates' Courts may variously cover one, two or even more administrative districts. The various levels of judicial officers are not clearly distinguished from each other. Moreover, in civil disputes, the pecuniary jurisdiction of each magistrates' court appears to depend entirely upon the grade of the magistrate posted to serve at any particular station. This structure makes it difficult for the public to access the courts.

#### **The IBAHRI and ILAC therefore recommend that:**

- (19) The Magistrates' Courts Act should be amended so as to divide the country into magisterial areas. Each magisterial area should be designated a grade and jurisdiction to which a magistrate of a specified grade should be posted.**

#### **5.2.2 Administration of the magistrates' courts**

Administrative responsibility for the magistrates' courts, as with all other courts in Kenya, is vested solely in the office of the Chief Justice.<sup>229</sup> As noted elsewhere in this report, this centralisation of power continues to have a detrimental effect on the efficient administration of the magistrates'

<sup>222</sup> Magistrates' Courts Act, section 3.

<sup>223</sup> Magistrates' Courts Act section 4.

<sup>224</sup> Magistrates' Courts Act, section 5.

<sup>225</sup> Magistrates' Courts Act, sections 7(1) and (2).

<sup>226</sup> Magistrates' Courts Act, section 7(3).

<sup>227</sup> Magistrates' Courts Act, section 8.

<sup>228</sup> Magistrates' Courts Act, section 9.

<sup>229</sup> Magistrates' Courts Act, section 19.



courts, since they remain to a significant extent unsupervised.

In the opinion of the IBAHRI and ILAC, the administration of justice in magistrates' courts would greatly benefit from the devolution of administrative responsibility for these courts to an appropriate judicial officer within the magistrates' court system. Such direct administrative responsibility would allow for a greater focus on the special needs of magistrates in various regions of the country and consequently greater efficiency in the deployment of resources.

**The IBAHRI and ILAC therefore recommend that:**

**(20) There should be a judicial officer designated to have primary responsibility for the administration of all magistrates' courts throughout Kenya.**

### *5.2.3 Security of tenure of magistrates*

Principle A.4(m) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* imposes an obligation on the state to guarantee the tenure of magistrates by law.<sup>230</sup> However, in Kenya, the tenure of magistrates is not guaranteed under the Constitution as it is for the judges of the High Court and Court Appeal. Similarly, magistrates do not enjoy any security of tenure under the Magistrates' Courts Act.

**The IBAHRI and ILAC therefore recommend that:**

**(21) The security of tenure of magistrates should be expressly guaranteed in the Constitution or Magistrates' Courts Act.**

### *5.2.4 Appointment, promotion, discipline and removal of magistrates*

The power to appoint, promote, discipline and remove magistrates from office is vested solely in the Judicial Service Commission, without any requirement of Presidential approval.<sup>231</sup>

The Judicature Act for Magistrates provides some nominal criteria for qualification as a magistrate, namely that they hold a law degree, a diploma from the Kenya School of Law, have been admitted to the Roll of Advocates and do not have any pending complaint with the Advocates Complaints Commission or the Disciplinary Committee. However, there is no requirement that they have actually practised law. Therefore, it is not uncommon for individuals who have just graduated to be appointed magistrates. Further, although vacancies for the post of magistrate are advertised and the JSC does interview applicants in order to assess their merit, there do not appear to be any clear criteria against which applicants are assessed.

Similarly absent are any clear merit-based criteria for the promotion of magistrates to a higher rank or an institutionalised process for evaluating their performance. The delegation was informed by a Chief Magistrate that promotion should take place automatically after service in one rank for a period of three years. The IBAHRI and ILAC are concerned that promotion within the magistracy does not appear to be based on any assessment of performance or determined against any merit-based criteria. This serves to discourage professional development.

<sup>230</sup> See also UN Basic Principles on the Independence of the Judiciary, Principle 11.

<sup>231</sup> Constitution of Kenya, section 69(3)(b).

The power to discipline magistrates is also vested in the Judicial Service Commission. For the reasons addressed at length in section 4.2.3, the IBAHRI and ILAC consider that, as presently constituted, the JSC lacks the independence and impartiality that international standards require of a disciplinary tribunal. Further, the power vested in the JSC is without regulation. The law leaves it to the JSC's discretion to decide whether to subject a magistrate to the disciplinary process and if so, what sanctions to apply. Moreover, the disciplinary process does not guarantee basic due process rights. Decisions are often made on the basis of correspondence only and there is no express requirement that magistrates against whom allegations are made are furnished with the particulars of such allegations or are afforded an opportunity to defend themselves through oral testimony or cross-examination of the complainant.<sup>232</sup>

**The IBAHRI and ILAC therefore recommend that:**

- (22) Clear criteria should be established for the recruitment and promotion of magistrates based on academic qualifications, work experience, moral integrity and merit;**
- (23) Promotion of magistrates should be dependent upon a satisfactory assessment of performance against merit-based criteria; and**
- (24) Disciplinary proceedings in respect of magistrates should be conducted in accordance with the proposed procedure for judges set out in the Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009.**

### *5.2.5 Working conditions of magistrates*

Magistrates labour under low salaries and poor working conditions. By contrast, the emoluments of judges have progressively been enhanced over the years, making them the most highly paid civil servants after Members of Parliament. The Chief Justice receives a basic salary of KSH 531,650 plus an additional KSH 460,000 in allowances each month (US\$13,186 per month). Court of Appeal judges earn KSH 500,000 plus an additional KSH 460,000 in allowances each month (US\$12,765 per month). High Court judges earn a basic salary of KSH 300,000 plus an additional KSH 460,000 in allowances each month (US\$10,106 per month).<sup>233</sup> The judiciary is exempted from paying income tax on a large portion of their earnings and judges may import, without liability to pay duty, motor vehicles for personal use, subject to certain conditions.<sup>234</sup> In contrast, the salaries of magistrates are not only disproportionately less, but in many cases inadequate. A Chief Magistrate receives a salary of KSH 230,000 per month inclusive of all allowances (US\$3,058 per month) and a middle-ranking Senior Resident Magistrate receives a salary of KSH 104,000 per month inclusive of all allowances (US\$1,382 per month). However, the majority of District Magistrates are paid less than KSH 50,000 every month (US\$664 per month). Moreover, the salaries of magistrates are also subject to income tax at 30 per cent of gross income, thus reducing their disposable income further still.

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<sup>232</sup> Interview with a Chief Magistrate and Resident Magistrate. See also the Report of the Sub-Committee on the Ethics and Governance of the Judiciary, January 2006 at pp 44-45. Available online at: [http://www.marsgroupkenya.org/Reports/Government/Kenya\\_Judiciary\\_Ethics\\_and\\_Governance\\_Subcommittee\\_Report\\_January\\_2006.pdf](http://www.marsgroupkenya.org/Reports/Government/Kenya_Judiciary_Ethics_and_Governance_Subcommittee_Report_January_2006.pdf).

<sup>233</sup> Daily Nation, 100pc pay increase plan for Kenya AG and CJ, 8.5.2009. Available online at: <http://www.nation.co.ke/News/-/1056/595406/-/view/printVersion/-/vo3g5oz/-/index.html>; Nairobi Star, Wako eyes 100% salary increase, 23.5.2009. Available online at: <http://multimedia.marsgroupkenya.org/?StoryID=256291&page=2&p=Kabete>.

<sup>234</sup> ICJ Kenya, Comments on the draft report of the Task Force on Judicial Reforms (undated).

The magistracy is severely under-staffed and over-worked. The Judiciary Strategic Plan for 2005-2008 recorded that there were 245 vacant positions in the magistracy in 2005.<sup>235</sup> According to the Judiciary Strategic Plan for 2009-2012, there are currently 280 magistrates in post and 275 vacant positions.<sup>236</sup> Those who are in office face a significant backlog of cases. According to the Preliminary Report on the Synchronised Survey of Pending Cases in Kenyan Courts, of 796,216 cases pending before the courts of Kenya in October 2007, a total of 723,321 of these cases were pending before the magistrates' courts. At current levels of recruitment, this equates to a backlog of 2,583 cases per magistrate, although it is widely accepted that two years later the true figure is likely to now be substantially higher.

The delegation was informed by a Senior Resident Magistrate that in his district there are five magistrates for a population of four million people. In a typical day he hears 12-15 cases. In the absence of any recording facilities, a hand-written note of proceedings must be taken. Judgments must be written up during the evenings. Chief Magistrates are also required to address all administrative, financial and human resource issues for their duty station.

Court buildings are reportedly insufficient in number and those that do exist are poorly maintained. Law libraries are available only at High Court stations and they are not well stocked. There are few law reports available to the magistracy and if they wish to access the internet for the purposes of legal research then they must provide a computer and meet the cost of the internet connection themselves. Some magistrates lack transport facilities and are therefore forced to use public transport to travel on duty, thus exposing them to the risk of criminal attacks.<sup>237</sup>

The IBAHRI and ILAC note the recommendations of the Taskforce on Judicial Reform that all vacant positions for magistrates should be filled without further delay, the salaries and allowances of magistrates should be enhanced, magistrates' cause lists should consist of a maximum number of applications and hearings each day and magistrates without personal transport should be provided with pool transport.<sup>238</sup> The IBAHRI and ILAC endorse these recommendations and urge also that additional financial and material resources should be devoted to upgrading the infrastructure and facilities of the magistrates' courts.

**The IBAHRI and ILAC therefore recommend that:**

**(25) Magistrates should be given greater financial, human and material resources to assist them in carrying out their professional responsibilities to the people of Kenya.**

### *5.2.6 Education and training of magistrates*

Upon appointment, new magistrates are required to attend an induction course that lasts for two weeks. However, in practice they are immediately sent to a duty station where they typically spend one week observing another magistrate. They are then assigned their own courtroom and required to commence hearing cases. New magistrates are typically sent to attend the induction course after three to four months, although it is not unheard of for them to have to wait for as long as 12 months, during which time they are expected to manage a full case-load.<sup>239</sup>

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<sup>235</sup> Judiciary Strategic Plan 2005-2008, p 9.

<sup>236</sup> Judiciary Strategic Plan 2009-2012, p 38.

<sup>237</sup> Report of the Task Force on Judicial Reforms 2009, section 10.3.

<sup>238</sup> Ibid, sections 5.2, 5.11, 10.1 and 10.3.

<sup>239</sup> Interview with a Chief Magistrate and a Senior Resident Magistrate.

Continuous judicial education for magistrates is similarly haphazard. The delegation was informed by a Chief Magistrate that as a head of station he had been called to attend a training course at the Judicial Training Institute (JTI) four times, while other magistrates had not been given the opportunity to attend even once.

The IBAHRI and ILAC consider that it is wholly unsatisfactory that new magistrates should be expected to manage cases and deliver judgments without any formal training. Moreover, the IBAHRI and ILAC have grave concerns about the adequacy of the two week induction course currently provided for new magistrates. This period of training appears wholly insufficient to prepare magistrates for their new positions. Further, there is clearly a need to improve the administration of the JTI's continuous legal education programme for magistrates so as to ensure that all members of the magistracy receive appropriate in-service training.

**The IBAHRI and ILAC therefore recommend that:**

**(26) The training provided to new magistrates should be reviewed and upgraded; and**

**(27) A continuing judicial education programme for magistrates should be institutionalised.**

### *5.2.7 Retirement age of magistrates*

Whereas judges of the High Court and Court of Appeal are required to retire from office at 74 years of age, magistrates are required to retire from office at 55 years of age. The IBAHRI and ILAC can see no justification for this anomaly. Section 206(1) of the draft Constitution provides for the retirement age of judges to be reduced to 70 years of age. The IBAHRI and ILAC consider that as a step towards greater parity of conditions of service, and as a measure to increase the number of magistrates in Kenya, the retirement age for magistrates should be increased to 70 years of age.

**The IBAHRI and ILAC therefore recommend that:**

**(28) The retirement age for magistrates should be increased from 55 years of age to 70 years of age.**

## **5.3 Conclusion**

Despite the fact that magistrates determine more than 90 per cent of the country's case-load, and for most people represent their first and possibly only contact with the judicial system, the magistracy has been largely disenfranchised from the reform process to date. However, the needs of magistrates are deserving of significant attention.

The organisation of the magistrates' courts is cumbersome and with administrative responsibility vested in the office of the Chief Justice, they operate largely unsupervised. There are no clear criteria for the recruitment and promotion of magistrates and for those that are appointed, there is no constitutionally-guaranteed security of tenure. Disciplinary proceedings against magistrates are conducted by a body that lacks basic guarantees of independence, using a power that is unregulated and by means of a process that fails to guarantee basic due process rights. Magistrates labour under low salaries, poor working conditions and are provided with pre-service and in-service training that can only be described as inadequate.

# Chapter Six – Office of the Attorney-General

## 6.1 Introduction

The Attorney-General is appointed by the President and fulfils multiple roles.<sup>240</sup> Section 26 of the Constitution vests power in the Attorney-General to act as the Principal Legal Adviser to the Government of Kenya.<sup>241</sup> The Attorney-General is also empowered to institute, take over or discontinue criminal proceedings against any person before any court.<sup>242</sup> The Attorney-General is also a member of the Judicial Service Commission,<sup>243</sup> and an ex-officio member of the Cabinet and National Assembly.<sup>244</sup>

## 6.2 Major obstacles facing the office of the Attorney-General

### 6.2.1 Constitutional responsibilities of the Attorney-General

There is an obvious conflict inherent in the roles of the Attorney-General. The Attorney-General's advisory and political responsibilities mean that, on the one hand, he is a representative of the executive. Yet at the same time, as Chief Public Prosecutor, he is required to discharge prosecutorial duties as a representative of the people. This is problematic since it leaves space for political considerations to enter into decisions relating to prosecutions which, as stipulated in both the UN Guidelines on the Role of Prosecutors and the Principles and the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, should be made impartially and objectively.<sup>245</sup> In the opinion of the IBAHRI and ILAC, there is therefore a pressing need to delineate the roles of the Attorney-General so as to separate the executive functions from the prosecutorial ones. The IBAHRI and ILAC consider that the most appropriate model to adopt in order to achieve this separation would be for the Attorney-General to continue to act as the Principal Legal Adviser to the executive branch in accordance with section 26(2) of the Constitution, but for the Attorney-General's prosecutorial powers to be transferred to an independent office of Director of Public Prosecutions (DPP) vested with the powers that are currently vested in the Attorney-General under sections 26(3), (4) and (8) of the Constitution.

<sup>240</sup> Constitution of Kenya, section 109.

<sup>241</sup> Constitution of Kenya, sections 26(2).

<sup>242</sup> Constitution of Kenya, sections 26(3).

<sup>243</sup> Constitution of Kenya, section 68.

<sup>244</sup> Constitution of Kenya, section 36.

<sup>245</sup> United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle F.

The IBAHRI and ILAC note that such reform is provided for in sections 193 and 194 of the harmonised draft Constitution. During the course of the delegation's meeting with the Attorney-General, he assured the delegation that this proposal is not contentious. Attorney-General Wako informed the delegation that he is at the forefront of advocating for an amendment to the Constitution that will lead to the establishment of an independent prosecution authority in 2010. The IBAHRI and ILAC welcome the initiative taken by the Attorney-General in this regard as a positive development that will enable the power to institute, takeover and discontinue criminal proceedings to be exercised in an independent, impartial and objective manner.

As noted in section 4.2.3 of this report, however, the IBAHRI and ILAC also consider that the presence of the Attorney-General on the Judicial Service Commission is problematic. As a political appointee, legal advisor to the executive and ex-officio member of the Cabinet and Parliament, the inclusion of the Attorney-General on the Commission exposes the judiciary to the risk of executive influence. In the opinion of the IBAHRI and ILAC, therefore, section 68 of the Constitution should be amended so as to exclude the Attorney-General from membership of the Judicial Service Commission.

**The IBAHRI and ILAC therefore recommend that:**

- (29) An office of Director of Public Prosecutions should be established, vested with the powers that are now vested in the Attorney-General under sections 26(3), (4) and (8) of the Constitution, as provided for in section 194 of the harmonised draft Constitution;**
- (30) The Director of Public Prosecutions should be empowered to exercise these functions independently without interference, control or direction from any other person or any authority, as provided for in section 194(10) of the harmonised draft Constitution;**
- (31) Section 68 of the Constitution should be amended so as to exclude the Attorney-General from membership of the Judicial Service Commission; and**
- (32) The Attorney-General should continue to act as the principal legal advisor to the government of Kenya, as provided for in section 193 of the harmonised draft Constitution.**

### **6.2.2 Direction and control of criminal investigations**

In a recent report written by Mr Philip Alston, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, following his mission to Kenya in February 2009, the Attorney-General is accused of having failed to use his constitutional power to force criminal investigations in cases involving alleged extrajudicial killings by the police.<sup>246</sup> It is asserted that in such cases the Attorney-General has instead engaged in a game with successive Commissioners of Police whereby he has sent letters directing that an investigation be conducted but the police have then failed to conduct any investigation or conducted an ineffective investigation. The Attorney-General has thereafter directed that the police conduct a further investigation and the police have then again failed to conduct any investigation or conducted an ineffective investigation and so on, with the result that these cases have been neither investigated sufficiently, nor prosecuted. Mr Alston concluded that, accordingly:

<sup>246</sup> Report of Mr Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, following his mission to Kenya in February 2009. UN Doc A/HRC/11/2/Add 6 26.5.2009 at paras 29 and 30.

‘[The Attorney-General’s] unrelenting failure to prosecute any senior officials implicated in extrajudicial executions renders him not just complicit in, but absolutely indispensable to, a system which has institutionalised impunity in Kenya. In order to restore the integrity of the office, the current Attorney-General should resign or be requested to leave office. In future, prosecutions should be undertaken by a constitutionally entrenched and independent Department of Public Prosecutions. The powers to prosecute and to intervene in prosecutions should not be held by a political office-holder’.<sup>247</sup>

Mr Alston’s call for the Attorney-General to resign was echoed by several interlocutors during the course of the delegation’s mission. However, in the view of the IBAHRI and ILAC, it is important for attention to be given to the systemic weakness in the constitutional framework for the control of criminal investigations by the office of the Attorney-General.

Section 26(4) of the Constitution provides that the Attorney-General ‘may require’ the Commissioner of Police to investigate any matter which, in the opinion of the Attorney-General, relates to any alleged or suspected offence and the Commissioner of Police ‘shall comply with that requirement’.<sup>248</sup> Therefore, the Attorney-General is constitutionally empowered to direct that the police conduct an investigation into any alleged or suspected offence and upon receipt of such a direction the police are required to investigate. However, importantly, the Attorney-General can do no more than require the police to investigate. Under current constitutional arrangements, neither the Attorney-General nor the Department of Public Prosecutions under his authority have any control over the quality of the criminal investigation subsequently conducted by the police.

During the course of the IBAHRI/ILAC mission, the Attorney-General vehemently maintained that he had, in the full exercise of his section 26(4) powers, directed that investigations be undertaken in all cases of extrajudicial killings by the police, but that there was a lack of will and capacity within the police force to carry out effective criminal investigations in such cases. The Attorney-General further maintained that his instructions to the police in this regard were all documented. Although the delegation was not shown this documentation, the delegation notes that Mr Alston was provided with ‘a significant volume of correspondence’ between the Attorney-General’s office and police headquarters which consisted of repeated letters from the Attorney-General directing that the police charge certain individuals or conduct further investigations.<sup>249</sup> The IBAHRI and ILAC consider therefore, that there may be some merit in the Attorney-General’s plea that responsibility for the failure to prosecute any senior officials implicated in the mastermind of extrajudicial executions in Kenya should lay, not with the Attorney-General himself, but with the Commissioner of Police. To reiterate, this is so because as an institution, the office of the Attorney-General has no constitutional mandate to control the effectiveness of police investigations, it is only empowered to direct that investigations be conducted, and this the Attorney-General did.

The IBAHRI and ILAC therefore consider that there is an urgent need to reform the systemic weakness in the ability of the office of the Attorney-General to oversee the effectiveness of criminal investigations by the police. Regrettably, this does not appear to be addressed by section 194 of the harmonised draft Constitution. If enacted, section 194(4) of the harmonised draft Constitution will

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<sup>247</sup> Ibid.

<sup>248</sup> Constitution of Kenya, section 26(4).

<sup>249</sup> Report of Mr Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, following his mission to Kenya in February 2009. UN Doc A/HRC/11/2/Add.6 26.5.2009 at para 27.

authorise the Department of Public Prosecutions to direct the Inspector-General of the Kenya Police Service to investigate any information or allegation of criminal conduct, however, the Department of Public Prosecutions will still not have any constitutional power to control the effectiveness of the subsequent investigation.

In the opinion of the IBAHRI and ILAC, what is required is a radical reform of the investigative arm of the police service with a view to affording the prosecuting authority greater influence over it. There should be established a Directorate of Criminal Investigations that is constitutionally-independent, so that it is not subject to political influence. This directorate should operate under the authority and control of a constitutionally-entrenched and independent Department of Public Prosecutions. Investigation processes and procedures should at the same time also be professionalised. The IBAHRI and ILAC understand that a Police Reform Commission has been established to work on these and other reforms of the police service. The Commission is urged to complete its work expeditiously.

**The IBAHRI and ILAC therefore recommend that:**

**(33) The systemic weakness in the ability of the office of the Attorney-General (as the current authority in charge of prosecutions) to oversee the effectiveness of criminal investigations by the police should be removed by establishing a Directorate of Criminal Investigations that operates under the authority and control of a constitutionally entrenched and independent Department of Public Prosecutions; and**

**(34) The processes and procedures of criminal investigations should be professionalised.**

### *6.2.3 Direction and control of public prosecutions*

Section 26(3) of the Constitution empowers the Attorney-General to institute, take over or discontinue criminal proceedings against any person before any court.<sup>250</sup> Section 26(5) of the Constitution authorises the Attorney-General to delegate his prosecutorial powers to any officer subordinate to him. In practice, for offences over which only the High Court has jurisdiction (such as murder), prosecutorial functions are delegated by the Attorney-General to a Department of Public Prosecutions. This department is not separately provided for in the Constitution and is not an independent office. Rather, it is an office of the Attorney-General under his authority. For offences which can be heard in magistrates' courts (including, for example, robbery), prosecutorial functions are, due to human resource constraints, delegated by the Attorney-General to the police.

As a consequence, most criminal cases at the High Court are prosecuted by qualified lawyers acting as state counsel. However, prosecutions in the magistrates' courts are conducted by police prosecutors. This is problematic for two reasons. First, it means that the system of prosecutions at this level is dichotomised, with dual control and reporting lines between the Attorney-General and the Commissioner of Police, neither of which are clearly defined. The result is that, since police prosecutors tend to view themselves as police officers first and prosecutors second, then in practice, and despite the requirements of the Constitution to the contrary, the Attorney-General is not able to exercise effective direction and control over public prosecutions in the magistrates' courts.

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<sup>250</sup> Constitution of Kenya, section 26(3).



Second, police prosecutors receive little and inadequate training on the law and are generally under-resourced.

During the course of the delegation's meeting with the Attorney-General, he recognised that this situation is unsatisfactory. The delegation was informed that there is a plan to phase out police prosecutors completely within two to three years and to replace them with appropriately qualified and trained state counsel. The IBAHRI and ILAC unreservedly support this proposal.

**The IBAHRI and ILAC therefore recommend that:**

**(35) Police prosecutors should be phased out and replaced by state counsel under the control and direction of the Attorney-General, with control and direction transferred to an independent Director of Public Prosecutions once such an office is established;**

**(36) State counsel should receive appropriate pre-service and in-service training, including on professional standards for prosecutors;**

**(37) State counsel should be provided with all necessary resources (libraries, reference materials, transport etc) to enable them to conduct successful, professional prosecutions.**

### **6.3 Conclusion**

There is an urgent need for reform of the office of the Attorney-General. The dual roles of the Attorney-General, both legal advisor to the government and Chief Public Prosecutor, mean that impartiality and objectivity in decisions relating to prosecutions cannot be guaranteed. There is also a systemic weakness in the ability of the office of the Attorney-General to oversee the effectiveness of criminal investigations by the police, and the Attorney-General is not able to exercise effective direction and control over police prosecutors in the magistrates' courts.

The delegation is pleased to report, however, that sections 193 and 194 of the harmonised draft Constitution will, if enacted, establish an independent office of Director of Public Prosecutions with overall responsibility for instituting, taking over or discontinuing criminal proceedings. There is, however, still a need to ensure that the Department of Public Prosecutions is able to exercise control over the effectiveness of criminal investigations. In this regard, the IBAHRI and ILAC welcome the support expressed by the Attorney-General for the establishment of a Directorate of Criminal Investigations that operates under the authority and control of a constitutionally-entrenched and independent Department of Public Prosecutions. The IBAHRI and ILAC are also reassured by the Attorney-General's commitment to phasing out police prosecutors within two to three years. The IBAHRI and ILAC urge that these measures be implemented at the earliest opportunity.



# Chapter Seven – Advocates

## 7.1 Introduction

The Law Society of Kenya (LSK) was formed in 1948 by section 3 of the Law Society of Kenya Ordinance 1948. It is now established under the Law Society of Kenya Act (Chapter 18 of the Laws of Kenya), which came into force on 30 October 1992.<sup>251</sup>

The LSK is Kenya's premier bar association with a membership of approximately 7,500 practising advocates.<sup>252</sup> The Law Society has a mandate to advise and assist members of the legal profession, government and public in all matters relating to the administration of justice in Kenya.<sup>253</sup>

The governing body of the Law Society is the Council, comprised of a Chairman, a Vice-Chairman and ten other members who must be members of the LSK. Council members are elected annually by members of the society by means of a postal ballot. The Law Society also has several specialised committees, including an ethics committee and a continuing legal education committee. A Secretariat manages the daily affairs of the society and consists of a Chief Executive Officer, Programme Directors, Programme Officers, Accountants and additional administrative and logistical staff.<sup>254</sup>

Membership of the LSK is a compulsory requirement in order to practice as an advocate in Kenya. The LSK maintains a database that details the practising status of all of its members. This has now been published on its website as a searchable directory, enabling users of the site to quickly and simply discover whether a particular advocate is authorised to practice law or not.<sup>255</sup>

## 7.2 Entry to the profession

The rules governing admission to the Roll of Advocates of the High Court of Kenya are contained in the Advocates Act (Chapter 16 of the Laws of Kenya) and the Advocates (Admission) Regulations. In order to be admitted to practice, trainee advocates are required to have obtained a university degree in law, completed a 12 month pupillage (a period of practical training under the supervision of an experienced advocate) and passed, or be exempted from, a qualifying examination administered by the Council of Legal Education, the professional examining body for entry to the profession. After completing these stages of training and qualification, applicants may petition the Chief Justice of Kenya for admission to the Roll of Advocates of the High Court of Kenya.

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<sup>251</sup> Website of the Law Society of Kenya. Available online at: <http://www.lsk.or.ke/index.php>.

<sup>252</sup> Since Kenya has a population of approximately 39 million people, this equates to a ratio of one lawyer to 5,200 people.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> The directory is available online at: [http://www.lsk.or.ke/members\\_directory.php](http://www.lsk.or.ke/members_directory.php).

### 7.3 Legal education

Academic training for the legal profession involves the completion of a university degree in law. Law degree courses are provided by the Faculties of Law at the University of Nairobi and Moi University. The Kenya School of Law is responsible for providing post-graduate vocational training via the Advocates Training Programme (ATP). The ATP includes a period of supervised pupillage. Approved pupillage centres broadly fall into three categories: (i) Advocates Chambers (a pupil supervisor must be an advocate of not less than five years standing); (ii) government (Attorney-General's Chambers, the judiciary and legal advisors undertaking substantial litigation work); and (iii) private and public corporations undertaking substantial litigation work.<sup>256</sup> After admission to the Roll of Advocates, continuing professional legal education is provided by the Law Society of Kenya and the Kenya School of Law. Every member of the LSK is required to obtain, in each year of practice, not less than five units of continuing legal education. The issue of a practising certificate for the following year is conditional upon proof of the same.

The delegation was impressed by the commitment of the LSK to continuing legal education. The LSK's Continuing Legal Education (CLE) programme has been in full operation for the last three years. The programme is self-financed by registration fees charged to participants of the sessions and administrative support is provided by the LSK. The programme rolls out an annual calendar which covers different law topics in the format of seminars, videos and lectures. The sessions are carried out in various towns in the country and a number of advocates volunteer to present or facilitate at the sessions. The 2007 CLE Calendar had over 60 sessions in 17 towns in Kenya. Furthermore the programme rolls out supplementary programmes throughout the year, many of which are organised in partnership with development partners. A Committee on Continuing Legal Education provides policy direction to the programme and meets monthly in order to discuss pertinent issues of implementation of the programme. The Committee also accredits other institutions that wish to conduct sessions on professional development for lawyers. The Committee has developed guidelines on CLE which ensure the efficient running of the programme.

The maintenance of high professional standards by advocates is partly determined by the quality of Continuing Legal Education. The IBAHRI and ILAC welcome the considerable efforts of the LSK in this regard and encourage the LSK to continue to ensure that its CLE programme covers diverse areas of legal practice, emerging and contemporary legal problems as well as contemporary international best practices.

### 7.4 Legal aid

The right to be represented by a lawyer, even when the person has no financial means to procure one, constitutes an integral part of the right to a fair trial recognised by international law. Individuals who are charged with a crime must at all times be represented by a lawyer in order to ensure that their rights are respected.<sup>257</sup>

Kenya lacks a state-sponsored legal aid system. Indeed, section 77(2) (d) of the Constitution provides that every person charged with a criminal case 'shall be permitted to defend himself/herself before

<sup>256</sup> Website of the Kenya School of Law. Available online at: [http://www.ksl.ac.ke/index.php?option=com\\_content&task=view&id=20&Itemid=523](http://www.ksl.ac.ke/index.php?option=com_content&task=view&id=20&Itemid=523).

<sup>257</sup> See, for example, the African Charter on Human and Peoples' Rights, Article 7(1)(c); International Covenant on Civil and Political Rights, article 14(3)(d); UN Basic Principles on the Role of Lawyers, Principle 1.

the court in person or by a legal representative of his/her own choice'. However, the same section of the Constitution under subsection (14) explicitly states that 'nothing contained in subsection (2) (d) shall be construed as entitling a person legal representation at public expense'. Therefore, not only does the Constitution fail to provide for legal aid, it goes a step further and explicitly rules it out. There is clearly no constitutional basis for legal aid in criminal proceedings and no basis at all for legal aid for indigent persons in civil matters.<sup>258</sup>

A pauper brief system has been developed by the courts over the years in respect of capital offences only. However, this system is inefficient and not wholly effective.<sup>259</sup> In civil proceedings, Order 32 of the Civil Procedure Act provides for the institution of suit *in forma pauperis*. However, this does not provide free or subsidised legal representation; it only waives court-filing fees.<sup>260</sup>

Since legal fees are too high for most Kenyans to pay privately, the absence of any state-sponsored legal aid scheme means that a large proportion of the population are denied access to legal representation. Women, children and poor men are disproportionately affected by this lack of affordability, leading to a feeling that the court system is discriminatory against the poor and marginalised.<sup>261</sup> Various non-governmental organisations such as the Federation of Women Lawyers (FIDA) Kenya and the Legal Resources Foundation have stepped in to assist certain marginalised groups such as women and children. However, these organisations do not have a countrywide presence and are generally only able to offer legal aid for civil matters rather than criminal cases. The Law Society of Kenya organises an annual Legal Awareness Week during which its members provide free legal aid and information to the public.

The Ministry of Justice has recently launched a three year pilot National Legal Aid and Awareness (NLAA) project. The aim of this project was to address specific issues of representation in five centres around the country. However, according to the KHRC, due to lack of resources the project has now been limited to the provision of free legal representation in the Children's Court and Family Division of the High Court in Nairobi. Legal representation under the scheme is provided by members of the LSK.

If enacted, section 71 of the harmonised draft Constitution will provide that the state shall ensure access to justice for all persons. In accordance with this guarantee, the delegation considers that whilst economic constraints may present a practical challenge to implementation, there is nevertheless an urgent need to institute a nationwide legal aid scheme in order to ensure that indigent persons are guaranteed legal representation.

**The IBAHRI and ILAC therefore recommend that:**

**(38) A national legal aid scheme should be implemented.**

## **7.5 Functioning of the legal profession**

To the extent that the delegation was able to ascertain within the context of a one-week mission limited to the capital city, at the present time advocates in Kenya are generally able to carry out

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<sup>258</sup> Legal Resources Foundation Kenya, *Balancing the Scales: A Report on Seeking Access to Justice in Kenya* (undated) at section 1.3.3.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, Executive Summary pp vii-viii.

their professional functions in an independent manner. During the course of the mission the delegation received no information to suggest that advocates had recently been exposed to any form of improper state interference. Advocates appear able to consult with their clients freely, to access all relevant information for the cases in which they are involved and they are able to exercise their right of audience in court unhindered. Their right to freedom of expression and association is fully respected, with their professional interests represented by a highly organised and effective bar association, the LSK.

In order to enhance the effectiveness of the LSK further still, however, there would be merit in the LSK entering into twinning agreements with other professional bar associations around the world. Such legal cooperation partnerships could contribute to the effective and efficient provision of legal services in Kenya by informing the institutional development of the LSK as an independent representative and regulatory body for the legal profession.

**The IBAHRI and ILAC therefore recommend that:**

**(39) The LSK should enter into twinning agreements with other professional bar associations.**

The absence of any state-sponsored legal aid system and the lack of knowledge of the law and legal procedure amongst Kenyans do however present obstacles to the efficient functioning of advocates in Kenya. The IBAHRI and ILAC therefore recommend that the LSK establish a specialised Access to Justice Committee tasked with engaging stakeholders and the people of Kenya on issues surrounding access to justice, as well as originating proposals for reform of relevant law and practice.

**The IBAHRI and ILAC therefore recommend that:**

**(40) The LSK should establish a specialised Access to Justice Committee.**

## **7.6 Disciplinary proceedings**

As individuals with public responsibilities, advocates must conduct themselves according to ethical standards.<sup>262</sup> Regrettably, the delegation did receive some complaints regarding unethical behaviour on the part of some practising advocates, including a willingness to participate in corruption. The need for a robust and independent disciplinary process in respect of advocates is therefore paramount.

Principle 28 of the UN Basic Principles on the Role of Lawyers provides that: 'Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review'.<sup>263</sup> However, the independence of the disciplinary mechanisms available to the LSK under the Advocates Act is limited.

The Advocates Complaints Commission has powers to investigate complaints against advocates and may provide redress in the form of reimbursement of loss or damage not exceeding KSH 100,000. It can also refer complaints to a Disciplinary Committee for investigation and a ruling. The Disciplinary Committee may order that an advocate be fined, pay compensation not exceeding KSH 5,000,000, be suspended from practice or struck off from the Roll of Advocates.

<sup>262</sup> See, for example, UN Basic Principles on the Role of Lawyers, Principle 14.

<sup>263</sup> UN Basic Principles on the Role of Lawyers, Principle 28.

However, all the members of the Commission and some of the Disciplinary Committee are appointed by the President.<sup>264</sup> Indeed, other than occupying three out of 14 seats on the Disciplinary Committee, the LSK is not afforded any role in disciplinary proceedings against its members, despite its legal mandate to regulate the legal profession. Instead, the IBAHRI and ILAC are given to understand that in practice it is the Attorney-General who determines the operational structure of the Advocates Complaints Commission. At the same time, the Attorney-General is also both a member of the Disciplinary Committee and appoints three out of the remaining 13 members of the Committee.

In the opinion of the IBAHRI and ILAC, the constitution of the Advocates Complaints Commission and the Disciplinary Committee is deficient and represents an obstacle to the independence of advocates in Kenya.

**The IBAHRI and ILAC therefore recommend that:**

- (41) The role of the President, Attorney-General and Solicitor-General in relation to the functioning of the LSK should be removed with a view to establishing professional self-regulation as a step towards securing the independence of advocates.**

The IBAHRI and ILAC also encourage the LSK to establish an independent Professional Conduct Committee with a mandate to conduct an assessment of the state of professional misconduct, including but not limited to corruption, within the legal profession. The Committee should be required to report on the level of unethical behaviour amongst advocates and formulate appropriate recommendations aimed at enhancing the regulation of professional conduct.

**The IBAHRI and ILAC therefore recommend that:**

- (42) The LSK should establish an independent Professional Conduct Committee mandated to investigate and report on the state of professional misconduct within the legal profession and also formulate recommendations for the improving the regulation of professional conduct.**

## **7.7 Conclusion**

Kenyan advocates are generally able to carry out their professional functions in an independent manner. However, the absence of any state-sponsored legal aid system and a lack of knowledge on the part of Kenyans as to the law and legal procedure mean that a significant proportion of the population are not able to access their services. The IBAHRI and ILAC encourage the LSK to take a more visible role in promoting access to justice through the establishment of a specialised Access to Justice Committee.

In order for the independence of the legal profession to be fully guaranteed, however, it is necessary for the LSK to be afforded full self-regulation in relation to disciplinary proceedings against its members. The LSK also needs to play its part in promoting public confidence in the judicial system. This means routing out unethical behaviour amongst its members. The IBAHRI and ILAC encourage the LSK to establish an independent Professional Conduct Committee with a mandate to investigate and report on the state of professional misconduct within the legal profession and also formulate recommendations for improving the regulation of professional conduct.

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<sup>264</sup> The Advocates Complaints Commission consists of such number of Commissioners appointed by the President who are qualified to be appointed judges of the High Court. The Disciplinary Committee consists of the Attorney-General; the Solicitor-General; six advocates; the Chair, Vice-Chair and Secretary of the LSK; and three other persons who are not advocates and who are appointed by the Attorney-General.





# Chapter Eight – Quality and Efficiency within the Judicial System

## 8.1 Introduction

The importance of quality and efficiency within the judicial system is recognised in the UN Basic Principles on the Independence of the Judiciary. Principle 7 states: ‘It is the duty of each Member State to provide adequate resources to enable the Judiciary to properly perform its functions’.<sup>265</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulate that: ‘States shall endow judicial bodies with adequate resources for the performance of their functions’.<sup>266</sup> The Latimer House Guidelines say: ‘Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought’.<sup>267</sup> A requirement of efficiency is also implicit within the right to trial within a reasonable time as guaranteed under Article 7 of the African Charter on Human and Peoples’ Rights. Article 7 imposes on contracting states a duty to organise their judicial system in such a way that their courts can meet the requirement to hear a case within a reasonable time.<sup>268</sup>

The judicial system in Kenya is faced with a large backlog of cases. According to the Preliminary Report on the Synchronised Survey of Pending Cases in Kenyan Courts, there were 796,216 cases pending before the courts of Kenya in October 2007. This was comprised of an estimated 4,069 cases pending before the Court of Appeal, 68,825 cases pending before the High Court and 723,321 cases pending before the magistrates’ courts. Of these, 409,044 were classified as traffic cases, 244,515 were classified as civil cases and 142,657 were classified as criminal cases. The Expeditious Disposal of Cases Committee of the judiciary is currently conducting a census in order to ascertain the current status of the backlog, however several of our interlocutors cited 850,000 pending cases as the most recent estimate. The delegation was also informed that typically court cases take four to five years to determine.

In the opinion of the IBAHRI and ILAC, these statistics leave no doubt that there is a compelling need to improve the efficiency and functioning of the judicial system in Kenya. The remainder of this chapter highlights a selection of the key obstacles that the IBAHRI and ILAC consider serve to impede both the quality and efficiency of the justice system in Kenya. The IBAHRI and ILAC also advance appropriate recommendations for reform that they hope will, if implemented, improve the quality of the litigation process, promote the prompt and efficient disposal of cases and restore public confidence in Kenya’s judicial system.

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<sup>265</sup> UN Basic Principles on the Independence of the Judiciary, Principle 7.

<sup>266</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle IV (v).

<sup>267</sup> Latimer House Guidelines, Guideline IV(c).

<sup>268</sup> African Charter on Human and Peoples’ Rights, Article 7.

## **8.2 Major obstacles affecting quality and efficiency within the judicial system**

### *8.2.1 Financial resources*

The UN Basic Principles on the Independence of the Judiciary establish that: ‘It is the duty of each Member State to provide adequate resources to enable the Judiciary to properly perform its functions’.<sup>269</sup> The Latimer House Guidelines, which were approved by judges from Commonwealth countries, contain the following provision on funding: ‘Sufficient and sustainable funding should be provided to enable the Judiciary to perform its functions to the highest standards’.<sup>270</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that: ‘States shall endow judicial bodies with adequate resources for the performance of their functions. The Judiciary shall be consulted regarding the preparation of budget and its implementation’.<sup>271</sup>

For several years, the Kenyan judiciary has been allocated between KSH 800 million and 1.2 billion, constituting 0.3 per cent or less of the total budget. In the 2009/2010 national budget, the executive was allocated KSH 598.7 billion (98.2 per cent of the budget), the National Assembly was allocated KSH 7.6 billion (1.3 per cent of the budget), while the judiciary was allocated a little over KSH 3 billion (0.5 per cent of the budget).<sup>272</sup>

The delegation received numerous complaints that the judiciary is grossly underfunded and under prioritised. Although the IBAHRI and ILAC recognise that financial resources alone cannot address the structural obstacles faced by the Kenyan judicial system, the delegation considers that there is nevertheless a need to ensure that the judiciary receives adequate funding in order to enable it to discharge its functions appropriately. In particular, there is a need for funding to fully meet the requirements of adequate salaries and benefits to judges, magistrates and judicial support staff, and provide the necessary resources for capital development, stationery and equipment.<sup>273</sup> In this regard, the IBAHRI and ILAC note that the Task Force on Judicial Reforms 2009 has recommended that the judiciary should be allocated, as a minimum, one per cent of the national budget.<sup>274</sup>

**The IBAHRI and ILAC therefore recommend that:**

- (43) The proportion of the budget allocated to the administration of justice should be substantially increased;**
- (44) Consideration should be given to incorporating a provision within the Constitution guaranteeing that the judiciary receive a minimum one per cent share of the national budget.**

### *8.2.2 Administration of the courts*

As presently constituted, the system of court administration in Kenya is ill-equipped to promote effective and efficient administration of justice. As this report noted in section 4.2.2, the administrative head of all the courts of Kenya is the Chief Justice. However, he is mandated to fulfil

<sup>269</sup> UN Basic Principles on the Independence of the Judiciary, Principle 7.

<sup>270</sup> Latimer House Guidelines, Guideline II.2.

<sup>271</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para A, 4(v).

<sup>272</sup> Task Force Report on Judicial Reforms, p 18.

<sup>273</sup> Latimer House Guidelines, Guideline II.2.

<sup>274</sup> Report of the Task Force on Judicial Reforms 2009, Section 3.3.

this administrative role in addition to his judicial functions. In practice therefore, day to day running of the courts is entrusted largely to the Registrar of the High Court. The powers of the Registrar of the High Court are not clearly defined; however in practice she too exercises a variety of different roles as follows:

- (a) The most senior Court administrator after the Chief Justice;
- (b) The Chief executive officer;
- (c) The Chief accounting officer;
- (d) The Chief personnel officer;
- (e) Supervision of all subordinate courts;
- (f) Advisor to the Chief Justice on matters involving magistrates and paralegals;
- (g) Spokesperson of the judiciary;
- (h) Secretary to the Judicial Service Commission.

The Registrar of the High Court is assisted by a Chief Court Administrator, and in the regions by Resident Judges, Deputy Registrars, Chief Magistrates and Executive Officers. However none of those charged with the administration of the courts in Kenya have any relevant qualifications or training in either public administration or management.<sup>275</sup>

Therefore, overall responsibility for the administration of the courts in Kenya is entrusted to two individuals, the Chief Justice and the Registrar of the High Court. The effect of this centralisation of power is that neither the Court of Appeal, the divisions of the High Court or the magistrates' courts are permitted to run independently. However, at the same time, both the Chief Justice and Registrar of the High Court have an array of other professional duties to attend to. The net result is poor supervision of the courts, unsatisfactory personnel deployment, and inconsistent policy formulation on various aspects of court management.<sup>276</sup> There is a need to reconstitute the court administration system so as to bring about effective and efficient administration of the courts.

**The IBAHRI and ILAC therefore recommend that:**

- (45) Administrative responsibility for the functioning of the courts should be localised within each court in accordance with our recommendation at section 4.2.2 above;**
- (46) Professional court administrators should be employed in order to superintend over the non-judicial functions of the courts.**

### **8.2.3 Number of judges and magistrates**

The judiciary suffers from a chronic shortage of judges and magistrates. At the moment, there are ten Court of Appeal judges in office out of an establishment of 14. There are 45 High Court judges in office out of an establishment of 70. The total number of magistrates in post is 280 against an

<sup>275</sup> Report of the Task Force on Judicial Reforms 2009, section 6.1.

<sup>276</sup> Judiciary Watch Report - Judicial Reform in Kenya, 1/2005. Publication of the Kenyan Section of the International Commission of Jurists (ICJ Kenya), No 3 in the Judiciary Watch Series.

establishment of 554. Therefore, there are 335 judges and magistrates working throughout Kenya, with 303 unfilled vacancies.<sup>277</sup>

Viewed in the context of an estimated population of 39 million people, these figures indicate that currently the population to judge ratio in Kenya stands at 709,090 persons per judge. If all vacant posts in the judiciary were filled, this ratio would stand at 464,285 persons per judge. The population to magistrate ratio in Kenya currently stands at 139,285 persons per magistrate. If all vacant posts in the magistracy were filled, this ratio would stand at 70,397. Overall, the population to judge/magistrate ratio in Kenya stands at 116,417 persons per judge/magistrate. If all vacant posts were filled, this ratio would stand at 61,128 persons per judge/magistrate.

Even with all vacancies filled, this ratio is disproportionately below that of countries with comparable populations.<sup>278</sup> It is not possible, however, to evaluate the needs of the Kenyan judicial system by comparing the figures cited above with figures from other jurisdictions as the court systems and the way in which cases are handled varies considerably from country to country. The number of judges needed is related not only to the size of the country and the number of inhabitants, the criminality, the number of civil and administrative cases and so on but also, which is harder to account for, the internal organisation of the judiciary and its functioning. What the IBAHRI and ILAC are able to conclude, however, is that the present number of judges and magistrates is insufficient.

The IBAHRI and ILAC note that in 2007 the Chief Justice expressed a commitment to increasing the number of judges in both the High Court and in the Court of Appeal once the Statute Law (Miscellaneous Amendments) Bill 2007 was in force.<sup>279</sup> The IBAHRI and ILAC welcome this pledge and urges that all vacant posts for judges and magistrates should be filled without delay. Nevertheless, in the opinion of the IBAHRI and ILAC, there are certain other basic reforms that could be implemented in order to facilitate an increase in the overall number of judicial personnel in Kenya.

For example, section 7 of the Judicature Act (Chapter 8, Laws of Kenya) imposes a statutory upper limit on the total number of judges. In 2007, the statutory limit was raised to 14 Court of Appeal judges and 70 High Court judges.<sup>280</sup> The Task Force on Judicial Reforms 2009 has proposed that section 7 of the Judicature Act be amended again in order to increase the establishment of the Court of Appeal to 30 judges and the High Court to 120 judges. In the opinion of the IBAHRI and ILAC, however, whilst there is an obvious justification for having a lower limit on the number of judges, there is no justification for any upper limit remaining. This statutory upper limit appears to be little more than a historical anomaly and should be abolished. Moreover, the IBAHRI and ILAC further note that whereas the retirement age for judges is currently 74 years of age, magistrates are required to retire at 55 years of age. As discussed in section 5.2.2, the IBAHRI and ILAC can see no justification for this anomaly. Moreover, if the retirement age for magistrates were to be raised then this would gradually lead to a substantial increase in the number of magistrates. Section 206(1) of the draft Constitution provides for the retirement age of judges to be reduced to 70 years of age. The IBAHRI and ILAC consider that as a step towards greater parity of conditions of service, and as a measure to increase the number of magistrates in Kenya, the retirement age for magistrates should be increased to 70 years of age.

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<sup>277</sup> Judiciary Strategic Plan 2009-2012, p 38.

<sup>278</sup> For example, in Canada there are about 2,000 judges who serve a population of 35 million people, translating to 17,500 persons to every judge.

<sup>279</sup> Colloquium Speech by the Hon Justice Gicheru, Chief Justice of the Republic of Kenya, on the role of the judiciary in development, Colloquium, 2007. Reproduced in the JTI Bulletin, July 2009.

<sup>280</sup> Judicature Act, section 7.

The Task Force on Judicial Reforms 2009 has proposed that, as a measure to address the backlog, in addition to filling vacant posts and increasing the establishment of the higher courts, 22 Commissioners of Assize should be appointed for an initial period of one year to hear and determine cases in the High Court that have been pending for five years or more, or as may be directed by the Chief Justice. It is proposed that in hearing and determining cases, Commissioners of Assize will exercise the same powers as a Judge of the High Court. The Commissioners of Assize will hold office subject to the terms and conditions of an Instrument of Appointment, a copy of which has been provided to the delegation.

It is beyond the delegation's mandate to undertake a detailed analysis of the terms and conditions of appointment of Commissioners of Assize. However, the delegation notes that it is intended that the Commissioners will be contracted to perform their services during a fixed term, their performance will be periodically evaluated by, or on behalf of, the Chief Justice and the results of this evaluation will have a direct bearing on the extension or otherwise of the Commissioner's engagement.<sup>281</sup>

The IBAHRI and ILAC do not support this proposal. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa are clear on appointments limited in time when they state that: 'judicial officers shall not be appointed under a contract for a fixed term'.<sup>282</sup> However, the IBAHRI and ILAC are also concerned that since Commissioners of Assize will be required to undergo a recertification procedure at certain intervals in order to determine whether they may continue in office, the Commissioners will lack sufficient guarantees of security of tenure in their positions and be capable of being freely removed or suspended. The IBAHRI and ILAC observe that the Human Rights Committee has repeatedly criticised the requirement that judicial officers be periodically re-evaluated as affecting the independence of the judiciary by denying security of tenure.<sup>283</sup> The IBAHRI and ILAC also observe that periodic re-evaluation of Commissioners is unlikely to bolster public confidence in the working of the High Court as a whole. The IBAHRI and ILAC therefore recommend that the proposal to appoint Commissioners of Assize be dispensed with in favour of the appointment of more High Court judges.

**The IBAHRI and ILAC therefore recommend that:**

- (47) All vacant posts for judges and magistrates should be filled without delay;**
- (48) Section 7 of the Judicature Act should be amended so as to abolish the statutory upper limit on the number of judges appointed to the High Court and Court of Appeal;**
- (49) The number of judges of the Court of Appeal and High Court should be substantially increased;**
- (50) The retirement age for magistrates should be increased from 55 years of age to 70 years of age, in accordance with the recommendation at section 5.2.7;**

<sup>281</sup> Terms and Conditions of Appointment of Commissioners of Assize, 2009, paragraphs 3 and 9. The Report of the Task Force on Judicial Reforms 2009 further recommends that the performance of the Commissioners be reviewed as frequently as the Chief Justice may determine.

<sup>282</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para 4(n)3.

<sup>283</sup> See, for example, Concluding Observations of the Human Rights Committee on Peru, Report of the Human Rights Committee, Volume 1, GAOR A/51/40, paras 352 and 364; Concluding Observation of the Human Rights Committee on Azerbaijan, UN Doc CCPR/CO/73/AZE, para 14; Concluding Observations of the Human Rights Committee on Kyrgyzstan, UN Doc CCPR/CO/69/KGZ, para 15.

**(51) The terms and working conditions of judges and magistrates should be improved in order to attract and retain more judicial officers;**

**(52) The proposal to appoint Commissioners of Assize should be dispensed with.**

#### **8.2.4 Case management**

The proper and timely disposal of cases cannot be achieved without effective case management by judicial officers. In Kenya, however, it is too often left to litigants and lawyers to dictate the pace of court proceedings. There is a need to instil in all judicial officers a culture of personal responsibility for the case management processes of their courts, such that they take a personal charge over the fair and efficient determination of all proceedings before them.

The IBAHRI and ILAC note that the judiciary has taken certain positive steps to improve case management. The output of judicial officers is monitored through a regime of monthly returns to the office of the Chief Justice and poor output may form the basis of disciplinary action.<sup>284</sup> The IBAHRI and ILAC also welcome the Practice Directions on the expeditious disposal of cases issued by the Chief Justice in Gazette Notice 8167 of 5 September 2008.<sup>285</sup> However, the Report of the Task Force on Judicial Reforms 2009 notes that these Practice Directions have not been followed.<sup>286</sup> The IBAHRI and ILAC therefore urge that steps continue to be taken to sensitise both judicial officers and advocates to the provisions of this Practice Direction, which should be strictly adhered to.

A further concern, however, centres on the continued absence of any effective system for the management of the courts and judges' case files. An electronic case management system would enable court staff to efficiently manage the court's cases from the filing of the case to termination, keeping track of all court processes in the litigation. Such a system would automatically track court dates, actions taken and relevant deadlines. It could create lists of actions needed with appropriate reminders being forwarded to judges as and when necessary. It would assist judicial officers to identify court cases that are no longer being pursued by litigants, thereby enabling such cases to be removed from the backlog. As an additional feature, such a system could provide a management tool for analysis of work-flow, case status, and types of cases opened and closed. In the opinion of the IBAHRI and ILAC, there is an urgent need for such a court case management system to be developed, with appropriate training being provided to judges and court personnel in its application.

**The IBAHRI and ILAC therefore recommend that:**

**(53) Training on case management should be incorporated into both pre-service and in-service training of judicial officers;**

**(54) Judicial officers should continue to be sensitised as to the provisions of the Chief Justice's Practice Direction on the expeditious disposal of cases;**

**(55) An electronic case-management system should be introduced in all courts in Kenya, with appropriate training provided to judges, magistrates and court personnel in its application.**

<sup>284</sup> Colloquium Speech by the Hon Mr Justice Gicheru, Chief Justice of the Republic of Kenya, on case management, Colloquium, 2006. Reproduced in the JTI Bulletin, July 2009.

<sup>285</sup> For full text of the Practice Direction see the JTI Bulletin, July 2009. For a summary of the key directions see the Report of the Task Force on Judicial Reforms 2009, section 5.9.

<sup>286</sup> Report of the Task Force on Judicial Reforms 2009, section 5.9.

### 8.2.5 Information and communication technology

As indicated in the previous section, the judiciary has not yet fully harnessed the benefits that accrue from information and communication technology (ICT). Most of the systems and processes of the courts, the registries and the libraries are not automated. Judges and magistrates rely on their own handwritten note as the only record of court proceedings. Storage and retrieval systems for court files are also manual, leading to the misplacement and loss of court records. Few judicial officers have access to the internet or e-mail.<sup>287</sup>

During the course of the mission, the delegation was informed that the World Bank had recently acted as custodian of a substantial sum of grant trust fund money that had been specifically allocated to part-finance the automation of court proceedings in Kenya, in particular through the provision of sound recording facilities and stenographers. However, over a period of five years, the World Bank had been unable to spend this money. In the opinion of the IBAHRI and ILAC, it seems likely that the reason for the non-implementation of the World Bank financed court automation project was, as the Report of the Task Force on Judicial Reforms 2009 suggests, a lack of capacity within the system of court administration for long and cumbersome procurement procedures associated with the absorption of donor funds.<sup>288</sup> The IBAHRI and ILAC are fortified in this conclusion by the comment of one senior judge to the delegation that the project reached the environmental impact assessment stage, but no assessment was ever conducted. The IBAHRI and ILAC hope that our recommendations on reform of the administration of the judiciary in sections 4.2.2 and 8.2.2 will, if implemented, serve to ameliorate this situation.

The delegation is nevertheless pleased to report that during the course of its mission, it detected only strong judicial support for improved ICT facilities. The delegation was informed that in 2008 a system of audio court recording was piloted by the judiciary and that the Chief Justice has recently established a committee specifically to implement ICT, starting with the High Court and Court of Appeal. The IBAHRI and ILAC note that the report of the Task Force on Judicial Reforms 2009 has documented a number of specific ICT initiatives that are currently being implemented by the judiciary aimed at automating judicial operations.<sup>289</sup> These include the introduction of teleconferencing facilities, electronic billboards, audio-visual recording systems and transcription facilities. Although it is appropriate to note that implementation of these projects appears to be at a very early stage, the IBAHRI and ILAC nevertheless welcome this development. The introduction of appropriate ICT in Kenya's courts would not only facilitate speedier trials but also guarantee transparency and fairness in the adjudication of cases. Automation of the courts would therefore also serve to enhance public confidence in the judiciary as an institution.

**The IBAHRI and ILAC therefore recommend that:**

**(56) Automation of the systems and processes of the courts, the registries and the libraries should be prioritised;**

**(57) Adequate financial resources should be allocated to the provision of ICT in order to ensure implementation.**

<sup>287</sup> Judiciary Strategic Plan 2009-2012.

<sup>288</sup> Report of the Task Force on Judicial Reforms 2009, section 6.1.

<sup>289</sup> Ibid, section 5.5.

## 8.2.6 Judicial education and training

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that:

‘(a) States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law; (b) States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa; (c) States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation’.<sup>290</sup> The Latimer House Guidelines state: ‘A culture of judicial education should be developed. Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body’.<sup>291</sup>

Historically, the Kenyan judiciary has lacked any formal in-service education or training programme. Indeed, writing in 2005, a mission sent to Kenya by the International Commission of jurists reported that the general attitude within the judiciary towards continuing education and training was, at that time, often negative.<sup>292</sup> The IBAHRI and ILAC are pleased to report that attitudes have changed. The Chief Justice is clearly committed to instituting judicial education throughout the Kenyan Judiciary. During the delegation’s meeting with the Chief Justice, he emphasised his desire for continuous training of all judicial officers, including by means of refresher courses, so that both judges and magistrates may be well educated in administering justice.<sup>293</sup> This sentiment was reflected within the wider judiciary, who now appear to embrace the notion of continuing education and training for judges and magistrates as positive.

Judicial education and training is also one area where positive intentions have actually been translated into positive implementation. In September 2008, the judiciary established a Judicial Training Institute (JTI). The head of the JTI is a Judge of the High Court. The mandate of the JTI is to provide induction courses and continuing professional development for judicial officers and other staff. The JTI has developed training modules and courses which are structured by way of content, duration and method of delivery. By August 2009, the Institute had trained a total of 650 judicial officers, clerical staff, librarians and registry staff.<sup>294</sup> It is proposed that each judge and magistrate will in future spend three weeks training annually. This is based upon the capacity of the JTI and the fact that in a country with only 330 judges and magistrates, the amount of time for which any one judicial officer may be absent from his or her court is limited.<sup>295</sup>

However, the JTI is still in its infancy. The funding available for training expenses, expenditure on library acquisitions and computer costs is inadequate, the institute does not yet systematically offer pre-service induction courses for newly appointed judicial officers, and training on case management

<sup>290</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle B.

<sup>291</sup> Latimer House Guidelines, Guideline II.3.

<sup>292</sup> International Commission of Jurists, Kenya: Judicial Independence, Corrupt and Reform, April 2005.

<sup>293</sup> The Chief Justice has been exhorting judges to ‘improve our knowledge of the principles of law, systems of delivery and methods of accountability’ since at least 2004 (Speech of the Hon Chief Justice of Kenya, Judges Colloquium 2004, Mombasa).

<sup>294</sup> Report of the Task Force on Judicial Reforms 2009, section 7.2.

<sup>295</sup> Interview with the interim co-ordinator of the JTI.



is absent from the curriculum.<sup>296</sup> In order to become fully functional therefore, there is a need for the financial resources allocated to the JTI to be substantially increased. It is also clear, however, that the JTI would benefit from a broad range of technical assistance and capacity building measures, notably within the areas of curriculum development and training of trainers.

**The IBAHRI and ILAC therefore recommend that:**

- (58) The financial resources allocated to the Judicial Training Institute should be substantially increased;**
- (59) The Judicial Training Institute should commission a regional and/or international expert on the education and training of the judiciary to conduct a study into the technical assistance and capacity building needs of the institute.**

### *8.2.7 Performance management*

Performance management of the Kenyan judiciary is largely absent. Magistrates, Kadhis and support staff are supposed to be subject to annual appraisals. However, appraisals are submitted in an ad hoc manner and are not subject to any form of analysis. Judges are not exposed to any form of performance evaluation beyond the requirement that they submit monthly returns in relation to case output.<sup>297</sup>

There is a clear need to institute a judicial performance evaluation programme for the entire judicial branch. Such a system would help the judiciary as an institution to identify and set guidelines for its operations, facilitate an improvement in the performance of individual judges, and increase the quality and efficiency of the work delivered by the courts in accordance with the needs and expectations of the public.

Judicial evaluation should not be viewed as jeopardising judicial integrity or independence, but rather as a basis for judges and magistrates to maximise their potential for excellence through self-improvement. Evaluation programmes give judges the feedback that they need in order to improve their own performance and that of the courts on which they serve.

The IBAHRI and ILAC note that provision for a system of performance evaluation and appraisal of the judiciary is made in clause 26 of the Judicial Service Commission Bill 2009. The IBAHRI and ILAC urge that the Bill should be enacted at the earliest opportunity.

**The IBAHRI and ILAC therefore recommend that:**

- (60) The judiciary should develop and implement a formal programme for the evaluation of judicial performance;**
- (61) All members of the judiciary should be evaluated by the JSC on a periodic basis against recognised criteria for judicial performance such as legal ability, integrity and impartiality, communication skills, professionalism and temperament and administrative capacity.**

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<sup>296</sup> Report of the Task Force on Judicial Reforms 2009, section 7.2.

<sup>297</sup> Ibid, section 7.1.

### 8.2.8 *The Supreme Court*

There is no Supreme Court to hear appeals from the Court of Appeal, as is found in many other jurisdictions. Instead, the Court of Appeal is established under section 64 of the Kenyan Constitution as the superior court of record.<sup>298</sup>

In the opinion of the IBAHRI and ILAC, the absence of a Supreme Court comprised of a small number of select jurists of unquestionable intellectual ability, judgment and integrity constitutes an obstacle to the efficient functioning of the judicial system in Kenya for two main reasons. First, the Court of Appeal presently faces a significant backlog of cases. According to the Preliminary Report of the Synchronised Survey of Pending Cases in Kenyan Courts, the number of cases pending before the Court of Appeal in October 2007 was estimated at 4,069.<sup>299</sup> With only ten Court of Appeal judges throughout the country, usually sitting in panels of three, the Court of Appeal is labouring under considerable pressure of workload. It is difficult to resist the conclusion that the Court of Appeal lacks sufficient time or resources to maturely reflect upon the most important legal issues facing the nation. Secondly, under the current structure, the judges of the Court of Appeal are not accountable to any higher instance.

The absence of a Supreme Court has not been addressed by the Task Force on Judicial Reforms 2009. However, section 201 of the draft Constitution does make provision for the establishment of a Supreme Court with appellate jurisdiction to hear and determine appeals from the Court of Appeal and the Constitutional Court, which is to be established under section 203 of the draft Constitution.<sup>300</sup> Section 201 further provides that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes arising from the process of the impeachment of the President.<sup>301</sup> If established, all other courts will be bound by the decisions of the Supreme Court.<sup>302</sup>

During the course of its mission, the delegation discerned a strong political will for a Supreme Court to be established. Notably, both the Minister of Justice, National Cohesion and Constitutional Affairs and the Vice-President and Minister for Home Affairs independently proposed the same.

**The IBAHRI and ILAC therefore recommend that:**

**(62) A Supreme Court should be established, as provided for in section 201 of the draft Constitution.**

### 8.2.9 *Judicial power to dismiss appeals for want of prosecution*

Order 16 of the Civil Procedure Rules provides a procedure whereby judges may dismiss civil cases for want of diligent prosecution. However, when a person convicted after a trial by a subordinate court files a criminal appeal under section 349 of the Criminal Procedure Code, but thereafter fails to prosecute the appeal, judges of the High Court of Kenya have no jurisdiction to dismiss the appeal for want of prosecution. Instead, even in cases where the appellant and/or their counsel do not present themselves before the court, judges are still required to either adjourn the appeal to another day or determine the appeal in the absence of the appellant. This situation inevitably leads to a significant

<sup>298</sup> Constitution of Kenya, section 64.

<sup>299</sup> Report of the Task Force on Judicial Reforms 2009, p 24.

<sup>300</sup> Draft Constitution of Kenya, section 201(4)(b).

<sup>301</sup> Draft Constitution of Kenya, section 201(4)(a).

<sup>302</sup> Draft Constitution of Kenya, section 201(9).

amount of court time being unnecessarily devoted to the determination of criminal appeals which are, in reality, no longer being pursued.

**The IBAHRI and ILAC therefore recommend that:**

**(63) The Criminal Procedure Code should be amended so as to provide High Court Judges with authority to dismiss criminal appeals for want of prosecution in circumstances where either the appellant or his or her counsel fail to attend court without reasonable justification.**

#### *8.2.10 Small Claims Courts*

There are many civil cases of a minor nature within the court system that could be resolved more expeditiously in a forum less technical than the ordinary courts. However, Kenya lacks an institution comparable to the Small Claims Courts found in other jurisdictions. Small Claims Courts offer user-friendly simplified rules of procedure and evidence and are generally accessible without the assistance of a lawyer.

The IBAHRI and ILAC welcome the fact that a Small Claims Court Bill 2009 has been drafted. The intention and purpose of the Bill is to constitute a court with jurisdiction to hear and determine any claim the value of which does not exceed KSH 100,000 or such other sum as the Chief Justice may determine.<sup>303</sup> The delegation is given to understand that the contents of the Bill are not controversial and that it has the support of both the LSK and the judiciary.

**The IBAHRI and ILAC therefore recommend that:**

**(64) The Small Claims Courts Bill 2009 should be enacted by the National Assembly at the earliest opportunity.**

#### *8.2.11 Alternative dispute resolution*

There is currently no mechanism within Kenya to encourage, where appropriate, a friendly settlement of civil disputes, either outside the judicial system, or before or during judicial proceedings.

Alternative dispute resolution (ADR) is designed to be a less formal and less complex means of resolving disputes quickly and less expensively than via court proceedings. ADR can take various forms but in essence it generally involves the use of a mediator to encourage open communications by helping the disputants identify the specific areas of dispute and agreement with the aim of ultimately reaching a negotiated settlement of their differences. The negotiated settlement may be placed before a judge so as to give it the form of a judicial settlement that is readily enforceable, or it may be left merely as an agreement between the parties which is not readily enforceable and which would thus require a regular judgment from a court after examination on the merits to be enforced. Either way, however, the important point remains the same, namely that the parties in dispute are required to submit to conciliation before adjudicating the matter before a court.

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<sup>303</sup> Small Claims Bill 2009, clause 7(2).

In the opinion of the IBAHRI and ILAC, the introduction of a mechanism for citizens involved in private law disputes to receive advice and conciliation prior to the commencement of legal action could serve to reduce the number of lawsuits within the court system in Kenya. As an added advantage, such a system could benefit the parties involved by avoiding the expense and emotional disruption of litigation. In this regard, the IBAHRI and ILAC consider that the facility to direct deserving cases to ADR would be of particular benefit to women, who are disproportionately disenfranchised from the formal court system.

An attempt to institutionalise court annexed mediation through the Statute Law (Miscellaneous Amendments) Bill 2009 was recently opposed by the LSK on various technical grounds and the Bill ultimately failed when it was taken to Parliament. However, the IBAHRI and ILAC are given to understand that the Bill is in the process of being redrafted and will soon be presented to Parliament again, this time with the support of both the LSK and the judiciary. The IBAHRI and ILAC also note that section 197(2)(c) of the harmonised draft Constitution will, if enacted, provide for the promotion of ADR.

**The IBAHRI and ILAC therefore recommend that:**

- (65) Legislation should be introduced to facilitate the settlement of private law disputes in conciliation committees or similar institution;**
- (66) Judicial officers and lawyers should be trained in basic alternative dispute resolution methods and techniques.**

#### *8.2.12 Traffic cases*

The Preliminary Report of the Synchronised Survey of Pending Cases in Kenyan Courts indicated that out of the 796,215 cases pending in courts in October 2007, 409,044 were traffic cases. Nearly all of these traffic cases relate to offences under section 117 of the Traffic Act, which provides for police in minor traffic offences to issue police notification forms. These forms charge the offender and provide him or her with the opportunity to enter a written guilty plea. If the offender elects to plead guilty, then he or she is required to forward the form to court for the imposition of a fine. The IBAHRI and ILAC are given to understand, however, that it has been extremely difficult for the courts to collect these fines because in most cases either the details of the offender are not correct, or ownership of the vehicle in question is transferred to another party.<sup>304</sup>

**The IBAHRI and ILAC therefore recommend that:**

- (67) An audit of traffic cases should be conducted with a view to identifying and dispensing with cases where all reasonable efforts have been made to recover the fine but there is no longer any realistic prospect of doing so;**
- (68) A package of appropriate legislative and administrative amendments should be implemented so as to remedy, so far as possible, the causes of the backlog of traffic cases. In this respect the IBAHRI and ILAC endorse the recommendations of the Task Force on Judicial Reforms 2009.<sup>305</sup>**

<sup>304</sup> Report of the Task Force on Judicial Reforms 2009, section 5.10.

<sup>305</sup> Ibid.

### 8.2.13 Court vacations

In accordance with Rules 1 and 2 of the High Court (Practice and Procedure) Rules made under the Judicature Act (Laws of Kenya, Chapter 8), a total of 62 working days each year are allocated for the three vacations of the High Court. This is comprised of 12 days for the Easter vacation, 34 days for the Summer vacation and 16 days for the Christmas vacation. Taken together, the High Court is therefore not in session for a period of over 12 weeks each year.<sup>306</sup>

Long court vacations are common to many jurisdictions. Indeed, they are often one of the few times in a year when judges have an opportunity to read up on new legislation and case law, as well as undertake formal training. However, in Kenya, in addition to the long court vacations, judges are also entitled to take a further six weeks annual leave and, the delegation was informed, not infrequently this annual leave is taken during sittings of the court. In the view of the IBAHRI and ILAC, this practice only serves to contribute to delay in the disposal of cases. It is reasonable to expect that, save in exceptional circumstances, all judges should be required to take their annual leave during court vacations. This position finds support in the report of the Task Force on Judicial Reforms 2009.<sup>307</sup>

Indeed, in the opinion of the IBAHRI and ILAC, the backlog of cases within the High Court is such that the Chief Justice should consider appointing special High Court benches to deal with the backlog during the court vacations. The IBAHRI and ILAC note that the Chief Justice has previously expressed a commitment to exploring the possibility of such a measure.<sup>308</sup>

#### **The IBAHRI and ILAC therefore recommend that:**

**(69) In order to ensure the uninterrupted conduct of hearings during sittings of the court, judges should be required to take their annual leave during court vacations;**

**(70) Special High Court benches should be appointed to address the backlog of cases in that Court during the court vacations.**

### 8.3 Conclusion

Backlog and delays in the disposal of cases erode public confidence in the judiciary and promote recourse to extra-legal remedies. If the rule of law is to be maintained in Kenya, there is therefore a pressing need to improve the efficiency and functioning of the judicial system.

Kenya's judicial system faces a number of significant challenges in this regard. Financial and human resources need to be increased, support structures need to be modernised and courtroom procedures need to be streamlined. With the backlog most acute at the level of the subordinate courts, particular attention should be given to the needs of the magistracy.

<sup>306</sup> Colloquium Speech by the Hon Justice Gicheru, Chief Justice of the Republic of Kenya, on case management, Colloquium, 2006. Reproduced in the JTI Bulletin, July 2009.

<sup>307</sup> Report of the Task Force on Judicial Reforms 2009, section 5.21.

<sup>308</sup> Colloquium Speech by the Hon Justice Gicheru, Chief Justice of the Republic of Kenya, on the role of the judiciary in development, Colloquium, 2007. Reproduced in the JTI Bulletin, July 2009.



# Chapter Nine – Legal Initiatives to Address the Post-Election Violence

## 9.1 The establishment of a Special Tribunal

Following the violence triggered by the controversial 2007 presidential election, the Coalition Government established the Commission of Inquiry into Post-Election Violence (CIPEV). Chaired by the Honorable Justice Philip Waki, the mandate of the CIPEV was to investigate the facts and events that occurred during the post-election violence, examine the conduct of state security agencies in handling the violence, and make recommendations regarding these and any other matters.<sup>309</sup> Following a three month investigation, on 15 October 2008 the Commission published its report (the Waki Report). The Commission concluded that politicians on all sides had organised and funded attacks on supporters of their opponents. The inquiry also found that security forces had used excessive force against civilians, intervened to have allies released from custody and failed to investigate individuals responsible for the violence. The Commission recommended that a series of reforms should be instituted and that a Special Tribunal, composed of international and Kenyan judges and prosecutors, should be established to investigate and prosecute those bearing the greatest responsibility for gross violations of human rights and crimes against humanity.<sup>310</sup> The Commission set a deadline of 30 January 2009 to pass legislation to establish the Special Tribunal and stipulated that if this deadline was breached, then Kofi Annan would pass a sealed envelope with the names of the main suspects to the Chief Prosecutor of the International Criminal Court (ICC) for further investigation.<sup>311</sup>

When the Waki Report was published, both President Mwai Kibaki and Prime Minister Raila Odinga pledged to implement its recommendations. However, within weeks, a substantial body of politicians representing both the PNU and ODM parties proved reluctant to establish a Special Tribunal.<sup>312</sup> Nevertheless, by early December 2008, two Bills – one to entrench the tribunal in the Constitution and another on the Statute for a Special Tribunal – had been prepared.<sup>313</sup> On 17 December 2008, President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement which formally started the process of establishing a local tribunal to try post-election violence suspects.<sup>314</sup>

309 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008). Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf).

310 Human Rights Watch, Kenya: Promptly establish Special Tribunal, 15.10.2008. Available online at: <http://allafrica.com/stories/200810160029.html>.

311 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008). Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf).

312 Mmegi Online, Time running out as Kenyan parties dither on special tribunal, 19.11.2008. Available online at: <http://www.mmegi.bw/index.php?sid=2&aid=11&dir=2008/November/Wednesday19>; BBC News, Timeline Kenya. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/1026884.stm>.

313 The Independent, Kenya tribunal to punish organisers of poll violence, 4.12.2008. Available online at: <http://www.independent.co.uk/news/world/africa/kenya-tribunal-to-punish-organisers-of-poll-violence-1050606.html>.

314 Reuters, Kenyan leaders sign agreement for special tribunal, 17.12.2009. Available online at: <http://www.reuters.com/article/africaCrisis/idUSLH178793>.

On 12 February 2009, the Kenyan Parliament voted against the Constitutional Amendment Bill proposing the establishment of a Special Tribunal.<sup>315</sup> In the days that followed, local media reported that efforts to pass the legislation had been frustrated by certain ministers who themselves feared prosecution.<sup>316</sup> Human Rights Watch additionally observed that efforts to pass the legislation had been marred by a failure of political leadership, with President Kibaki and Prime Minister Odinga having made little effort to marshal support for the Bill or impress upon lawmakers their collective responsibility to establish the Special Tribunal as a means to provide accountability.<sup>317</sup> It was also recognised that the Bill for a Special Tribunal, as introduced by the government, had been poorly prepared, leading even some genuine proponents of justice to oppose it.<sup>318</sup> On 24 February 2009, Kofi Annan, chairman of the Panel of Eminent African Personalities and the broker of the original agreement that ended the violence, granted the government more time to reintroduce the measures.<sup>319</sup>

On 9 July 2009, after several months without progress towards the establishment of a Special Tribunal, Kofi Annan handed a sealed envelope with the names of at least ten alleged masterminds of the violence to Luis Moreno-Ocampo, the ICC's Chief Prosecutor.<sup>320</sup> Mr Annan's action pre-empted an earlier agreement with the government, giving it an extension until the end of August 2009 to set up a Special Tribunal.<sup>321</sup> On 14 July 2009, the Kenyan Cabinet met again to consider the two draft laws, but after four hours of discussions its members failed to reach a consensus. This same scenario was repeated again on 20 July 2009, with parliamentarians split along party and factional lines. The only change in position of note was that those MP's who had earlier opposed any local prosecutions for the post-election violence but instead favoured the ICC, now expressed support for the establishment of a local Truth, Justice and Reconciliation Commission.<sup>322</sup> On 30 July 2009, Kenya's Cabinet ministers announced that they would not set up a Special Tribunal to try those responsible for the post-election violence but would use existing local courts instead.<sup>323</sup>

On 11 August 2009, backbenchers in parliament led by Imenti Central MP Gitobu Imanyara launched a revised Constitution of Kenya Amendment Bill. The Bill sought to establish a Special Tribunal to prosecute perpetrators of the post-election violence, while leaving trials of those bearing the greatest responsibility to the ICC.<sup>324</sup> The draft legislation won support from some key ministers, including Justice Minister Mutula Kilonzo and Prime Minister Raila Odinga, but failed to secure the official endorsement of the government.<sup>325</sup> The following day, Justice Minister Mutula Kilonzo announced that the mandate of the Truth, Justice and Reconciliation Commission in Kenya would not be expanded to include trials of suspects linked to post-election violence.<sup>326</sup>

315 *China View*, Kenyan PM says local tribunal still option for those behind post-election violence, 15.2.2008. Available online at: [http://news.xinhuanet.com/english/2009-02/15/content\\_10820395.htm](http://news.xinhuanet.com/english/2009-02/15/content_10820395.htm).

316 *The East African*, Justice or impunity: What will Kenya choose?, 3.4.2009. Available online at: <http://www.theeastafrican.co.ke/news/-/2558/557048/-/view/printVersion/-/uv7rdf/-/index.html>.

317 Human Rights Watch, Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court, 25.3.2009. Available online at: <http://www.hrw.org/en/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court>.

318 Human Rights Watch, Kenya: Swiftly Enact Special Tribunal, 25.3.2009. Available online at: <http://www.alertnet.org/thenews/newsdesk/HRW/d83f097334facb996033b412eeaa747b.htm>.

319 *Ibid*.

320 BBC News, Annan acts on Kenya poll suspects, 9.7.2009. Available online at: [http://news.bbc.co.uk/1/hi/ukfs\\_news/mobile/newsid\\_8140000/newsid\\_8142200/8142263.stm](http://news.bbc.co.uk/1/hi/ukfs_news/mobile/newsid_8140000/newsid_8142200/8142263.stm).

321 BBC News, Annan gives Kenya court deadline, 11.6.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8094696.stm>.

322 *The Ghanaian Chronicle*, Kofi Annan puts politicians on the spot over poll violence, 29.7.2009. Available online at: <http://www.ghanaiachronicle.com/thestory.asp?id=13107&title=<b>

323 BBC News, Kenya shuns special poll tribunal, 30.07.3009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8177525.stm>; *The Telegraph*, Kenya ignores calls for international trials over election violence, 31.7.2009. Available online at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/5949137/Kenya-ignores-calls-for-international-trials-over-election-violence.html>.

324 Kenya, Broadcasting Corporation, MPs introduce special tribunal bill, 11.8.2009. Available online at: <http://www.kbc.co.ke/story.asp?ID=59162>.

325 *Daily Nation*, The Hague moving in for Kenya trials, 27.8.2009. Available online at: <http://www.nation.co.ke/News/-/1056/646536/-/um8g4y/-/index.html>.

326 Kenya: TJRC Mandate 'Will Not Change', 12.8.2009. Available online at: <http://allafrica.com/stories/200908120936.html>.



On 30 September 2009, after the government missed a further deadline to set up a local tribunal, the ICC's Chief Prosecutor announced that he would prosecute those suspected of bearing the greatest responsibility for the post-election violence, while national accountability proceedings, such as a Special Tribunal, should try other perpetrators and the Truth, Justice and Reconciliation Commission should examine the full history of past events and suggest mechanisms to prevent such crimes in the future.<sup>327</sup> Justice Minister Mutula Kilonzo responded that the ICC could hold its trials in Kenya and suspects would be arrested.<sup>328</sup> However, during his visit to Kenya in early October 2009, Kofi Annan reiterated that he foresaw the need for a three-tier approach towards bringing those responsible for the post-election violence to justice: (i) a Truth, Justice and Reconciliation Commission; (ii) a Special Tribunal, as recommended by the Waki Commission, or another effective local mechanism; and (iii) the International Criminal Court. Mr Annan remarked that the establishment of an effective national judicial mechanism was 'absolutely essential ... It is not either the ICC or a local mechanism. It must be both'.<sup>329</sup>

On 5 November 2009, the Kenyan Government refused to formally refer the matter of suspected crimes against humanity committed during the post-election violence to the ICC. However, President Kibaki and Prime Minister Odinga jointly pledged to cooperate with any investigation and prosecution of the key planners of the post-election violence that might be initiated by the ICC on its own volition.<sup>330</sup> In light of the non-referral, Mr Moreno-Ocampo announced that he would open a formal investigation into the post-election violence, stating that there was sufficient evidence to suggest that those behind the bloodshed committed crimes against humanity. Mr Moreno-Ocampo stated that he hoped that the investigation could commence in December.<sup>331</sup>

On 11 November 2009, Imenti Central MP Gitobu Imanyara introduced his Constitution of Kenya (Amendment) Bill on the establishment of a Special Tribunal in Parliament. However, just 19 out of 222 Members of Parliament attended to debate the bill. Accordingly, lack of quorum (thirty legislators are required for a vote to be held) forced the speaker to adjourn discussion of the bill for one week.<sup>332</sup> On 18 November 2009, the presence of only 17 Members of Parliament in the chamber forced debate on the establishment of a Special Tribunal to be halted once again.<sup>333</sup>

It is clear that Kenya's political leaders remain divided over the issue of how to deal with the perpetrators of the post-election violence. However, the coalition government remains obliged, both as a matter of international law and as a consequence of the commitments made as part of the National Dialogue and Reconciliation process, to investigate, prosecute and punish those responsible. The IBAHRI and ILAC further consider that the establishment of a Special Tribunal with international participation would also constitute an important first step in improving the capacity of the Kenyan judicial system. Moreover, trials in Kenya of those most responsible for the post-election

327 BBC News, ICC vows Kenya poll riots trial, 30.09.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8283612.stm>.

328 BBC News, Kenya backs poll violence trials, 2.10.2009. Available online at: <http://news.bbc.co.uk/1/hi/world/africa/8286733.stm>.

329 Remarks by H E Kofi Annan on conclusion of his visit to Kenya, 4-7 October 2009. Delivered at the Serena Hotel, Nairobi – 7th October 2009. Available online at: [http://www.dialoguekenya.org/docs/7thOctober2009-RemarksbyH.E.KofiAnnanonconclusionofhisvisittoKenya\(4-7thOctober2009\).pdf](http://www.dialoguekenya.org/docs/7thOctober2009-RemarksbyH.E.KofiAnnanonconclusionofhisvisittoKenya(4-7thOctober2009).pdf).

330 *Daily Nation*, Ocampo leaves meeting empty-handed, 5.11.2009. Available online at: <http://www.nation.co.ke/News/politics/-/1064/682638/-/item/0/-/nh32i0z/-/index.html>.

331 *Time*, After Kenyan Stalling, the ICC Will Investigate Post-Election Riots, 6.11.2009. Available online at: <http://www.time.com/time/world/article/0,8599,1935921,00.html>; The Standard, Kenya's options over, 6.11.2009. Available on-line at: <http://www.eastandard.net/InsidePage.php?id=1144027854&cid=4>.

332 Reuters, Vote on Kenya special tribunal delayed again, 11.11.2009. Available online at: <http://www.alertnet.org/thenews/newsdesk/LB034406.htm>.

333 *Daily Nation*, Tribunal bill debate halted over quorum, 18.11.2009. Available on-line at: <http://www.nation.co.ke/News/-/1056/687796/-/uopcqm/-/>.

violence would make such proceedings fully accessible to Kenyans and demonstrate that Kenya can bring its own criminals to justice.

**The IBAHRI and ILAC therefore recommend that:**

**(71) Parliament should establish a Special Tribunal, or other effective local mechanism, to ensure that the perpetrators of the post-election violence, including state security agents, do not enjoy impunity. In accordance with the three-pronged approach proposed by Kofi Annan, the IBAHRI and ILAC foresee that the establishment of a Special Tribunal, or other effective local mechanism, should complement but not displace proceedings before the Truth, Justice and Reconciliation Commission and the International Criminal Court.**

## **9.2 Sexual violence against women**

Sexual violence was rampant during the period between December 2007 and March 2008, consisting mainly of rape and gang rape, defilement, genital mutilation, sodomy, forced circumcision, and sexual exploitation.<sup>334</sup> Although men and male children were targeted, women and girls of all ages and backgrounds formed the majority of those who suffered.<sup>335</sup> The perpetrators of sexual violence included state security agents (for example administrative police, regular police, and members of the General Service Unit (GSU)), members of organised gangs (for example Mungiki, Kalenjin warriors, and others), neighbours, relatives, supposed friends, and individuals working in camps for internally displaced persons (IDPs).<sup>336</sup>

In addition to the suffering endured by the acts of physical assault, victims of the post-election sexual violence experienced a number of unintended consequences, including infection with HIV/AIDS, physical injury and psychological trauma, desertion by their spouses, unwanted pregnancy, and loss of trust that they might have previously had in state security agencies.<sup>337</sup> According to information provided to the Commission of Inquiry into Post-Election Violence, 82 per cent of victims did not formally report their experiences of sexual violence, especially to the police.<sup>338</sup>

During the course of the mission, the Kenya section of the Federation of Women Lawyers (FIDA) informed the delegation that one consequence of the delay in establishing a Special Tribunal for the investigation and prosecution of those bearing the greatest responsibility for gross violations of human rights is that evidence of sexual violence against women is gradually being lost. As time is passing, even those victims who have reported their experiences of sexual violence are, understandably, gradually becoming unwilling to revisit the horrors that were visited upon them.

The IBAHRI and ILAC consider that the documentation of victim and witness testimony in relation to crimes of post-election sexual violence cannot be delayed until the commencement of an investigation by a yet to be established Special Tribunal. If the perpetrators of sexual violence against women and girls are to be held accountable in the future, it is imperative that the evidence

<sup>334</sup> Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 244. Available online at: [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SNAA-7UK8PK-full_report.pdf/$File/full_report.pdf)

<sup>335</sup> *Ibid.*, and at 249, 250-252.

<sup>336</sup> *Ibid.*, at 252.

<sup>337</sup> *Ibid.*, at 261.

<sup>338</sup> The reasons for non-reporting included having been attacked by the police (32 per cent), fear of being attacked again (24 per cent), thinking nothing would be done (45 per cent), and not being able to identify the rapist (31 per cent). Others, the Commission was told, did not know where to report the incident, had been asked not to report the matter (34 per cent), or did not know how to do so (27 per cent). *Ibid.*, at 246-247.

of sexual violence is preserved now. Accordingly, the delegation considers that lawyers in Kenya with experience in dealing with gender issues, notably those affiliated with FIDA and the Centre for Advancement of Women and Children, should be provided with all necessary facilities to enable them to establish a record of the testimony of victims and witnesses of sexual violence, including by means of audio-visual recording.

**The IBAHRI and ILAC therefore recommend that:**

**(72) Financial resources should be allocated to lawyers in Kenya with experience in dealing with gender issues, notably those affiliated with FIDA and the Centre for Advancement of Women and Children, in order to enable the testimony of victims and witnesses of post-election sexual violence to be preserved for possible use in future criminal prosecutions.**



# Chapter Ten – List of Recommendations

## **The IBAHRI and ILAC therefore recommend that:**

1. The Constitution should be amended so as to vest judicial power exclusively in the courts and tribunals, as provided for in section 197 of the harmonised draft Constitution (page 36).
2. The Constitution should be amended so as to incorporate an express guarantee of judicial independence, as provided for in section 198 of the harmonised draft Constitution (page 36).
3. The role of the Chief Justice in the administration of the courts should be reconstituted as follows:
  - (a) the Chief Justice should retain overall responsibility for the judiciary and provide judicial leadership;
  - (b) the Chief Justice should preside over and have direct administrative responsibility for the Supreme Court, if established;
  - (c) the Presiding Judge of the Court of Appeal should be empowered to exercise sole and direct responsibility for the administration of the Court of Appeal;
  - (d) the Principal Judge of the High Court should be empowered to exercise sole and direct responsibility for the administration of the High Court. In particular, the Principal Judge of the High Court should be responsible for the selection of judges to particular benches and divisions of the High Court; and
  - (e) The same principle of localised administrative responsibility should apply also to the magistrates' courts (page 39).
4. The Chief Justice should not be a member of the Judicial Service Commission (page 39).
5. The composition of the Judicial Service Commission should be restructured in such a way as to ensure that it is fully independent from the executive and its membership is truly representative. An expanded membership of the Judicial Service Commission should consist of the following:
  - (a) one Supreme Court Judge, other than the Chief Justice, elected by the judges of the Supreme Court, if a Supreme Court is established;
  - (b) one Court of Appeal Judge, other than the Chief Justice, elected by the judges of the Court of Appeal;

- (c) a full-time chairperson who will be the judge of the highest court elected in accordance with either (a) or (b);
  - (d) one High Court Judge, other than the Chief Justice, elected by the judges of the High Court;
  - (e) one member from the subordinate courts elected by the Kenya Magistrates and Judges Association (KMJA);
  - (f) one member elected by the Kenya Women Judges Association (KWJA);
  - (g) two advocates, one of each gender, of at least 15 years standing elected by the Law Society of Kenya (LSK);
  - (h) one lay member elected by the Kenya Private Sector Alliance (KEPSA) (page 43).
6. The functions of the Judicial Service Commission should be restructured, as provided for in section 211 of the harmonised draft Constitution of Kenya as follows:
- (a) to ensure and enhance the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice;
  - (b) to recommend to the State President persons for appointment as judges;
  - (c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their remuneration;
  - (d) to advise the State President on the membership of a tribunal referred to in section 207(5) (a) and (b);
  - (e) to receive complaints against, investigate and remove from office or otherwise discipline, registrars, magistrates, other judicial officers and other staff of the judiciary, in such manner as may be specified by an act of parliament;
  - (f) to prepare and implement programmes for the continuing education and training of judges, magistrates, other judicial officers and other staff of the judiciary;
  - (g) to advise the national government on improving the efficiency of the administration of justice, and on access to justice, including legal aid;
  - (h) to ensure competitiveness and transparent processes for the appointment of judicial officers and other staff of the judiciary;
  - (i) to promote gender equality (pages 43-44).
7. The Judicial Service Commission should be provided with its own Secretariat and this Secretariat should be adequately funded from its own budget allocation, as provided for in the draft Judicial Service Commission Bill 2009 (page 44).
8. The qualification criteria for appointment to judicial office should be reorganised as follows, as provided for in section 205 of the harmonised draft Constitution of Kenya:

- (a) The Chief Justice and the judges appointed to the Supreme Court, if established, should possess at least 15 years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a Judge of the Court of Appeal or the High Court; or (ii) an advocate in practice;
  - (b) Judges appointed to the Court of Appeal should possess at least ten years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a Judge of the Court of Appeal or the High Court; or (ii) an advocate in practice;
  - (c) Judges appointed to the High Court should possess at least ten years of experience in Kenya or in another Commonwealth common law jurisdiction as (i) a professionally qualified magistrate; or (ii) an advocate in practice;
  - (d) The Chief Justice and judges appointed to the Supreme Court, the Court of Appeal or the High Court should possess suitable academic qualifications in law and eminence in legal practice and high moral character and integrity, as determined by the Judicial Service Commission (page 46).
9. The draft Judicial Service Commission [Appointment of Judges] Regulations 2009 should be implemented at the earliest opportunity (page 46).
  10. The Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 should be implemented at the earliest opportunity (page 49).
  11. The Judicial Service Commission Bill 2009 should be enacted at the earliest opportunity (page 50).
  12. The financial independence of the judiciary should be entrenched in the Constitution (page 50).
  13. The remuneration and benefits of members of the judiciary should be charged on and issued out of the Consolidated Fund, as provided for in section 198(3) of the harmonised draft Constitution (page 50).
  14. In order to combat judicial corruption, the recommendations in this report regarding the qualification and procedures for appointment of judges, the training of judges, the removal and discipline of judges, the strengthening of public prosecutions and the enhancement of the quality and efficiency of the justice system should be implemented (page 52).
  15. A Communications Department within the judiciary should be established with a mandate to create awareness and handle all the communication needs of the judiciary (page 54).
  16. Public education and information material containing written information on the services offered by the judiciary and the procedures for accessing them should be printed and distributed to members of the public (page 54).
  17. The judiciary should embrace the use of other communications media such as newspapers, radio and the internet. In particular, the judiciary should use radio broadcasts and other non-written media in order to facilitate increased access to justice for those who are illiterate (page 54).

18. Court public relations officers should be deployed within court buildings in order to provide litigants and members of the public who attend court proceedings with information on court procedures and processes and also directional information (page 54).
19. The Magistrates' Courts Act should be amended so as to divide the country into magisterial areas. Each Magisterial area should be designated a grade and jurisdiction to which a magistrate of a specified grade should be posted (page 56).
20. There should be a judicial officer designated to have primary responsibility for the administration of all magistrates' courts throughout Kenya (page 57).
21. The security of tenure of magistrates should be expressly guaranteed in the Constitution or Magistrates' Courts Act (page 57).
22. Clear criteria should be established for the recruitment and promotion of magistrates based on academic qualifications, work experience, moral integrity and merit (page 58).
23. Promotion of magistrates should be dependent upon a satisfactory assessment of performance against merit-based criteria (page 58).
24. Disciplinary proceedings in respect of magistrates should be conducted in accordance with the proposed procedure for judges set out in the Judicial Service Commission [Complaints against Judicial Officers and Staff] Regulations 2009 (page 58).
25. Magistrates should be given greater financial, human and material resources to assist them in carrying out their professional responsibilities to the people of Kenya (page 59).
26. The training provided to new magistrates should be reviewed and upgraded (page 60).
27. A continuing judicial education programme for magistrates should be institutionalised (page 60).
28. The retirement age for magistrates should be increased from 55 years of age to 70 years of age (page 60).
29. An office of Director of Public Prosecutions should be established, vested with the powers that are now vested in the Attorney-General under sections 26(3), (4) and (8) of the Constitution, as provided for in section 194 of the harmonised draft Constitution (page 62).
30. The Director of Public Prosecutions should be empowered to exercise these functions independently without interference, control or direction from any other person or any authority, as provided for in section 194(10) of the harmonised draft Constitution (page 62).
31. Section 68 of the Constitution should be amended so as to exclude the Attorney-General from membership of the Judicial Service Commission (page 62).
32. The Attorney-General should continue to act as the principal legal advisor to the government of Kenya, as provided for in section 193 of the harmonised draft Constitution (page 62).
33. The systemic weakness in the ability of the office of the Attorney-General (as the current authority in charge of prosecutions) to oversee the effectiveness of criminal investigations by



the police should be removed by establishing a Directorate of Criminal Investigations that operates under the authority and control of a constitutionally entrenched and independent Department of Public Prosecutions (page 64).

34. The processes and procedures of criminal investigations should be professionalised (page 64).
35. Police prosecutors should be phased out and replaced by state counsel under the control and direction of the Attorney-General in the first instance, with control and direction transferred to an independent Director of Public Prosecutions once such an office is established (page 65).
36. State counsel should receive appropriate pre-service and in-service training, including on professional standards for prosecutors (page 65).
37. State counsel should be provided with all necessary resources (libraries, reference materials, transport, etc) to enable them to conduct successful, professional prosecutions (page 65).
38. A national legal aid scheme should be implemented (page 69).
39. The Law Society of Kenya should enter into twinning agreements with other professional bar associations (page 70).
40. The Law Society of Kenya should establish a specialised Access to Justice Committee (page 70).
41. The role of the President, Attorney-General and Solicitor-General in relation to the functioning of the Law Society of Kenya should be removed with a view to establishing professional self-regulation as a step towards securing the independence of advocates (page 71).
42. The Law Society of Kenya should establish an independent Professional Conduct Committee mandated to investigate and report on the state of professional misconduct within the legal profession and also formulate recommendations for the improving the regulation of professional conduct (page 71).
43. The proportion of the budget allocated to the administration of justice should be substantially increased (page 74).
44. Consideration should be given to incorporating a provision within the Constitution guaranteeing that the Judiciary receive a minimum one per cent share of the national budget (page 74).
45. Administrative responsibility for the functioning of the courts should be localised within each court in accordance with our recommendation at section 4.2.2 above (page 75).
46. Professional court administrators should be employed in order to superintend over the non-judicial functions of the courts (page 75).
47. All vacant posts for judges and magistrates should be filled without delay (page 77).
48. Section 7 of the Judicature Act should be amended so as to abolish the statutory upper limit on the number of judges appointed to the High Court and Court of Appeal (page 77).
49. The number of judges of the Court of Appeal and High Court should be substantially increased (page 77).

50. The retirement age for magistrates should be increased from 55 years of age to 70 years of age, in accordance with the recommendation at section 5.2.7 (page 77).
51. The terms and working conditions of judges and magistrates should be improved in order to attract and retain more judicial officers (page 78).
52. The proposal to appoint Commissioners of Assize should be dispensed with (page 78).
53. Training on case management should be incorporated into both pre-service and in-service training of judicial officers (page 78).
54. Judicial officers should continue to be sensitised as to the provisions of the Chief Justice's Practice Direction on the expeditious disposal of cases (page 78).
55. An electronic case-management system should be introduced in all courts in Kenya, with appropriate training provided to judges, magistrates and court personnel in its application (page 78).
56. Automation of the systems and processes of the courts, the registries and the libraries should be prioritised (page 79).
57. Adequate financial resources should be allocated to the provision of information and communication technology (ICT) in order to ensure implementation (page 79).
58. The financial resources allocated to the Judicial Training Institute should be substantially increased (page 81).
59. The Judicial Training Institute should commission a regional and/or international expert on the education and training of the judiciary to conduct a study into the technical assistance and capacity building needs of the institute (page 81).
60. The judiciary should develop and implement a formal programme for the evaluation of judicial performance (page 81).
61. All members of the judiciary should be evaluated on a periodic basis against recognised criteria for judicial performance such as legal ability, integrity and impartiality, communication skills, professionalism and temperament and administrative capacity (page 81).
62. A Supreme Court should be established, as provided for in section 201 of the draft Constitution (page 82).
63. The Criminal Procedure Code should be amended so as to provide High Court Judges with authority to dismiss criminal appeals for want of prosecution in circumstances where either the appellant or his or her counsel fail to attend court without reasonable justification (page 83).
64. The Small Claims Courts Bill 2009 should be enacted by the National Assembly at the earliest opportunity (page 83).
65. Legislation should be introduced to facilitate the settlement of private law disputes in conciliation committees or similar institution (page 84).

66. Judicial officers and lawyers should be trained in basic alternative dispute resolution methods and techniques (page 84).
67. An audit of traffic cases should be conducted with a view to identifying and dispensing with cases where all reasonable efforts have been made to recover the fine but there is no longer any realistic prospect of doing so (page 84).
68. A package of appropriate legislative and administrative amendments should be implemented so as to remedy, so far as possible, the causes of the backlog of traffic cases. In this respect the IBAHRI and ILAC endorse the recommendations of the Task Force on Judicial Reforms 2009 (page 84).
69. In order to ensure the uninterrupted conduct of hearings during sittings of the court, judges should be required to take their annual leave during court vacations (page 85).
70. Special High Court benches should be appointed to address the backlog of cases in that court during the court vacations (page 85).
71. Parliament should establish a Special Tribunal, or other effective local mechanism, to ensure that the perpetrators of the post-election violence, including state security agents, do not enjoy impunity. In accordance with the three-pronged approach proposed by Kofi Annan, the IBAHRI and ILAC foresee that the establishment of a Special Tribunal, or other effective local mechanism, should complement but not displace proceedings before the Truth, Justice and Reconciliation Commission and the International Criminal Court (page 90).
72. Financial resources should be allocated to lawyers in Kenya with experience in dealing with gender issues, notably those affiliated with the Federation of Women Lawyers (FIDA) and the Centre for Advancement of Women and Children, in order to enable the testimony of victims and witnesses of post-election sexual violence to be preserved for possible use in future criminal prosecutions (page 91).



# Chapter Eleven – Project Proposals

## **(a) Enhancing public communication and outreach by the judiciary (section 4.2.8)**

In order to improve public confidence in the judicial system, it is necessary for the judiciary to establish an effective communication strategy that will enhance its image and credibility. The focus of such a strategy should be twofold: (i) to explain to potential court users the operations and procedures of the courts; and (ii) to make clear both the challenges that the judiciary is facing and the initiatives that it is undertaking in order to deliver a better service to the people.

To this end, the IBAHRI and ILAC recommend that technical assistance could be directed to assisting the judiciary to establish a Communications Department with a mandate to create awareness and handle all the communication needs of the judiciary. Support and assistance could also be provided with the aim of deploying court public relations officers within court buildings in order to provide litigants and members of the public who attend court proceedings with information on court procedures and processes and also directional information.

The IBAHRI and ILAC further recommend that public education and information material containing written information on the services offered by the judiciary and the procedures for accessing them could be printed and distributed to members of the public. The judiciary should also be encouraged to embrace the use of other communications media such as newspapers, radio and the internet. In particular, the judiciary should use radio broadcasts and other non-written media in order to facilitate increased access to justice for those who are illiterate.

## **(b) Improving training of state counsel (section 6.2.3)**

A legal system based on respect for the rule of law and human rights standards needs strong, independent and impartial prosecutors who are willing and able to resolutely investigate and prosecute suspected crimes committed against citizens, even if these crimes have been committed by persons acting in an official capacity. The IBAHRI and ILAC recommend that regional and/or international assistance could be directed to ensuring that state counsel receive appropriate pre-service and in-service training, including on professional standards for prosecutors. It is envisaged that the International Association of Prosecutors would be an appropriate body to facilitate such training.

**(c) Improving continuing legal education for advocates (section 7.3)**

The maintenance of high professional standards by advocates is partly determined by the quality of Continuing Legal Education. The IBAHRI and ILAC recommend that the design of the CLE curriculum for advocates and the delivery of the training could benefit from the involvement of regional and/or international expertise, particular within the areas of international law and contemporary international best-practice.

**(d) Strengthening the provision of legal aid (section 7.4)**

There is an urgent need to institute a nationwide legal aid programme in order to ensure that indigent persons are guaranteed legal representation. The IBAHRI and ILAC recommend that international donor assistance could usefully be directed to establishing legal aid offices throughout the country. It is envisaged that these legal aid offices would operate in cooperation with the Law Society of Kenya to provide basic legal advice and assistance free of charge to the population. They could be staffed by practising advocates and legal interns who would be recent law graduates or law students. The programme as whole could be coordinated by a secretariat in the capital, Nairobi.

**(e) Developing twinning agreements (section 7.5)**

In order to enhance the effectiveness of the Law Society of Kenya, there would be merit in the LSK entering into twinning agreements with other professional bar associations around the world. Such legal cooperation partnerships could contribute to the effective and efficient provision of legal services in Kenya by informing the institutional development of the LSK as an independent representative and regulatory body for the legal profession. To this end, the IBAHRI and ILAC recommend that professional bar associations could be encouraged to enter into twinning agreements with the Law Society of Kenya. It is envisaged that the International Bar Association would be an appropriate body to facilitate such arrangements.

**(f) Strengthening judicial case management (section 8.2.4)**

In order to reduce delay and increase justice system efficiency, it is necessary to institute a regime of effective case management by judicial officers. To this end, the IBAHRI and ILAC recommend that training on case management should be incorporated into both the pre-service and in-service training of judicial officers provided by the Judicial Training Institute. Both the design of the training curriculum and the delivery of the training could draw upon regional and/or international expertise within the field of judicial case management.

The IBAHRI and ILAC further recommend that international donor assistance could usefully be directed towards establishing an electronic case management system for the management of the courts and judges' cases file. The development of such a system should be accompanied by appropriate training for judges, magistrates and court personnel in its application. It is foreseen that such training could be delivered by the Judicial Training Institute.

### **(g) Enhancing judicial education and training (section 8.2.6)**

Although the Judicial Training Institute is now functioning, there is still a need to ensure that the education and training provided to the judiciary is organised, systematic, ongoing and under the control of an adequately funded body. The IBAHRI and ILAC recommend that the capacity of the JTI to carry out its mandate could be substantially increased through the injection of additional financial resources. Additional funding would enable the JTI to meet its training expenses, purchase library materials and procure essential computer equipment. Further, the JTI could benefit from the advice of one or more regional and/or international experts on the education and training of the judiciary with respect to the technical assistance and capacity building needs of the institute. Assistance with curriculum development and the training of trainers could be particularly beneficial.

### **(h) Promoting judicial performance management (section 8.2.7)**

There is a clear need to institute a judicial performance evaluation program for the entire judicial branch. Such a system would help the judiciary as an institution to identify and set guidelines for its operations, facilitate an improvement in the performance of individual judges, and increase the quality and efficiency of the work delivered by the courts in accordance with the needs and expectations of the public.

To this end, the IBAHRI and ILAC recommend that all members of the judiciary should be evaluated on a periodic basis against recognised criteria for judicial performance such as legal ability, integrity and impartiality, communication skills, professionalism and temperament and administrative capacity. The design of a formal programme for the evaluation of judicial performance could draw upon regional and/or international expertise within the field of judicial performance management.

### **(i) Preserving evidence of sexual violence against women (section 9.2)**

The documentation of victim and witness testimony in relation to crimes of post-election sexual violence cannot be delayed until the commencement of an investigation by a yet to be established Special Tribunal. If the perpetrators of sexual violence against women and girls are to be held accountable in the future, it is imperative that the evidence of sexual violence is preserved now. To this end, the IBAHRI and ILAC recommend that donor assistance could be provided to lawyers in Kenya with experience in dealing with gender issues, notably those affiliated with FIDA and the Centre for Advancement of Women and Children, so as to equip them with all facilities necessary to enable them to establish a record of the testimony of victims and witnesses of sexual violence, including by means of audio-visual recording.





# ANNEX A – Terms of reference

The International Bar Association’s Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC), with the support of the Law Society of Kenya, will participate in a needs assessment of the justice system of Kenya. During the week of 5 October 2009, a joint IBAHRI/ILAC delegation will visit Kenya to examine ways in which support might be provided to the justice sector.

The delegation to Kenya will aim to address the following areas:

- 1) Independence and needs of the judiciary;
- 2) Case and court management;
- 3) Trial practice;
- 4) Needs of bar associations and of members of the legal profession;
- 5) Access to legal aid;
- 6) Right of adequate defence;
- 7) Legal issues related to crimes targeting women, particularly crimes of sexual violence committed during the post-election period;
- 8) Role of Islamic courts (Kadhis);
- 9) Problems related to corruption and perceptions of corruption in the judiciary; and
- 10) Implementation of the Reform Agenda:
  - a) Efforts to establish a Special Tribunal;
  - b) Alternative options available to deal with crimes committed during post-election violence if a Special Tribunal is not established;
  - c) Adoption of laws related to the justice sector.

The IBAHRI/ILAC team of legal experts will be meeting with the following persons and organisations:

- Government officials;
- Members of the judiciary;
- Lawyers and lawyers’ organisations;

- Key organisations in the justice sector;
- Human rights organisations;
- Representatives of civil society;
- Women's groups;
- International and regional organisations (eg, UN, European Commission, OSI East Africa);
- The donor community; and
- Other relevant individuals.

The mission report will contain recommendations for support to the justice system. These recommendations will be designed to help the government, NGOs, donors and IGOs identify priority areas for future activities and funding. It will also help in formulating project proposals and capacity building programmes.

# ANNEX B – List of meetings

## 5 October 2009

Law Society of Kenya:

- **Mr Apollo Mboya**, Chief Executive Officer

International Commission of Jurists (Kenya Section):

- **Mr George Kegoro**, Executive Director

World Bank:

- **Mr Johannes Zutt**, Country Director

Open Society Institute East Africa Initiative:

- **Mr Mugambi Kiai**, Country Programme Officer

## 6 October 2009

Kenya National Commission on Human Rights:

- **Ms Florence Simbiri-Jaoko**, Chairperson

Transparency International (Kenya Section):

- **Mr Job Ogonda**, Executive Director

Office of the Prime Minister:

- **The Rt Hon Raila Odinga**, Prime Minister of the Republic of Kenya

Ministry of Justice, National Cohesion & Constitutional Affairs:

- **The Hon Mutula Kilonzo**, Minister for Justice, National Cohesion and Constitutional Affairs

## 7 October 2009

Office of the Attorney-General:

- **The Hon S Amos Wako**, Attorney-General of the Republic of Kenya

Ministry of Lands:

- **The Hon James Orengo**, Minister for Lands

Parliamentary Select Committee on the Constitution:

- **The Hon Mohammed Abdikadir**, Chairman

Delegation of the European Commission:

- **Ambassador Eric Van Der Linden**, Head of Delegation
- **Mr Ibrahim Laafia**, Head of Section

High Court of Kenya:

- **The Hon Justice Isaac Lenaola**, Judge of the High Court

East African Magistrates and Judges Association

- **The Hon Justice Fred Ochieng**, Judge of the High Court

Task Force on Judicial Reforms

- **The Hon Justice William Ouko**, Chairman

Public Complaints Standing Committee

- **Ambassador James Simani**, Chairman

Office of the Vice-President and Ministry for Home Affairs

- **The Hon Stephene Kalonzo Musyoka**, Vice-President and Minister for Home Affairs

## **8 October 2009**

International Federation of Women Lawyers

- **Ms Naomi Wangeraka**, Chairperson
- **Ms Patricia Nyaundi**, Executive Director

African Union Panel of Eminent African Personalities

- **Ambassador Nana Effah-Apenteng**, Chief of Staff

Kenya Human Rights Commission

- **Ms Muthoni Wanyeki**, Executive Director

Kenya Law Reform Commission

- **Mr Kathurima M'Inoti**, Chairman

United Nations Development Programme in Kenya

- **Ms Tomoko Nishimoto**, Country Director

- **Mr Aeneas Chuma**, Resident Representative

Commission of Inquiry into Post-Election Violence

- **The Hon Mr Justice Philip Waki**, Chairman

## **9 October 2009**

Governance, Justice, Law and Order Sector (GJLOS) Reform Programme

- **Ms Camilla Redner**, Swedish International Development Cooperation Agency
- **Mr Thomas Vennen**, GTZ
- **Ms Francis Kakai**, GTZ
- **Mr Samual Kimeu**, Embassy of Finland

Centre for Peace and Human Rights

- **Ms Margaret Wamuyu**, Programme Manager

University of Nairobi

- **Dr Richard Bosire**, Lecturer, Political Science
- **Mr Kamau Mubuu**, Lecturer, School of Journalism and Mass Communication

Legal Resources Foundation

- **Ms Janet Munywoki**, Senior Programme Officer

Kenya Human Rights Institute

- **Ms Wangeci Chege**, Senior Programme Officer

Kenya National Civic Education Programme

- **Mr Abubakar Zein**, Programme Manager

Africa Youth Trust

- **Ms Stella Agara**, Project Officer

Raoul Wallenberg Institute

- **Ms Geraldine Bjallerstedt**, Head of East Africa Office

Office of the Chief Justice of Kenya

- **The Hon Justice J E Gicheru**, Chief Justice of the Republic of Kenya

USAID Kenya

- **Ms Catie Lott**, Director of Democracy & Governance

Judicial Training Institute

- **Mr Edward M Muriithi**, Interim Coordinator

### **10 October 2009**

Representatives of the Magistracy

- **[name withheld]**, Chief Magistrate
- **[name withheld]**, Senior Resident Magistrate