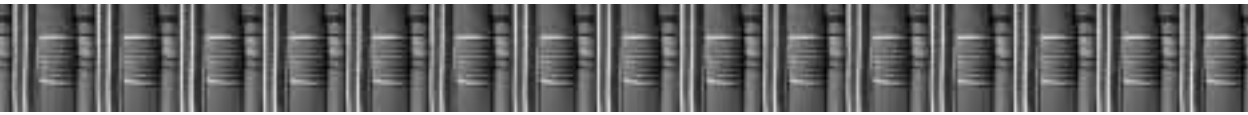


# Kenya

## Justice Sector and the Rule of Law



**Patricia Kameri Mbote and Migai Akech**

**A review by AfriMAP  
and the  
Open Society Initiative for Eastern Africa**

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# Preface

This report assesses Kenya's justice sector with a view to pointing out ways in which it promotes the attainment of the rule of law ideal. It is carried out in the context of growing interest in issues of good governance, democracy, human rights and the rule of law in African countries and has been prepared for the Open Society Initiative for Eastern Africa (OSIEA) and the Open Society Foundations' Africa Governance Monitoring and Advocacy Project (AfriMAP). Established in 2004 by the African foundations of the Open Society Foundations, AfriMAP has been monitoring the compliance of African states with the new commitments undertaken by the African Union since 2000 in the field of good governance, democracy, human rights and the rule of law. The report evaluates Kenya's respect for international standards in relation to the justice sector and the rule of law.

The overall objective of the report is to assess the efficacy, accountability, responsiveness and legitimacy of the justice sector in Kenya and suggest policy and legislative interventions. In particular, the report:

- Assesses whether, and the extent to which, Kenya is in compliance with its international human rights obligations, including the extent of incorporation of international human rights standards into national law;
- Reviews the historical evolution of the justice sector;
- Reviews the practice of constitutionalism and the rule of law in Kenya, with a view to identifying shortcomings and suggesting possible solutions;
- Reviews the efficacy, accountability and responsiveness of the administrative/institutional framework for the administration of justice;
- Assesses the adequacy of established frameworks in facilitating the independence, efficacy and accountability of the justice sector;
- Assesses the technical capacity of actors in the justice sector;
- Reviews the effectiveness, accessibility and accountability of the criminal justice system;
- Establishes whether, and the extent to which, Kenyans have access to justice (physical, financial, normative and procedural);
- Reviews the role of development partners in the justice sector; and
- Suggests policy and legal interventions that would enhance the efficacy, accountability, responsiveness and legitimacy of the justice sector.



The report proceeds from the premise that the attainment of the rule of law in Kenya is integral to the realisation of Vision 2030, a policy blueprint which was launched in June 2008. This policy spells out Kenya's development aspirations in the next 20 years and specifically seeks to transform the country from a developing to a medium-income economy by the year 2030. The second pillar of this vision, the social pillar, seeks to create and build a just, cohesive society, with equitable social development, in a clean and secure environment. The political pillar also has implications for the realisation of the rule of law by aiming for 'a democratic political system that nurtures issue-based politics, the rule of law, and ... all the rights and freedoms of every individual in society'.

The justice sector in Kenya has been going through major changes. The different arms of the sector have been the subject of intense interrogation and there are concrete proposals for reform of the legal and institutional framework supporting the rule of law, the justice system, the executive, the legislature, the criminal justice system and the Bar. Most notably, this research was carried out at a time when the confidence in these institutions had ebbed and after the disputed presidential poll in 2007 in which, according to the Commission of Inquiry into the Post-Election Violence (October 2008), an estimated 1 300 people were killed and 350 000 displaced. There were also gross human rights violations including physical and sexual molestation, rape and restrictions on the freedoms of movement during the two months of sporadic but violent inter-ethnic fighting pitting the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) supporters against each other. The violence ended with the signing of the Agreement on the Principles of Partnership of the Coalition Government by Mwai Kibaki and Raila Odinga on 28 February 2008. This led to the establishment of a coalition government whereby Odinga of the ODM became prime minister as Kibaki of the PNU retained the presidency. The agreement comprised of four agenda items:

1. Stop the violence and restore fundamental rights and liberties.
2. Address the humanitarian crisis occasioned by the massive displacement by resettling internally displaced people (IDPs) and promoting reconciliation and healing.
3. Overcome the political crisis.
4. Address and find solutions to the long-standing issues including constitutional, legal and institutional reform; land reform; poverty, inequity and regional imbalances; unemployment, particularly among the youth; consolidating national cohesion; and bringing about transparency, accountability and acting against impunity.

These issues, especially the implementation of point 4, are critical to the realisation of the rule of law in Kenya.

## Methodology

This study was carried out using a variety of methods. The authors used both primary and secondary data. Secondary data was used to assess the status of the legal and judicial sector. The authors reviewed statutory law, case law, the reports of various studies on the legal and justice sector and the reports of commissions established over the years to review different aspects of

the sector. They also took into account on-going reform initiatives in the legal and judicial sector. Most notable were the reforms being carried out under the aegis of the governance, justice, law and order sector (GJLOS).

Beyond secondary data, primary data was sought through various means:

- Interviews with key informants in the legal and judicial sector including judges; magistrates; employees of human rights bodies including non-governmental organisations; Kenya National Commission on Human Rights and non-governmental organisations; police officers; law reform officials; and other actors in the legal sector such as legal scholars, lawyers' staff of the National Council for law reporting, and police officers. The judges and magistrates interviewed were from different stations.
- A survey of the legal and judicial sector was carried out through the Steadman Omnibus National Survey carried out in December 2008. The main objective of the survey for this study's purpose was to tease out Kenyans' opinions and views on core aspects pertaining to the rule of law, access to justice and the security situation in the country. 2007 respondents participated in this survey drawn from all Kenyan provinces, social classes, cultural groupings and occupations. Most importantly, consideration for age and gender variables was given.

The majority of respondents in the Steadman Survey were drawn from the Rift Valley (24%), followed by Nyanza and Eastern with 15% each. Another 13% and 12% of the respondents were drawn from the Central and Western Provinces respectively, while 3% hailed from the North-Eastern Province (see Table 1).

*Table 1: Distribution of respondents by province*

Province	No. of respondents	Percentage (%)
Nairobi	161	8
Central	256	13
Coast	179	9
Eastern	310	15
Nyanza	310	15
Rift Valley	483	24
Western	241	12
North-Eastern	68	3
<b>Total</b>	<b>2007</b>	<b>100</b>

In terms of age distribution of respondents, the majority of them were in the 15–17 and 18–24 year-old categories with a combined score of 70% while the rest, up to the age of 44, comprised 30% of the respondents. There were no respondents older than 44 (see Table 2).

Table 2: Distribution of respondents by age

Age bracket of respondents	No. of respondents	Percentage (%)
15–17 yrs	574	29
18–24 yrs	823	41
25–34 yrs	351	18
35–44 yrs	259	13
<b>Total</b>	<b>2007</b>	<b>100.0</b>

Regarding religion, the overwhelming majority of respondents were Christians, accounting for over 90% of the survey sample. These respondents belonged to various denominations, but largely included Catholic and Protestant. Muslims and other religions comprised 7.1% and 2.1% of the sample respectively.

Table 3: Distribution of respondents by religion

Religion	No. of respondents	Percentage (%)
Christian	1823	90.8
Muslim	140	7.1
Other	43	2.1
<b>Total</b>	<b>2007</b>	<b>100.0</b>

The majority (52%) of the survey respondents were married, 38% were single while 6% and 3% were separated and cohabiting respectively. Only a mere 1% did not respond to the question. The majority of those interviewed in this study were women accounting for 51% while men accounted for 49%.

Table 4: Distribution of respondents by gender

Gender of respondents	No. of respondents	Percentage (%)
Men	984	51
Women	1023	49
<b>Total</b>	<b>2007</b>	<b>100.0</b>

According to data elicited in this survey, the overwhelming majority of respondents had at least attained some basic formal education. A very small category of those without formal education accounted for only 0.6% of the sample. The majority of those who had attained formal education had completed at least secondary education (35.2%). Those who had completed primary education comprised 15.9% of the sample while those with some primary and some secondary education accounted for 7.8% and 10.9% respectively. Those with post-secondary education accounted for 27.4%. Among the latter, 19.2% had a tertiary education while 8.2% had received university education (see Table 5).

Table 5: Distribution of respondents by highest level of education

Respondents' level of education	No. of respondents	Percentage (%)
No formal education	44	2.2
Some primary education	157	7.8
Completed primary education	320	15.9
Some secondary education	219	10.9
Completed secondary education	706	35.2
Tertiary college education	385	19.2
University education	165	8.2
RTA	11	0.6
<b>Total</b>	<b>2007</b>	<b>100.0</b>

The results of the survey and the interviews were triangulated with the secondary data to bring out a holistic view of the legal and judicial sector.

## Summary of findings

The study's main findings are that:

- Kenya has made good progress towards realising the rule of law, especially since 2003. This progress is evidenced by a more robust human rights' enjoyment context, the establishment of the Kenya National Human Rights and Equality Commission, the establishment of the National Commission on Gender and Development and the revamping of the Law Reform Commission, among others.
- More recently, the establishment in 2008 of a National Cohesion and Integration Commission and of a Truth, Justice and Reconciliation Commission also illustrate a commitment to realise the rule of law. Kenya has made significant efforts to make the judiciary a true guardian of the rule of law, as evidenced by the 2010 Report of the Task Force on Judicial Reforms and the new constitution, which now needs to be implemented urgently and sustained, with a view to establishing an autonomous and accountable judiciary. There is a need to enhance and sustain the accountability of the executive and the legislature to the people of Kenya, as the new constitution demands.
- Access to justice remains a mirage for most Kenyans. There is a need to enhance access to justice by, for example, using traditional dispute resolution mechanisms as required by the new constitution.

There is a need for a programme that addresses justice sector reforms in view of the provisions of the new constitution, and the proposals of task forces and commissions established to inquire into the activities of justice sector institutions such as the judiciary and the police. We hope that the proposals of this report will inform the establishment and provide terms of reference for such a sector-wide programme.

Binaifer Nowrojee

Executive Director

Open Society Initiative for Eastern Africa

# **Part I**

## **Kenya Justice Sector and the Rule of Law**

Discussion Paper



# Introduction

The justice sector in Kenya has been the subject of major reform efforts in recent years. The different arms of the sector have been the subject of intense discussion and there are concrete proposals for reform of the legal and institutional framework undergirding the rule of law, the justice system, the executive, the legislature, the criminal justice system and the Bar. Some of the reform measures have resulted in positive changes in the implementation of the rule of law in Kenya since the installation of a new government with a reforming agenda in 2003. This is evident in, among other measures, the establishment of the Kenya National Commission on Human Rights and the National Commission on Gender and Development, as well as the revamping of the Law Reform Commission. Yet the National Rainbow Coalition (NARC) government under President Mwai Kibaki soon fell away from its reforming commitments, and by the end of its first term many promises for change had not been implemented.

The 2007–2008 post-election crisis in Kenya gave the law reform agenda a significant impetus. The traumatic events witnessed during the crisis demonstrated a real need for the evaluation and overhaul of fundamental institutions of governance. Above all, the inability of the system to resolve the electoral disputes through a legal process re-emphasised the need to transform Kenya's justice system and make it genuinely independent of political interference. Two commissions of inquiry with international representation – on the post-election violence and on the election management system itself – highlighted issues of the rule of law and impunity for abuses in their recommendations. The reinstated government of President Kibaki realised, despite – or because of – its weak and contested mandate, that it must become more serious about implementing the initial reforming agenda with which it had entered office in 2003.

Above all, the post-election crisis forced the government to return to its commitment to complete Kenya's long-standing quest for a new constitution. This time, a fresh review process culminated in the endorsement of a new constitution by more than two-thirds of Kenyans in the referendum held on the 4 August 2010. The new constitution includes many important reforms as well as the symbolic and actual opportunity to make a new start in enshrining respect for the rule of law. With respect to the justice sector, key reforms contained in the constitution include:

- Inclusion of the rule of law, equity, social justice, inclusiveness, equality, human rights and non-discrimination among the national values and principles of governance binding all state organs, state officers, public officers and others when applying or interpreting the constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions.

- The anchorage of a revamped Kenya National Human Rights and Equality Commission with an expanded mandate.
- The specification of leadership and integrity requirements for public officers which can be used to stem impunity and disregard for law by the executive, legislature and the judiciary.
- The right to fair administrative action to enable citizens to participate in, and hold to account, governmental decision-making processes.
- Measures for greater independence of the judiciary including re-organisation, financial and operational autonomy and a revamped Judicial Service Commission.
- The re-organisation of the policing agencies and the establishment of the National Police Service Commission as a constitutional commission.
- The anchorage and elaboration of the rights of persons who are arrested, detained, imprisoned or held in custody.
- Enhancing the objectivity and accountability in investigations and prosecutions by assigning the state's powers of prosecution to the office of the Director of Public Prosecutions (DPP).
- The anchorage of access to justice and broadening of avenues for dispute resolution through alternative means such as reconciliation, mediation, arbitration and traditional dispute resolution.

However, for these important constitutional principles to translate into a concrete realisation of the rule of law ideal, the government needs to pass enabling legislation and put in place adequate administrative mechanisms to address a number of issues and align them to the new constitutional dispensation. Some of these include:

- The ratification of key international and regional human rights instruments that have not been ratified.
- The establishment of legislative and administrative mechanisms for realising the objectives of human rights treaties and implementing the rulings of regional courts, such as the African Commission on Human and Peoples' Rights.
- The enactment of the Kenya Law Reform Commission Bill into law as soon as possible to give the Commission operational autonomy and enable it to discharge its role in law reform and execute the huge mandate it has under the fifth schedule of the constitution.
- The need for exploration of customary or informal systems of criminal justice, because in some parts of Kenya, these are very prevalent and have been resilient despite efforts over the years to eradicate them. They should be allowed to operate to the extent that they are participatory, accountable, non-discriminatory and are not inconsistent with the constitution and any other written law.
- The establishment of a national legal aid scheme to enable more Kenyans to access justice given the levels of legal rights awareness and costs of legal services.
- There have been many proposals affecting actors in the legal and justice sector. The changes needed in these sectors for improved effectiveness and to support the attainment of the rule of law are known. The problem is implementation and follow-through. This raises the need to catalogue the proposals for change over time and in



the new constitution and track these reforms over time in the police force, the judiciary and other actors in the sector. The tracking should go beyond ‘ticking boxes’ on what has been done to linking the reforms to improvement in the attainment of rule of law:

- There should be synergy between the different legal and judicial sector actors to ensure that reforms are carried out holistically.
- Research, training and capacity building are critical in moving from the old constitutional dispensation to the new.

## 1. Consolidating the legal and institutional framework to advance rule of law principles

### A more effective domestication of international law

Kenya has ratified most of the important international and African human rights treaties, most of them without a great delay from the time when they were adopted by the relevant international bodies. Nonetheless, key international and regional human rights instruments need to be ratified by the government, including the Protocols to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the ‘Maputo Protocol’) and on the Rights and Welfare of the Child.

In line with the common law tradition, Kenya applies the dualist approach to international treaties, which does not have direct effect in domestic law and require implementing legislation. Since different legal norms apply, including customary law and international law provisions on gender equality for instance, some have remained unimplemented despite Kenya ratifying the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The provisions of the new constitution offer some respite but the period before implementation will leave a window open for gender discrimination.

The government has also in some cases taken deliberate action to domesticate treaty obligations by enacting new laws. Examples include the Children’s Act of 2001, the Persons with Disabilities Act of 2003 and the HIV/Aids Prevention and Coordination Act of 2006.

Kenya has been slow and irregular in following the reporting procedures related to the international human rights treaties to which it is a party; though this has improved in recent years. For example, after submitting its initial report on the International Covenant on Civil and Political Rights to the Human Rights Committee in 1979, due in 1977, it then submitted its next report (consolidating the second, third, fourth and fifth reports) only in 2004. The next report was due in 2006 and is yet to be submitted. Kenya has so far failed to submit any report to the Committee Against Torture despite acceding to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997, which obliged it to submit reports at intervals of four years from 1998. The report to the Committee on Economic, Social and Cultural Rights submitted in 1992 was rejected by the Committee for being too scanty and not following the established guidelines, and then only resubmitted in 2007. Kenya submitted its first report to the African Commission on Human and Peoples’ Rights in 2006, combining all overdue reports into one.

The government has taken measures to enable it to improve its performance, including the establishment in 2002 of an inter-ministerial committee on human rights reporting obligations, whose responsibility is to prepare and produce country reports on human rights treaties. The membership of this committee includes non-governmental organisations (NGOs). In addition, the government has been consulting stakeholders such as civil society organisations working on human rights in the process of preparing its reports. This has improved the quality of the reports as more people are involved bringing in a broad range of competences.

Kenya has been the subject of several complaints to the African Commission on Human and Peoples' Rights (ACHPR), for being in violation of its obligations under the African Charter. However, the government has a poor record of implementing the rulings of the Commission. In the *Ouko* case, for example, the government failed to comply with the ruling that it 'facilitate the safe return' of John Ouko, a student union leader who was forced to flee the country after being subjected to arbitrary arrest, detention and acts of torture.

A more recent complaint is the *Endorois* case, involving violations resulting from the displacement of the Endorois, an indigenous community, from their ancestral lands without adequate compensation. In its decision, the ACHPR found that the government was in violation of the rights to freedom of religion, property, health, culture, and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered. The government is yet to comply with this ruling.

## Strengthening the independence of the Kenya Law Reform Commission

The Kenya Law Reform Commission (KLRC) has the mandate to keep all the laws of Kenya under review to ensure their systematic development and reform. The KLRC works with other sectors of society to identify areas that need legislative reform, they then conduct research and recommend appropriate legislative action. The KLRC has been an important actor in the push for reform, including the development of the Children Act of 2001 and the Sexual Offences Act (SOA) of 2006, both milestones in the protection of the rights of women and children. These new laws offer useful lessons both to the KLRC and to civil society organisations on successful reform efforts, including the importance of sensitising important constituencies through an effective media strategy and engaging in negotiations and displaying willingness to compromise.

However, the KLRC has also faced constraints on its work due to a lack of operational independence. The body responsible for approving the KLRC's work programmes (the Attorney General) is different from the body responsible for controlling the funds allocated to it in the government's budget (the Ministry of Justice and Constitutional Affairs). The draft Kenya Law Reform Commission Bill of 2006 would remedy this by providing the KLRC with full institutional independence and the operational autonomy it requires. It should be enacted as soon as possible to enable the KLRC to execute its task of law reform as required by the new constitution. The implementation of the constitution requires the enactment of new laws as well as a review and revision of others. A robust operational context for the KLRC will greatly facilitate the performance of these tasks.

## 2. Promoting mechanisms that guarantee greater independence of judges

The lack of independence of the judiciary has historically been one of the greatest threats to the rule of law in Kenya. The lack of trust in the courts directly contributed to the post-election violence of 2007/2008, and has undermined the rule of law in all aspects of national life.

The 1963 constitution gave the president complete discretion in the appointment and dismissal of the Chief Justice; while the Chief Justice has had extensive administrative powers over the functioning of the courts. Together, these powers have undermined the legitimacy of the judiciary and the decisional independence of judicial officers. As a result, many judicial officers are insecure in their positions. The system for appointing judges has also been open to abuse, since it establishes no standards or criteria for vetting candidates. Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Although the constitution required courts to be independent and impartial, there were no constitutional provisions on immunity of judicial officers, thus judges and magistrates were not ensured immunity from executive-branch pressure. Judges and magistrates who acted with independence and impartiality to the executive's detriment have been penalised by transfers to outlying stations.

The constitution also failed to establish due process mechanisms to ensure that the process of removal was transparent, impartial and fair. The importance of this issue was highlighted by the Integrity and Anti-Corruption Committee established in 2003 to investigate corruption in the judiciary (the Ringera Committee). While the purge of judges that followed the Ringera Committee's recommendations was partially welcomed, and it fulfilled the technical letter of the 1963 constitution's requirements for dismissal of judges, it was at the same time heavily criticised for failing to respect basic due process and therefore for implicating some judges who were not in fact guilty of corruption. Some judges were not even informed of the action that was to be taken against them.

These various problems were identified by the 2010 Report of the Task Force on Judicial Reforms. This latest task force, chaired by a judge of the High Court and with membership drawn from the judiciary, civil society and government, highlighted critical changes that needed to make the judiciary more effective in executing its mandate. These include: restructuring of the Judicial Service Commission; need for merit-based appointment of judges and other judicial officers; need to address the backlog and delay of cases; need to improve the administration of the judiciary; need for a performance management system for judges and judicial officers; need for ethical conduct and prevention of corruption in the judiciary; need to promote human rights and access to justice; improved access to information and communication; and improvement of terms and conditions of judicial officers.

The new constitution implements many of these recommendations. It seeks to enhance judicial independence and accountability by dispersing judicial authority, giving the judiciary autonomy from the executive, establishing transparent and accountable mechanisms for the

appointment of judges, and circumscribing the power to dismiss judicial officers. The 2010 constitution provides for the re-establishment of the Judicial Service Commission, with a new mandate to 'promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice', including by recommending judges for appointment to the president. It also provides for due process in the removal of judges, providing very limited grounds and requiring the adoption of legislation within one year to regulate the use of these powers. The transitional provisions in the sixth schedule to the new constitution require legislation within one year that will establish mechanisms to vet existing judges and magistrates and remove those who are found not to be fit for office. The sitting Chief Justice must vacate his office and may either retire from office or, subject to vetting, continue to sit on the reconstituted Court of Appeal.

These measures are comprehensive and necessary as an effort to restore the legitimacy of the judiciary in the perception of citizens. They provide the details for which the constitution sets the framework and should therefore be seen as part and parcel of the reform package.

The independence of the judiciary is further threatened by its poor performance due to the poor conditions of service, poor funding and severe shortage of qualified personnel. These problems contribute both to poor quality decision-making and also to the backlog of cases in the courts. The issue of resources will need to be urgently addressed by the new Chief Justice, playing an advocacy role with the Minister for Justice and Kenya's development partners for increased support to the judicial system.

The constitution requires the reconstituted Judicial Service Commission to have regard for, among other things, the promotion of gender equality in the judiciary, something that has been notably lacking from the previous commission. The 2010 Task Force found that females were grossly under-represented in the justice sector. There were no women designated in the Chief Justice or Chief Court Administrator posts, neither were they present in the Court of Appeal as judges or as Kadhis. There is a higher, but still insufficient, ratio of women in the magistracy. An affirmative action legislative amendment was rejected by Parliament in 2007, although it was followed by a presidential directive that at least one-third of all appointments to public office should be of women. The Judicial Service Commission did not appear to have any policy to actively increase the number of qualified women in the judiciary.

As the appointment procedures for judges are reviewed, including by the adoption of new legislation on the judiciary, the appointment of more women to senior judicial positions should be a priority. If the Chief Justice is a man, the Deputy Chief Justice should be a woman. It is encouraging that the JSC has ensured gender representation by requiring, for instance, that of the two advocates representing the Law Society of Kenya, one should be a man and the other a woman. This is also the case with the two representatives of the public. One of the factors that may keep women from the judiciary is the failure to make conditions conducive for them to perform roles in public and in private as wives and mothers. For instance, frequent transfers are likely to affect women who tend to be the anchors of homes and carers for their families. Such transfers may affect children's learning and discourage women from judicial service.

Finally, there is a need to review the powers of the judiciary to impose penalties for contempt of court. While in theory a protection designed at ensuring respect for the judicial system, the

courts have in practice used the power to punish for contempt to squelch legitimate public criticism of judicial conduct. The *Republic v. Gachoka and Another* case in 1999 relating to allegations of corruption in the judiciary illustrates this problem. Here, the Attorney General had instituted contempt of court proceedings against the respondents for publishing articles in the *Post of Sunday*, alleging that they had contravened the sub judice rule by commenting on an ongoing case, and that they were scurrilous and malicious attacks on the character of the judiciary and the Chief Justice. The new legislation on the judiciary envisaged by the constitution should also regulate the use of this power and ensure that punishment for contempt of court is only imposed in such a way that it does not prevent reporting in the public interest on the courts.

### 3. Breaking a long tradition of government disrespect for the rule of law

Successive governments in Kenya have circumvented the prescriptions of law when they found them to be a hindrance to the attainment of their short-term political interests. The result has been a self-destructive culture of impunity and lawlessness, as the law has ceased to be authoritative. The current government has not been exempt from this disregard for established rules and procedures. In 2003 for instance, the Minister for Tourism and Information defied a court injunction restraining the government from taking over a building whose ownership was in dispute. The same government minister subsequently defied a court order requiring him to disband a committee he had constituted to investigate the affairs of a radio station. Again in 2003, the Minister for Local Government defied a court order which sought to prevent him from revoking the nomination of a councillor of the Mombasa City Council. The same minister defied a court order quashing the nomination of an individual to serve in the Kisumu City Council. No action was taken against these defiant government ministers.

Parliament has also eroded the separation of powers by passing laws that give its members executive powers and control over significant budgets. The Kenya Roads Board (KRB) Act of 1999 established a 'Districts Road Committee' for every district and provided that all MPs from the district be members of this agency of government, thus conferring executive powers on legislators. This was unconstitutional as it subverted the separation of powers doctrine by giving legislators the power to enact and enforce the laws. The Constituency Development Fund (CDF) Act 2003 gave MPs the power to expend public resources and account to Parliament for such expenditure. In both cases Parliament did not take steps to amend such laws despite the High Court's rulings, in 2000 and 2005 respectively, that they are unconstitutional. Both laws should be reviewed to ensure that they conform to the new constitution, and in particular to bar MPs from administering funds that should be the province of the executive.

The new 2010 constitution includes within its bill of rights a new provision on 'fair administrative action', stating that 'every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair' (article 47). It requires legislation to be enacted within four years that would give force to this right, in particular by allowing for review of all administrative action by a court or tribunal. Applying to all public officials and

agencies, this law would establish principles and procedures for controlling governmental power to ensure that public authorities do not abuse the powers granted to them by the constitution and acts of Parliament. It should regulate the procedures and acts of public administrators by, for example, guiding the initiation of investigations of complaints against public functionaries, and provide for remedies and applicable orders directing parties to conform to governing statutes or rules. It should also entrench the principles of natural justice to ensure fairness and procedure and reasonableness in decision-making.

Legislation on fair administrative action should be supplemented by stronger judicial action on the failure, neglect or refusal of public officers to comply with court orders. In the well-known *Kisya Investments Ltd v. Attorney General & Another* of 2005, the High Court has adopted an interpretation of the Government Proceedings Act which precludes courts of law from issuing orders 'for enforcing payment by the government of any money or costs'. This precedent should be directly addressed by the legislation on fair administration action requiring courts to interpret the Government Proceedings Act and other relevant statutes in a manner that fulfils the broad intentions of the new constitution, especially government respect for the rule of law.

The Kenyan government has, since independence, made frequent use of the appointment of commissions of inquiry under legislation that is similar in many Commonwealth countries. Such commissions are chaired by a judge or former judge, have quite broad powers of investigation, and are appointed in response to public demand for action on a particular issue. Since independence, successive presidents have established about 25 commissions of inquiry. Though they may produce useful reports and recommendations, commissions of inquiry are in many cases established as a means of containing public anger where it appears the executive does not intend to implement their recommendations: the president is under no obligation to make the reports of such commissions public nor to implement their findings. Moreover, since successive presidents have tended to appoint sitting judges as heads of commissions of inquiry, these judges are drawn into political controversies, while their determinations as members of the commission may then be challenged in courts of law. As the Bosire Commission observed, 'judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined'.

There is a need for review of the Commissions of Inquiry Act, including the provisions surrounding appointment of sitting judges as commissioners in non-judicial processes. Commissions of inquiry are a tool used by the executive and therefore tend to be political in nature. They are therefore not in the realm of judicial decision-making and can open judges who sit on them to situations of conflict of interest if from the evidence, triable issues are raised. Moreover, if matters raised in the commission are subjected to judicial review, there is the likelihood of a High Court judge sitting in judgment over a matter overseen by a Court of Appeal judge as the chair of the commission. In the circumstances, and to maintain the decorum of the court, judges should not serve on commissions of inquiry. Such exemption is important for enhancing the independence of the judiciary. In addition, new legislation should enhance the autonomy, transparency and accountability of commissions.

## 4. Transforming a largely unfair criminal justice system

There has been a rapid increase in the levels of crime in Kenya over the last two decades. These high crime levels have been attributed to a number of factors, including rapid growth in urban populations coupled with acute housing shortages, declining economic prosperity, rising urban unemployment, the collapse of municipal institutions of governance, the emergence of vigilante groups and perceptions of impunity among criminals. The Kenya Police Crime Report notes the current threat to national security posed by organised criminal gangs like the Mungiki and the sustained proliferation of firearms from countries such as Somalia and Southern Sudan. Police and prison officers work under deplorable conditions and terms of service, which may predispose them toward oppressing the public they are supposed to serve.

The criminal justice system is characterised by wide but unregulated discretionary powers whose exercise often leads to the criminalisation of poverty and the persecution of citizens. A majority of convicted prisoners are petty offenders, who could have been dealt with other than by imprisonment. As of 31 May 2009 for instance, out of the 34 500 convicted offenders, 18 956 prisoners had been sentenced to less than three years imprisonment. The existing policy and legal framework has served to ensure that public security agencies only serve the interests of the political regime in power and the *samaki kubwa* ('big fish'), the influential top few stakeholders, to the detriment of the realisation of the rule of law for the majority.

The Kenya Police Force (KPF) is understaffed and the officers are not adequately equipped in terms of resources to effectively perform their duties. The current 1:850 ratio of police officers to citizens falls short of the UN recommended ratio of 1:450.

A number of critical reform measures have already been initiated, while the new constitution should provide a firm anchorage for these reform measures. Nevertheless, there is a need for many more measures to be taken in order to supplement the constitutional guarantees of a fairer criminal justice system.

### Improved intelligence and strategy on crime

One of the key factors that aggravate the deficit of effective criminal justice relates to the poor quality of information about the crimes that are committed. There is little existing information beyond official records produced by the criminal justice administration, which are hardly made available to the public. These records are in any event not conclusive since many crimes are never reported to the police.

Currently, several factors have contributed to the failure to report crimes. First, the reluctance with which the police handle certain cases discourages the reporting of crimes. Some cases are normally labelled as 'unfounded' claims even where investigations have not been instituted. For example, domestic violence cases are trivialised and offenders are not always charged when victims report them to the police. Secondly, the lack of adequate resources and infrastructure impacts adversely on the efficiency of the police in responding to crime. For example, sexual offences require immediate medical examination and collection of evidence for a conviction to

be made possible. However, some victims do not have easy access to police stations and hospitals to obtain the required evidence in good time. The longer this takes the harder it is to obtain sufficient evidence warranting a conviction. Low conviction rates thus discourage victims from reporting such crimes.

These problems of low reporting rates are shared with many countries, even the richest. Nevertheless, the Kenyan government and police could improve their response on the crimes that most affect ordinary people by commissioning independent victim surveys to identify those crimes that are most common and of most concern, and developing policing strategies designed to address those problems.

## Improving policing

Policing in Kenya is mainly the preserve of the Kenya Police Force (KPF). The Police Act also provides for an Administration Police Force (APF), whose function is to ‘assist the provincial administration in the exercise of their duties’.

Policing in Kenya has been characterised by poor performance and abuse. At the most egregious level, the KPF has often been deployed as an instrument for the political repression of the citizenry, as pointed out in the report of the Commission of Investigation into Post Election Violence (CIPEV).

At the level of day-to-day policing, KPF officers frequently arrest and detain suspects they do not intend to charge with any particular offences, especially through a practice known as ‘the Friday Collection’. They make arrests on Friday evening, solicit bribes from those arrested and tell those who refuse to pay that they cannot have access to a lawyer or magistrate until Monday. Police officers have been accused of using firearms indiscriminately. A 2009 report by the UN special rapporteur on extrajudicial, arbitrary or summary executions, Prof. Phillip Alston, concluded that extrajudicial killings in Kenya appeared to be ‘widespread and some of the killings are opportunistic, reckless or personal’. Police officers also commit or participate in criminal activities. Between 2001 and 2004, 312 police officers were arrested for being involved in violent crime. Further, they are often heavy-handed, insensitive and use excessive force in their dealings with citizens. The international corruption watch organisation Transparency International has consistently ranked the KPF as the most corrupt national institution in Kenya.

The key legislation governing the police, the Police Act of 1960 (revised in 2002) and the Police Standing Orders of 1962 (revised in 2001) adopted under the Act, are out of date and inadequate. For example, the Commission of Inquiry into Post-Election Violence argued that their main weaknesses were: unclear responsibilities and confused lines of accountability; constraints around the ability to place the right people in the right jobs; an inadequate system for managing staff performance and discipline issues; little guidance to work with partner agencies, domestically or internationally; and few supports to enable the use of modern policing tactics.

To address these problems, the government should carry out a comprehensive vetting of police staff, as recommended by the National Task Force on Police Reforms, appointed in 2005 to look into these issues. The institutional and legislative framework that has been promoted thus far for the vetting process is not conducive to promoting positive codes of conduct among



the staff of the Kenya Police Force and the Administration Police. This framework needs to be revisited and specific legislative instruments must be calibrated in order to ensure stricter oversight over the forces and also, importantly, to require the training of these staff members and to create clear legislative guidance on how to govern the vetting process. In particular, policing needs to be democratised by sharing policing information with the citizenry, and by giving them a voice and an influence in the decision-making process. Establishing civilian oversight bodies constitutes one way of democratising the policing decision-making process. The establishment in September 2008 of a Public Oversight Board was a giant step that acknowledged the need to develop accountability mechanisms for the KPF. But the Board was not yet in operation and its secretariat was yet to be set up at the time of writing this report. Moreover, the setting up of this Board was not fully expected to address the underlying issues stemming from the fact that the KPF was established, and continues to be based, upon a regime that does not demand police accountability.

The National Task Force on Police Reforms also recommended that the conditions of service and the welfare of police officers should be improved. Among other things, the Task Force has asked the government to: improve the remuneration and allowances of police officers; take the interests of family members into account when transferring police officers; provide medical and life insurance cover; and improve the quality of their housing and accommodation.

After receiving the report of this Task Force, the government established a Police Reforms Implementation Committee, which is currently preparing draft laws on civilian oversight of policing, administration of policing and regulation of private security providers for consideration by Parliament.

## Appropriate sentencing

The current practice in sentencing convicted criminals is largely discretionary and highly variable, while it does not provide adequate measures for non-custodial sentencing in the case of petty offences. Section 35 of the Penal Code which addresses conditional discharges merely hints at sentencing principles and directs the judicial officer to take into account the circumstances of the offence and the character of the offender. Where only the maximum penalties are provided, but not minimum, the judicial officers have wide discretionary powers on the appropriate sentences. General sentencing principles are well-developed in case law in Kenya, but they should be reviewed to bring them up-to-date and make sentencing more transparent. Comprehensive sentencing guidelines should be established either in statutory or policy documents.

Where an offender has been convicted, the law allows courts to make probation orders in place of custodial sentences. Furthermore, the court is entitled to commit offenders convicted of an offence punishable by imprisonment for a term of up to three years to perform community service. But courts have generally been reluctant to give non-custodial sentences, although this trend is now beginning to change. Nevertheless, the use of non-custodial services demands the enhancement of the capacity of the Probation Department to administer such sentences. In addition, the community service orders programme should take into account the need to rehabilitate offenders by, for example, counselling offenders.

## Increasing the independence of the prosecution system

The new constitution seeks to enhance objectivity and accountability in investigations and prosecutions. Section 26 of the old constitution vested in the Attorney General the power to decide if and when an individual should be prosecuted for a criminal offence. Further, it gave the Attorney General the power to take over and continue criminal proceedings that had been instituted or undertaken by persons or authorities, and to terminate any prosecution. This power was often abused, and resulted in individuals being prosecuted, only for charges to be dropped along the way. The failure to regulate this power resulted in the law being used to persecute innocent citizens, to the detriment of the legitimacy of the criminal justice system. In the context of human rights violations and economic crimes, this power was often applied selectively, with the result that the perpetrators of these crimes were hardly ever punished.

In the new constitution, the task of exercising the state's powers of prosecution will now be undertaken by the office of Director of Public Prosecutions (DPP) (article 157). The primary functions of the Attorney General will be to give legal advice to the government and represent it in legal proceedings (article 156). It is worth noting that the new constitution requires the current Attorney General to vacate office not later than 12 months after it takes effect. This should be seen as a vetting exercise, given that the Attorney General is considered to be 'not just complicit in, but absolutely indispensable to, a system which has institutionalised impunity in Kenya', according to the 26 May 2009 Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. The DPP can only take over a criminal suit with the permission of the person or authority who instituted it. In addition, the DPP can only discontinue a prosecution with the permission of the court. And to preclude the abuse of the power to prosecute, the new constitution requires that its exercise 'shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process'.

## Regulating informal systems of criminal justice

The deficiencies of the criminal justice system have led to the emergence of private modes of security provision. Among the poor, vigilante groups have emerged to fill the vacuum created by the state. And among the rich, there has been a proliferation of corporate security. A culture of 'mob justice', which involves the lynching of criminals by the public, has also developed. Thus in effect, the public have taken the law into their own hands due to the perception that the police and the courts are unable to guarantee justice. The dark side to this has been the resulting manifestation of vigilante groups. Examples include the Mungiki, Taliban, Jeshi la Mzee, Baghdad Boys, Kagio, Kaya Bombo Youth and Sungu Sungu. Although these groups often engage in criminal activities, sections of the citizenry perceive them to be an appropriate response to crime in many cases, in particular when they operate to curtail the criminal activities of other vigilante groups. In some cases, moreover, vigilante groups are touted as a form of community policing, as they consult with police officers in their areas of operation.

## 5. Enhancing mechanisms for a broader access to justice

Access to justice is quintessential to the realisation of the rule of law ideal. Yet many Kenyans remain unaware of their basic rights while the courts are structured in a way that does not facilitate equal access to justice. Court fees are high for an ordinary citizen and for many, legal services are unaffordable. To promote access to justice it is of paramount importance that the government and civil society should establish mechanisms for educating citizens on their rights and assist them in accessing justice.

The government should establish a national legal aid scheme to enable more Kenyans to access justice. Currently, the government provides minimum legal aid which does not cover all people who cannot afford legal services. The state only provides legal aid for persons charged with murder in the High Court, and conditional legal aid for a child offender having no other recourse to legal assistance. The Civil Procedure Act also makes provision for pauper briefs where people who do not have sufficient means may apply to the court to be allowed to sue as paupers. Such applications are however dependent on the availability of lawyers to take up the brief. Most free legal aid and associated clinics are consequently provided by non-governmental organisations to disadvantaged groups of people especially children, women and the poor. However, free legal advice from non-governmental organisations (NGOs) is restricted by the fact that they do not have a countrywide presence. Some NGOs and the Kenya National Commission on Human Rights (KNCHR) offer free legal aid clinics, but the assistance does not extend much further than providing legal opinions. A national legal aid scheme would not only support the efforts of these smaller organisations, but would effectively ensure a nation-wide knowledge of such access as an entitlement, as at present many Kenyans are unaware that they have any rights to legal aid.

In most of the rural parts of Kenya, justice is sought through the use of non-state justice systems such as a council of elders or extended family members, and religious institutions. Cases which are most commonly brought to these institutions include matters to do with land disputes, livestock disputes, marital and domestic matters as well as domestic violence. Some crimes such as assault and sexual violence are also referred to the elders for resolution. Being closer to 'the people', as well as much easier to access, much more familiar and less bureaucratic, the governmental *de jure* recognition of customary systems of justice would be beneficial as a way to increase access to criminal justice for all citizens.

The government should encourage and institutionalise alternative dispute resolution to ease the backlog in courts and ensure expedient resolution of justice, as proposed by the 2010 report of the Task Force on Judicial Reform. Generally there has been no effort to formalise these courts. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process. It is important to note that the 2010 constitution requires the National Land Commission (section 67) 'to encourage the application of traditional dispute resolution mechanisms in land conflicts' and thus the crystallisation of alternative justice methods in a legal sense would indeed be a step forward in the justice sector for increasing access to justice across the country.

The court structure as it is does not afford equal access to justice for all. Most of the courts are found in major towns and at times far from rural areas or vulnerable populations in refugee camps. The 2010 Report of the Task Force on Judicial Reforms noted that in Northern Kenya courts are situated as far as 500km away from the users and that in such marginal areas, there is a dearth of legal service providers. It also pointed out that apart from a shortage of space, there is also a personnel shortage. The staff establishment for the judiciary is 4 681 but there are only 1 456 people in posts. With regard to judicial officers, the total number of magistrates in post is 277 against an establishment of 554; 11 Court of Appeal judges out of an establishment of 14 judges and 46 High Court judges out of an establishment of 70. The Judicial Service Commission should ensure that there are enough judicial officers and in the interim, find innovative ways of ensuring access to justice for all Kenyans. This could be through mobile courts, moving judges and magistrates temporarily from courts with fewer cases to those with a big backlog and reviewing court procedures and processes for faster justice.

The government should also implement the provisions of the new constitution and the recommendations of the report of the Task Force on Judicial Reforms related to access to justice, namely that :

- Physical facilities of courts be made more accessible to persons with physical disabilities and other vulnerable groups;
- Courts administer substantive justice without undue regard to procedural technicalities;
- Rules of procedure of Kadhi courts be developed and enacted to standardise the procedures and practices of the courts; and
- Court rules and procedures are reviewed regularly to ensure that they are efficient and simple.

## 6. Ensuring national accountability of external funding in the justice sector

While development assistance has contributed to the realisation of the rule of law in Kenya, donors continue to set much of the agenda and the conditions for cooperation, even in the context of sector-wide approaches (SWAs), such as the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme in Kenya. Here, there is a concern that donors continue to exert too much influence as they are too involved in the detail of the programmes, which can only work to the detriment of the SWAp objective of ensuring governmental leadership and ownership of development assistance programmes. Furthermore, such donor influence means that the main flow of accountability will continue to be outward, that is from the recipient government and SWAp institutions to the development partners.

By far the most significant concern is the ambivalence of development partners over the use of recipient government administrative procedures and accounting systems. While they acknowledge the need to rely on national procedures and systems, donors are exceedingly reluctant to do so, arguing that these procedures and systems are inefficient and corrupt. As a result, they create parallel structures which only end up undermining national systems. Even

more worrisome, these parallel structures bypass national accountability mechanisms. In the case of the GJLOS Reform Programme, for example, the private firm responsible for procuring goods and services is entirely unaccountable to national constituencies. Thus in order to circumvent this potential threat and enhance the effectiveness of aid in general and in promoting the rule of law in particular, several measures need to be taken.

One such measure could consist of a mandate given to the government to keep an inventory of all development assistance agreements and facilitate public access to those agreements. The GJLOS Reform Programme is an important case to examine in this regard, as it was created to strengthen the capacities of the institutions in the governance and legal sector to enable efficient, accountable and transparent administration of justice. The principal document governing the Reform Programme was a memorandum of understanding (MoU) between the government of Kenya and the development partners. The MoU set out the funding arrangements for the Programme. It provided that most of the development partners would provide funding through a basket fund, the GJLOS Basket Fund, while others would do so on a bilateral basis. Further, the MoU set out the terms and procedures for the joint management, funding, monitoring and evaluation of the Programme. Thus it provided for the appointment of a Financial Management Agent (FMA) to manage both the basket and non-basket funds, through a holding account in a commercial bank. It also gave the government overall responsibility and accountability for the implementation of the Programme. Nonetheless, one of the major shortcomings of this Programme was related to the fact that it has not been sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems have been noted because of the poor linkage between the programme and the Ministry of Finance, where the GJLOS is not well-known or understood.

Perhaps the most important unfulfilled expectation relates to the Programme's efforts to strengthen the government's financial management and procurement capacities. Because the development partners were convinced that the government's financial management and procurement systems are cumbersome and corrupt, they insisted on the appointment of the FMA. In effect, therefore, they created financial management and procurement structures that by-passed the national systems. With respect to financial management, whilst the FMA is contracted to improve the government's capacities, it appears that neither indicators nor a timetable for doing so were provided. The review team thus found no evidence of the FMA proactively identifying financial management capacity gaps and filling them. And a subsequent review conducted some two years later reported that the participating government ministries and departments were concerned about poor communication, procurement delays and – perhaps most importantly – no real demonstrable evidence of financial capacity building. Furthermore, bypassing the government's financial management system is likely to weaken the government's financial management capacity since disbursements take place outside of the governmental financial system. A vicious cycle – in which the government's financial management system is bypassed and weakened thereby justifying the continued demand for an FMA – is thus formed. It is, however, encouraging that a consensus seems to be emerging among the development partners towards moving to an arrangement under which the Programme's finances are managed by the Ministry of Finance through a special account. Thus

this Programme is an important marker of the real necessity for the government to enact a law to govern the administration of all forms of aid as a way to not only streamline and make more efficient the funding and consequently the administrative process, but it would also increase the accountability of the institutions to the public.

The government should subject the private firms appointed as the FMAs of sector-wide aid programmes to the requirements of the Public Procurement and Disposal Act of 2005. This Act gives standing to ‘any person who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity’. This need was further reinforced by the experiences and bottlenecks of the GJLOS Reform Programme which illustrated the need for a national law on the administration of aid, establishing clear institutional and accountability frameworks, and also structuring the participation of all stakeholders. This would therefore make the process more transparent and reduce the available channels for corruption since this legal mechanism would attenuate the lines of accountability. Moreover, it would in effect create a framework through which the local electorate can hold such governments to account if aid funds have not been used for their intended purposes, further meaning that the electorate could demand accountability directly from the development partners too.

## 7. Conclusion

Most of the recommendations in this paper expand on and are meant to facilitate full implementation of the proposals of the 2010 Report of the Task Force on Judicial Reforms. They also stem from the legal guarantees enshrined in the new constitution adopted in the 4 August 2010 referendum. The independence of the judiciary is key to the implementation of these recommendations. It is also crucial to maintain a systematic process that enables the tracking of the implementation of the proposals of the Report of the National Task Force on Police Reforms, and the provisions of the new constitution on the reform of the criminal justice system. The implementation of these recommendations would also require an adequate tracking of the enactment of legislation required for the implementation of the new constitution, and auditing existing legislation (including subsidiary legislation) to ensure that they adhere to the values and principles of the new constitution.

Civil society groups should participate in and monitor the implementation of all these reforms, including the drafting of the laws needed to transform the justice system. Civil society actors, such as NGOs working on human rights, have played an influential role in getting the government, as well as the concerned institutions, to meet their obligations to date. Their ongoing involvement will be crucial to the advancement of the implementation process.

# **Part II**

## **Kenya Justice Sector and the Rule of Law**

Main Report





# 1

## Justice and the rule of law ideal: Theory and practice

As we understand it, the term ‘justice’ denotes what is right, fair, appropriate or deserved in social relations. Typically, the need to determine what is right, fair, appropriate or deserved arises in the context of competition for nature’s scarce resources. In the absence of mechanisms to determine what is justly due to one human being in relation to another human being relative to a given resource, it can be expected that ‘the natural lawlessness of human beings’ will lead to the strong trampling over the weak. This is the basic reason why human beings need the institution of law. As an instrument of social control, law establishes principles and procedures that, by facilitating the equal treatment of human beings, will hopefully ensure that the scarce resources of nature are shared fairly and legitimately, thereby enabling social stability. Where law leads to fair and legitimate outcomes in this manner, a claim can then be made that law has delivered justice.

It is this stabilising function of law that is expressed in the popular concept of ‘rule of law’. From this viewpoint, the justice sector comprises the institutions whose task it is to deliver the rule of law. In this report, we use the term ‘institutions’ broadly to denote the established rules, norms, practices and organisations that provide a structure to human actors to deliver the rule of law. Rule of law organisations include the executive, the legislature, the judiciary, the legal profession, prosecution services, prison services, civil society actors, traditional and other non-state justice systems and development partners. In Kenya, the justice sector comprises the following institutions, which assist in the administration of justice in one way or another: the judiciary, State Law Office, police, Prisons Department, Children’s Department, Probation and Aftercare Service Department, Law Society of Kenya, Kenya School of Law, university faculties or schools of law, non-governmental organisations (NGOs) and civil society organisations.

While a claim can therefore be made that the primary task of the justice sector is to deliver the rule of law, it should immediately be appreciated that the terms ‘justice’ and ‘rule of law’ are problematic concepts. Moreover, whether law functions to ensure or facilitate justice is a controversial issue. Nevertheless, it is important for us to understand these two concepts and their linkages if our study of the justice sector and the rule of law in Kenya is to be a useful tool for policy advocacy.

## A. The rule of law ideal

The essence of the rule of law ideal is that ‘people ought to be governed by law’.<sup>1</sup> For this goal of ‘government by law, not by men’ to be realised, the rule of law ideal requires the establishment of laws that meet a number of criteria.<sup>2</sup> First, law must be universal or general, in the sense that its prescriptions must be addressed to all citizens, and not to particular individuals. Second, law must be promulgated to its subjects, whose conduct it can only guide if they know of its existence. Third, law must prescribe modes of behaviour prospectively and not retroactively. Fourth, the prescriptions of law must be clear so that its subjects understand how they are required to behave. Fifth, the prescriptions of law must not be contradictory. Sixth, the prescriptions of law must not require conduct that is impossible for the subjects to perform. Seventh, the prescriptions of law must be stable over time. That is, while changes in the law are a good thing, such changes must not be too frequent since many of the actions that law seeks to regulate ‘require advance planning, preparations and a certain level of guaranteed expectations about the future normative environment’.<sup>3</sup> Finally, the prescriptions of law must be applied consistently, in the sense that there must be ‘considerable congruence between the rules promulgated and their actual application to specific cases’.<sup>4</sup> This criterion of the rule of law is particularly important, as it implicates the day-to-day and practical application of law.

For the rule of law to be realised, there must be suitable ‘application mechanisms’, including an independent and professional judiciary, easy access to litigation and reliable enforcement agencies’.<sup>5</sup> Its realisation also depends on access to power and economic resources, and this explains why the rich and the powerful tend to have better access to the rule of law.

Where these criteria of the law are observed on a day-to-day basis, law’s promise of justice can be attained. But where they are not observed, this promise is unlikely to be realised. A question then arises as to why these noble criteria may not be observed. In this regard, the rule of law should be seen as an empty vessel that can be filled with good or bad laws. In order for law’s promise of justice to be attained, the rule of law vessel needs to be filled with the values of a society, including its customs, culture, morality and religion. Looking at the rule of law from the perspective of the law’s first function discussed above, it then becomes important to appreciate that normative ordering in any given society works best where there is a desire among its members to observe the rules and consider it to be in their interests to do so. Law therefore claims and attains authority not because it is backed by threats of punishment against those who

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<sup>1</sup> Marmor (2003: 2).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* at 8.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

do not abide by its prescriptions, but because it commands the respect of the members of society. In any case, threats of coercion do not work particularly well where lack of respect for law is widespread. In such cases, the coercive apparatus of the state is often stretched beyond capacity, and anarchy tends to take over.

In this regard, it is also important to see the rule of law as a culture that mandates adherence to principles and procedures. Typically, law achieves its results by establishing the principles and procedures that need to be followed by the persons to whom it is addressed. For example, where the legislature proposes to make new laws, the culture of legality requires it to follow certain uniform procedures. Similarly, the police are required to adhere to certain procedures in conducting their investigations and prosecuting accused persons. And in order to facilitate order on the roads, motorists and pedestrians are required by law to observe the rules of the road whether or not someone is watching over them. Accordingly, procedures and processes facilitate the proper and uniform application of law so that, for example, its prescriptions may be predictable and stable over time.<sup>6</sup> More significantly perhaps, consistent procedures and processes preclude anarchy, which is the very antithesis of the rule of law. Thus, if Parliament does not follow its own law-making procedures, then social ills such as corruption are encouraged. Likewise, if motorists and pedestrians do not follow the rules of the road, then chaos will prevail on the roads. Whenever rules are not applied consistently, people begin to lose faith in their normative character or ability to regulate behaviour. The cumulative effect of such a lack of a culture of respect for the rule of law is that lawlessness begins to be entrenched in society. Thus, while the culture of legality may not always produce justice, it is an important attribute of the rule of law in so far as it facilitates fidelity to law and, consequently, order in society.

Conversely, it also needs to be appreciated that dogmatic adherence to the dictates of law may not be desirable. In particular, society should not be held captive by rules of procedure which hinder the attainment of justice. There is thus a need to constantly review rules of procedure to ensure that they lead to desired outcomes and do so in a way which is not only efficient but also fair.<sup>7</sup> Again, where people begin to perceive legal procedures and processes as being too rigid, they may begin to lose faith in the law.

In either scenario, therefore, the law must inspire the confidence of the citizenry. As DJ Galligan has observed, '[c]onfidence that the law has been properly applied or a discretion reasonably exercised, depends to a significant degree on confidence in the procedures as the means to those outcomes'.<sup>8</sup> For Galligan, confidence is fundamental to the institution of law since 'legal processes are social processes where the object is to reach a sound practical judgment about a matter in issue; a sound practical judgment for its part is one which can be explained and which can be seen to be rational and reasonable, so that at the end we have a confidence in it'.<sup>9</sup> The significance of public confidence in the law is also captured in the oft-cited expression that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.<sup>10</sup> A basic idea behind this expression is that established procedures, which have been tried and tested

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<sup>6</sup> Galligan (1996: 5).

<sup>7</sup> Ibid. at 6.

<sup>8</sup> Ibid. at 66.

<sup>9</sup> Ibid.

<sup>10</sup> *Republic v. Sussex Justices ex parte McCarthy* (1924) 1 KB 256.

sufficiently, form a practical guide for the public to determine whether ‘the right or best outcome has been reached and justice actually done’ in the particular case.<sup>11</sup>

Typically, whether or not a particular country has the rule of law is measured by the extent to which its legal system possesses the criteria outlined at the beginning of this chapter. In the main, these criteria are formalistic and say little about whether the legal system in question provides justice to all. This approach to the rule of law, which largely perceives law as neutral rules, fails to address a number of fundamental questions. For instance, who makes the prescriptions of law? Is the process of making law inclusive and to what extent? How is the polity in question organised? How accessible are the political processes in the polity? What are the political power and economic resource dynamics in the polity? Where are the judges and arbiters of the rules of law drawn from and what are their ideological predispositions? What role does the political process play in the appointment of these judges and arbiters? All these substantive questions have a bearing on the supply and demand of the rule of law. It is therefore important to investigate whether and how the rule of law ideal ‘fits in different political, social and institutional contexts’.<sup>12</sup>

In the international development policy context, the rule of law is perceived as an important commodity that developing countries need to acquire if they are to develop. This explains why the World Bank and the United States Agency for International Development (USAID), for example, impose the attainment of the rule of law as a conditionality for the grant of development assistance. Further, a number of treaties require nations and nation states to adopt the rule of law. For example, the United States of America’s African Growth and Opportunities Act (AGOA), requires African countries to establish the rule of law before they can be eligible for assistance under this Act. Indeed, the rule of law has acquired the status of a standard by which the progress of nations and nation states are to be assessed. In the African context, the New Partnership for Africa’s Development (NEPAD) sees the rule of law as one of the prerequisites for sustainable development.<sup>13</sup>

What is ironic, however, is that strictly speaking not even the developed countries possess some of the key formal attributes of the rule of law.<sup>14</sup> As Frank Upham has pointed out, for example, the United States judiciary ‘is permeated by politics’ and most state judges ‘belong to political parties and are chosen for their allegiance to partisan platforms’.<sup>15</sup> Even the process of appointing federal judges in the United States is ‘overwhelmingly political’. The lesson from the experience of such countries is that we should not be overly preoccupied with whether or not a legal system strictly conforms to the formal criteria of the rule of law. Instead, what should matter is that the social, cultural, political and economic context prevailing in a given country facilitates the utilisation of the prescriptions of law to facilitate the realisation of justice or fairness for all. Such an outcome would bode well for the legal system, as it would further its legitimacy in the perceptions of the citizenry. Again, the United States provides a good example of this phenomenon. In spite of the overt politicisation of the American judiciary, for example, most Americans still perceive the legal system as fair, since, among other things, the political

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<sup>11</sup> Galligan, *supra* note 6 at 72.

<sup>12</sup> Upham (2002: 8).

<sup>13</sup> New Partnership for Africa’s Development (NEPAD), para 80 (2001).

<sup>14</sup> Upham, *supra* note 12 at 14.

<sup>15</sup> *Ibid.*

role of the judiciary is structured and managed in a manner that is democratic and fair.<sup>16</sup> For example, because political parties in the United States rotate in power, ‘the judiciary is not totally dominated by one party or one political view’.<sup>17</sup> Therefore, the United States possesses the rule of law, not because its legal system embraces the formal characteristics of the rule of law, but because it has political stability.<sup>18</sup>

Furthermore, a country may have the rule of law despite eschewing formal dispute settlement mechanisms. Japan provides a good example. In this regard, Upham observes that the Japanese developed a broad system of informal mechanisms to keep most disputes out of the courts altogether.<sup>19</sup> Yet the adoption of informal dispute settlement mechanisms has not blocked Japan’s development path. More importantly, it cannot plausibly be claimed that Japan does not possess the rule of law because it eschews formal dispute settlement mechanisms. For developing countries, the important lesson from the Japanese experience is that no legal system can succeed if the adoption of a formal rule of law results in the neglect or eradication of existing informal means of social order.<sup>20</sup>

It is also important to appreciate the fact that in real life, far from being a body of neutral rules, law is often a means that the rich and the powerful use to achieve their ends, irrespective of whether such instrumental use of law produces injustice. Thus students of law in common law jurisdictions, such as ours, are taught – and even encouraged – to view law instrumentally, and to exploit loopholes in the rules. When they become lawyers, they often manipulate legal rules to achieve results that favour their clients.<sup>21</sup> Again, judges also often ‘reason instrumentally to lead to particular outcomes when deciding cases’.<sup>22</sup> The ends therefore justify the means.

It should also be noted that the prescriptions of law are often imprecise.<sup>23</sup> We do not always agree on the objectives of legislation, and written laws are therefore invariably the result of a process of negotiation, if not horse trading. Novel situations may also call for creative interpretation of existing prescriptions of law. This means that the laws made by the legislature typically call for interpretation by administrators and courts of law, who therefore have wide discretionary powers in many cases. For example, the law may require that any person who is accused of a criminal offence must be tried ‘within a reasonable time’.

It is such vague legal prescriptions that allow lawyers and judges to apply law instrumentally. But the application of law in this manner is detrimental to the binding quality of the rule of law.<sup>24</sup> The susceptibility of the prescriptions of law to instrumentalism may serve to undermine the authority and legitimacy of law, especially in divided societies where people see law in different ways.<sup>25</sup> In such societies, Brian Tamanaha contends that ‘legal decisions will be increasingly fused with political disputes, will increasingly be based upon political judgments, and will

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<sup>16</sup> *Ibid.* at 19.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 20.

<sup>19</sup> *Ibid.* at 22.

<sup>20</sup> *Ibid.* at 32.

<sup>21</sup> Tamanaha (2005: 131).

<sup>22</sup> *Ibid.* at 131.

<sup>23</sup> Endicott (1999: 5) (Observing that ‘vague language is a pervasive legislative tool’.)

<sup>24</sup> Tamanaha, *supra* note 21 at 152.

<sup>25</sup> *Ibid.* at 153.

increasingly be determined according to the political predispositions of the judges' and that 'as a consequence of judges making what appear to be political rather than legal decisions, political fights will increasingly break out over who will become judges'.<sup>26</sup>

What does all this mean for the justice sector and the rule of law in Kenya? As we interrogate the justice sector institutions, it is important to appreciate that their interactions with the rule of law are shaped by political, cultural, social and economic factors. More significantly, these interactions determine whether or not the rule of law will produce perceptions of justice or fairness among the citizenry. In the absence of such perceptions, it is arguable that many citizens may not consider the justice sector to be legitimate or relevant. The immediate outcome of an illegitimate or irrelevant justice sector would, for instance, be that the citizenry may resolve their disputes and other legal affairs outside the established formal legal system. It is therefore important for us to inquire into the nature of the rule of law that the justice sector in Kenya promulgates and implements. It is also important to inquire into how and why the rule of law was brought into being. From this perspective, it becomes necessary to interrogate the professional training of lawyers and judges. Further, we also need to ask whether these rules serve the public generally or only a section of Kenyan society.

In addition, it also becomes important for society to guard against the unbridled resort to instrumentalism. If law is to be applied consistently, there must be suitable 'application mechanisms' including an independent and professional judiciary, easy access to litigation and reliable enforcement agencies.<sup>27</sup> More importantly, perhaps, all groups in society need to be accorded sufficient resources to enable them to participate in 'the game' of interpreting law. In doing so, we need to appreciate that many social, political and economic battles are fought over and through law, which is therefore a heavily contested terrain.<sup>28</sup> Where this latter condition is not met, it is easy to see why the rich and the powerful will have better access to the rule of law. Last but not least, it is important for lawyers, judges and administrators who have the duty of interpreting the law to adopt a culture of fidelity to it so that they appreciate that the instrumental application of the law may be detrimental to its claim to authority and legitimacy.<sup>29</sup> They need to appreciate that in divided societies such as ours, if the instrumental use of law favours one interest group's claim at the expense of other groups, the binding authority of the law may be severely undermined. So that as they interpret the law, they need to ask themselves what impact their interpretation will have on society's perception of, and respect for, the law. A culture of restraint in the interpretation of the law that takes into account the prevailing social, cultural, economic and political circumstances of a society is therefore required if a society is to have a meaningful rule of law.

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<sup>26</sup> Ibid.

<sup>27</sup> Marmor, *supra* note 1 at 8.

<sup>28</sup> In the United States, for example, Brian Tamanaha has given excellent examples of societal contests through law. He writes that in the United States the context over and through law includes 'systematic efforts to control and wield the law: through careful ideological screening of prospective judges; by funnelling huge sums to pliable legislators who will enact desired legislation; by securing the appointment of lobbyists to administrative positions who will then implement favourable regulatory regimes and actions; by staffing law enforcement agencies like the Justice Department with ideologically motivated individuals; by aggressively bringing provocative law suits before judges perceived as friendly to the same ends'. See Tamanaha (2008: 7).

<sup>29</sup> Tamanaha, *supra* note 21 at 154 (Observing that '[t]he most important ingredient for the rule of law to function is that lawyers and judges, in particular, must be imbued with the belief that at their core legal rules have a binding component.') (emphasis supplied)

# 2

## Legal and institutional framework

The government has endeavoured to comply with its international obligations. This has mostly been done through the enactment of new laws domesticating treaty obligations. Civil society actors, such as non-governmental organisations (NGOs) working on human rights, have played an influential role in spearheading the promulgation of such laws, and in getting government to meet its reporting obligations under various human rights treaties. Nevertheless, such laws have not always been implemented effectively due to factors such as the lack of political will, which means that sufficient resources are not devoted to the establishment of the administrative mechanisms required for the realisation of the objectives of human rights treaties. Another drawback is that the country does not have legislative and administrative mechanisms for implementing the rulings of regional courts, such as the African Commission on Human and Peoples' Rights, especially where such rulings require the government to act in a particular way. However, an encouraging development is that the Kenya Law Reform Commission has begun to assert its authority, and is making significant strides to fulfil its mission which is 'to contribute to systematic reform, harmonisation and simplification of the Laws of Kenya'.

### **A. Compliance with international (human rights) obligations**

#### **Ratification and domestication of treaties**

Kenya has ratified many international and regional human rights instruments<sup>30</sup> as illustrated in Table 6. Kenya has ratified all the major human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and

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<sup>30</sup> International human rights instruments are treaties or conventions consisting of the standards, principles, declarations, bodies and procedures under international law developed by intergovernmental organisations to protect human rights. See Nowak (2003: 67).

Cultural Rights and the African Charter on Human and Peoples' Rights. It has also ratified instruments on the rights of women, children and minorities and those governing issues such as criminal justice, administration of justice, torture and labour relations. Despite this impressive record of ratification, many of the treaties are yet to be domesticated beyond being incorporated into the national laws either as part of the constitution or as separate acts of Parliament. For example, the absence of effective policy and institutional frameworks to facilitate and enhance the fulfilment of legal provisions, and the absence of political good will, have hindered the full realisation of various categories of human rights.<sup>31</sup>

*Table 6: Status of international human rights instruments in Kenya*

<b>Name</b>	<b>Status</b>	<b>Date</b>
International Covenant on Economic, Social and Cultural Rights	Acceded	1 May 1972
International Covenant on Civil and Political Rights	Acceded	1 May 1972
International Convention on the Elimination of All Forms of Racial Discrimination	Acceded	13 Sep 2001
Convention on the Elimination of All Forms of Discrimination against Women	Acceded	9 Mar 1984
United Nations Convention against Transnational Organised Crime	Acceded	16 Jun 2004
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime Preamble	Acceded	5 Jan 2005
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime	Acceded	5 Jan 2005
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Acceded	21 Feb 1997
Convention on the Rights of the Child	Signed/ratified	30 Jul 1990
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts	Signed/ratified	28 Jan 2002
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	Ratified	7 May 2001
Right to Organise and Collective Bargaining Convention	Ratified	13 Jan 1964
Convention concerning Forced or Compulsory Labour	Ratified	13 Jan 1964
Equal Remuneration Convention	Ratified	7 May 2001
Abolition of Forced Labour Convention	Ratified	13 Jan 1964
Discrimination (Employment and Occupation) Convention	Ratified	7 May 2001
Convention relating to the Status of Refugees	Acceded	16 May 1996
Protocol relating to the Status of Refugees	Acceded	13 Nov 1981
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	Acceded	1 May 1972
Rome Statute of the International Criminal Court	Signed/ratified	15 Mar 2005

<sup>31</sup> Shadow Report on the Second Periodic Report of the Republic of Kenya to the Human Rights Committee on the International Convention on Civil and Political Rights 5 (2005), edited and compiled by The Kenya Human Rights Commission.



Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ratified/ acceded	29 Sep 1966
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ratified/ acceded	29 Sep 1966
Geneva Convention relative to the Treatment of Prisoners of War	Ratified/ acceded	29 Sep 1966
Geneva Convention relative to the Protection of Civilian Persons in Times of War	Ratified/ acceded	29 Sep 1966
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	Ratified/ acceded	29 Sep 1966
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II)	Ratified/ acceded	29 Sep 1966
International Convention Against the Taking of Hostages	Acceded	8 Dec 1981
International Convention for the Suppression of Terrorist Bombing	Signed/ratified	27 Jun 2003
International Convention for the Suppression of the Financing of Terrorism	Signed/ratified	27 Jun 2003
International Convention for the Suppression of Unlawful Seizure of Aircraft	Acceded	11 Jan 1977
African Regional Conventions		
African (Banjul) Charter on Human and Peoples' Rights	Acceded	23 Jan 1992
Convention Governing the Specific Aspects of Refugee Problems in Africa	Signed/ratified	23 Jun 1992
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Signed	
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	Signed	
African Charter on the Rights and Welfare of the Child	Acceded	25 July 2000
Protocol on the Court of Justice of the African Union	Signed	
Convention on the Elimination of Terrorism	Signed/ratified	28 Nov 2001
The International Convention on the Protection on the Rights of All Migrant Workers and Members of their Families	Signed	July 2003
African Charter on Human and Peoples' Rights on the Rights of Women in Africa 11 July 2003	Signed	12 Dec 2003
Convention on the Rights of Persons with Disabilities 2006	Ratification	18 May 2008
Convention Against Torture 1997	Accession	12 Feb 1997
ILO Convention 138 on Employment Age	Ratification	9 April 1979
African Charter on the Rights and Welfare of the Child	Ratification	25 July 2000
Optional Protocol to CRC on Prostitution and Pornography	Signed	9 Sept 2000

Source: University of Minnesota Human Rights Library (<http://www1.umn.edu/humanrts/research/ratification-kenya.html>), The African Union's official website: [www.africa-union.org](http://www.africa-union.org) and [http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC\\_UPR\\_KEN\\_So8\\_2010\\_KenyaStakeholdersCoalitionforUPR\\_Annex3.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_So8_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf).

However, Kenya is yet to ratify the following notable treaties:

- The Optional Protocol to the African Charter on the Rights and Welfare of the Child;
- The Convention Governing Specific Aspects of Refugee Problems in Africa;
- The Protocol to the African Charter on Human and Peoples' Rights (on the Rights of Women in Africa – Maputo Protocol); and
- The 1948 International Labour Organisation (ILO) Convention 87 (Freedom of Association and Protection of the Rights to Organise).<sup>32</sup>

Kenya's record of complying with international obligations has recently been threatened following the decision of the legislature to withdraw the country from the Rome Statute of the International Criminal Court (ICC). This decision, which was made on 22 December 2010, follows the indictment of senior politicians and civil servants by the ICC, on allegations that they committed crimes against humanity during the post-election crisis of December 2007 to January 2008. Many members of the legislature contend that these indictments have been politicised, and that the accused persons will not receive a fair trial at the ICC. They also argue that Kenya now has a new constitutional order, which lays the basis for the establishment of an independent local tribunal to try the persons responsible for crimes relating to the 2007 general elections. Ironically, the ICC process was initiated precisely because the legislature refused to support the establishment of such a local tribunal. What we now have is a situation where although article 2(6) of the new constitution states clearly that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya', the legislature has decided to withdraw the country from a treaty it had ratified simply because it threatens extant political interests. While this provision of the constitution does not prevent the country from withdrawing from treaties that, for example, threaten or undermine the national interest, it is doubtful whether it permits withdrawals that are clearly based on narrow political interests.

## Poor reporting record

Kenya has neither been prompt nor regular in fulfilling its obligations under the international human rights instruments that it has ratified, especially the submission of reports. For example, Kenya submitted its initial report on the International Covenant on Civil and Political Rights to the Human Rights Committee on 15 August 1979. This report should have been submitted on 22 March 1977. Again, the second periodic report, which was due for submission on 11 April 1986, was only submitted on 27 September 2004. Further, the third, fourth, fifth and sixth reports which were due on 11 April 1991, 11 April 1996, 11 April 2001 and 11 April 2006 respectively are yet to be submitted.<sup>33</sup>

In addition, Kenya has not yet submitted any report to the Committee Against Torture (CAT). These reports should have been submitted at intervals of four years from 1998. The first, second and third reports were due on 22 March 1998, 22 March 2002 and 22 March 2006

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<sup>32</sup> Kenya National Commission on Human Rights (2007: 47).

<sup>33</sup> Even though reports to the HRC should be submitted when requested, the normal interval is five years. Submitted second through to fifth periodic reports due in 1986, 1991, 1996 and 2001 respectively in 2004. The ICCPR report was submitted on 15 March 2005. See *ibid*.

respectively. The state has also not made any submissions to the Committee on Elimination of All Forms of Racial Discrimination. It was supposed to submit its initial report on 13 October 2002, second periodic report on 13 October 2004 followed by the third and fourth periodic reports after every two years.<sup>34</sup>

The state's initial report to the Committee on Economic, Social and Cultural Rights (CESCR) was submitted on 2 August 1993, but the second and third periodic reports due on 30 June 2000 and 2005 respectively were submitted in 2006.<sup>35</sup> The initial report to the Committee on the Rights of the Child (CRC) was due on 1 September 1992 but was only submitted on 13 January 2000. The second periodic report, which was supposed to be submitted on 1 September 1997, was submitted on 20 September 2005, while the third and fourth reports which were due in 2002 and 2007 respectively are yet to be submitted. Further, the initial report on the CRC Optional Protocol which was due on 6 June 2004 is yet to be submitted. The second report was submitted and came up for consideration in January 2007.<sup>36</sup>

From these examples, it is clear that the government has not met many of its reporting obligations as numerous reports are long overdue. A number of factors explain why the government is not up to date with its reporting, including the lack of technical and personnel capacity and the multiplicity of reports. In addition, where reports have been submitted, they have not been very detailed. For example, the report to the Committee on Economic, Social and Cultural Rights submitted in 1992 was rejected for being too scanty and for not following the established guidelines. This particular report was only resubmitted in 2007, and illustrates the government's tardiness in revising reports which have been considered by the relevant committees.

Nevertheless, the government has sought to improve its performance. For example, in 2002 the Attorney General established an Inter-Ministerial Committee on Human Rights Reporting Obligations, whose responsibility is to prepare and produce country reports on human rights treaties.<sup>37</sup> The membership of this committee includes NGOs. In addition, the government has been consulting stakeholders such as civil society organisations working on human rights in the process of preparing its reports. In some cases, these organisations also prepare shadow reports which they present to the relevant committees alongside those of the government.<sup>38</sup>

## **Complaints filed against government before international human rights bodies**

In a number of instances, individuals have filed complaints against the government before the African Commission on Human and Peoples' Rights. These cases include *Njoka v. Kenya* involving allegations of wrongful detention and torture,<sup>39</sup> and *B. v. Kenya* involving allegations by a Kenyan judge of violation of the principles of security of tenure and the independence of the

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<sup>34</sup> See *ibid.*

<sup>35</sup> See *ibid.*

<sup>36</sup> See *ibid.*

<sup>37</sup> See Republic of Kenya (2004).

<sup>38</sup> See e.g. NGOs' Shadow Report (2005); Civil Society Organisations Parallel Report (2008).

<sup>39</sup> African Commission on Human and Peoples' Rights, Comm. No. 142/94 (1995).

judiciary.<sup>40</sup> The former case was dismissed for vagueness while the latter case was withdrawn by the complainant.

Two cases that were considered are *Kenya Human Rights Commission v. Kenya*<sup>41</sup> and *John D. Ouko v. Kenya*.<sup>42</sup> In the former case, the Kenya Human Rights Commission had filed a case on behalf of officials of the Universities Academic Staff Union (UASU) after the government had refused to register this union and had arrested and harassed its officials. Citing article 56 of the African Charter, the Commission dismissed the case on the grounds that the matter was still pending before the courts of Kenya, meaning that the complainants had not exhausted all available local remedies.

But the *Ouko* case was heard on its merits. Mr Ouko had been a student union leader at the University of Nairobi. He alleged that the government had arrested, detained and tortured him and forced him to flee the country due to his political opinions. Further, he alleged that by these acts, the government had violated articles 5, 6, 9, 10 and 12 of the African Charter. The Commission admitted his complaint, reasoning that he was 'unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees'. On these facts, the Commission thought that his claim was 'admissible based on the principle of constructive exhaustion of local remedies'.

The government did not contest Mr Ouko's claim, despite many requests made by the Secretariat of the Commission. The Commission therefore based its decision on the facts as presented by the complainant, and found that the government had violated his right to the respect of his dignity and freedom from inhuman and degrading treatment under article 5; his right to free expression under article 9; his right to freedom of association under article 10; and his rights to freedom of movement and to egress and ingress under article 12 of the Charter. The Commission then urged the government 'to facilitate the safe return of the Complainant to the Republic of Kenya, if he so wishes'. Unfortunately, because Kenya does not have legislative and administrative mechanisms for the implementation of such rulings, it is not clear whether the government facilitated the safe return of the complainant to the country.

There are also instances where communities have filed complaints against the government. Here, the landmark case is the *Endorois* case,<sup>43</sup> which involved violations resulting from the displacement of the Endorois community from their ancestral lands. In this case, the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) filed a complaint on behalf of the Endorois community. The indigenous community alleged that they were displaced from their ancestral lands without adequate compensation. Further, they alleged that the displacement was coupled with loss of property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture. In its decision, the Commission found that the government was in violation of the rights to freedom of religion, property, health, culture and natural resources under the African Charter

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<sup>40</sup> African Commission on Human and Peoples' Rights, Comm. No. 283/2003 (2004).

<sup>41</sup> African Commission on Human and Peoples' Rights, Comm. No. 135/94 (1995).

<sup>42</sup> African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000).

<sup>43</sup> African Commission on Human and Peoples' Rights, Comm. No. 276/2003.

on Human and Peoples' Rights (ACHPR). Accordingly, the court recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered.

## **B. The constitution and international human rights standards**

### **Amendment of the constitution**

Since independence, Kenya's constitution has been influenced by various political developments. In the first two decades of the post-independence period, the Kenyatta regime did much to ensure the concentration of political power in the presidency. The independence constitution was therefore amended on numerous occasions to achieve this goal.<sup>44</sup> These included amendments fusing all executive power in the president, giving the president the power to appoint and dismiss civil servants and establishing that the fundamental rights enshrined in the constitution would not be violated if the president exercised his special emergency powers including detention without trial. At the same time, these constitutional changes weakened the authority of the legislature, undermined the independence of the judiciary and subordinated holders of constitutional offices to the whims and pleasure of the president. The Kenyatta era was characterised by political assassinations, the criminalisation of the freedoms of expression and assembly and police brutality.

These practices were to continue unabated in the succeeding Moi regime. Indeed, they were arguably enhanced following the unsuccessful *coup d'état* of 1982 which attempted to overthrow Moi. For example, the legislature amended the constitution to make Kenya a *de jure* one-party state.<sup>45</sup> This amendment outlawed all opposition political parties, while giving the ruling party (the Kenya African National Union or KANU) the monopoly of political power under the stewardship of the president. It therefore strengthened the authoritarian presidential system even further. A subsequent amendment removed the security of tenure of judges, the Attorney General and the Controller and Auditor General.<sup>46</sup> Although this amendment was later reversed, its purpose of undermining and making these offices subservient to the president while it was operative was successful. This period was also characterised by gross abuses of human rights, including detention without trial and torture. The freedoms of movement, association, expression of opinion and assembly were severely curtailed.

The situation improved somewhat when the Moi government succumbed to concerted pressure from the international community and local civil society organisations to liberalise national politics by amending the constitution to reintroduce plural politics.<sup>47</sup> But the Moi government did all within its immense powers to frustrate the emergence and growth of a vibrant multi-party democracy.<sup>48</sup> Among other things, the Moi regime effectively deployed a highly authoritarian legislative and administrative framework to ensure that the newly formed

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<sup>44</sup> Muigai (2004).

<sup>45</sup> The Constitution of Kenya (Amendment) Act No. 7 of 1982.

<sup>46</sup> The Constitution of Kenya (Amendment) Act No. 14 of 1986.

<sup>47</sup> The Constitution of Kenya (Amendment) Act No. 12 of 1991.

<sup>48</sup> See e.g. Human Rights Watch (1994).

opposition political parties did not threaten its hold on power. Thus the Office of Registrar of Societies established by the Societies Act was successfully deployed to facilitate the disintegration of the Forum for the Restoration of Democracy (FORD) party, which clearly threatened to depose the Moi government. In addition, colonial-era laws such as the Preservation of Public Security Act<sup>49</sup> and the provisions of the Penal Code on sedition<sup>50</sup> were deployed to prevent the budding opposition parties from organising and soliciting public support. These laws made it exceedingly difficult for opposition parties to hold political rallies. Opposition politicians were frequently arrested, detained in police cells and arraigned in court on flimsy charges. At the inception of multi-party politics, the Moi government was also firmly in control of the only public media organisation, the Kenya Broadcasting Corporation, and also sought to control the liberalisation and privatisation of the media. As a result, only the government's voice could be heard as opposition parties were denied airtime. Further, the private media was frequently harassed by state security forces and some of their publications were banned. These circumstances ensured that the opposition parties could not compete with the Moi regime's political machine.

The dawn of multi-party politics in Kenya also witnessed the emergence of grand corruption, as the Moi regime sought to marshal the financial resources that would enable it to fend off the significant threat presented by the opposition parties. Kenya's grandest corruption scam, the Goldenberg scandal,<sup>51</sup> was hatched and executed at this time. In addition, the advent of multi-partyism was accompanied by a heightening of ethnicised politics and the re-emergence of the controversial *majimbo* debate.<sup>52</sup> One of the manifestations of this enhanced politicisation of ethnicity was the emergence of land clashes leading to the death and displacement of people perceived to be outsiders in regions such as the Rift Valley and the Coast Province, where land clashes have been a defining feature of all the general elections held since 1992.<sup>53</sup>

The Moi regime was able to retain power in the general elections of 1992 and 1997, leading the opposition parties to realise that the amendment of the constitution to allow multi-party politics had only been a cosmetic change, and that fundamental constitutional and legal reforms were required if Kenya was to become a real constitutional democracy in which political power could be exchanged peacefully between ruling and opposition parties.<sup>54</sup> It is out of this realisation that civil society groups began to clamour for the review of the constitution.<sup>55</sup> While the Moi regime at first used highly draconian means, including the deployment of the state security apparatus and authoritarian public order laws to resist the calls for constitutional law reform, it later sought to manipulate the clamour for change, a tactic which led to the signing of an Inter-Parties Parliamentary Group (IPPG)<sup>56</sup> agreement and the enactment of the Constitutional Review of Kenya Act<sup>57</sup> to facilitate the process of reviewing the existing constitution.

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<sup>49</sup> The Preservation of Public Security Act, chapter 57, Laws of Kenya.

<sup>50</sup> See sections 56, 57 and 58 of the Penal Code, which were repealed by Statute Law (Miscellaneous Amendments) Act 1997.

<sup>51</sup> See e.g. Republic of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair (2005).

<sup>52</sup> See e.g. Human Rights Watch (1993).

<sup>53</sup> Republic of Kenya (1999); see also Republic of Kenya (2008).

<sup>54</sup> See e.g. Throup and Hornsby (1998); Institute For Education in Democracy (1997); Ndegwa (1998).

<sup>55</sup> See Mutunga (1999).

<sup>56</sup> See Constitution of Kenya Review Commission (2005).

<sup>57</sup> Constitution of Kenya Review Act (1997).

The IPPG suggested a number of reforms that required constitutional amendments. These included the appointment and powers of the Electoral Commission of Kenya; rules on the nomination of MPs within a multi-party era and the rights of minority groups including representation of such groups in appointive and elective positions. However, these suggestions were never enacted into law.

The IPPG agreement also recommended the entrenchment of the multi-party system in the constitution, and the amendment or repeal of many of the repressive laws and administrative regulations (such as the Preservation of Public Security Act,<sup>58</sup> the Public Order Act,<sup>59</sup> the Penal Code,<sup>60</sup> the Chiefs' Authority Act<sup>61</sup> and the Societies Act).<sup>62</sup> It also proposed the enactment of a law to facilitate a comprehensive review of the constitution after the 1997 general elections. Further, the IPPG agreement led to the amendment of section 82 of the constitution (which dealt with discrimination) to include 'sex' as a basis for discrimination.<sup>63</sup> Many of the IPPG proposals did not, however, see the light of day because President Moi dissolved the legislature which could not, therefore, enact them into law.

Towards the end of his tenure in the late 1990s, President Moi finally bowed to pressure from local civil society actors and the donor community to initiate a process to review the constitution. The clamour for a new constitutional dispensation was largely influenced by a realisation that despite the formal reinstatement of multi-party politics in the early 1990s, President Moi continued to enjoy immense structural advantages over his opponents. Many of these advantages were found in the statutory order, including public order and security laws.

In 2001, the legislature enacted the Constitution of Kenya Review Act to guide the process of review. What is interesting about this law is how it enabled the Moi regime to control both the composition of the constitutional convention, and the process of constitution-making. The Act established a three-step process for the promulgation of a new constitution: (1) public consultation and initial drafting of a constitution by a body of experts known as the Constitution of Kenya Review Commission; (2) deliberations on, and revision of, the draft by a national convention known as the National Constitutional Conference; and (3) ratification by the legislature (or Parliament). The National Constitutional Conference consisted of 629 delegates, and included the members of the Commission as non-voting members, all members of the legislature, representatives from each administrative district and political party and representatives from religious, professional and other civil society organisations.

First of all, the Moi regime was able to establish criteria for membership in the National Constitutional Conference that guaranteed it majority representation. Thus, most of the delegates were drawn from the legislature and the districts, both predominantly controlled by the government. Secondly, the government made sure that it controlled the decision-making processes. Under the Act, once the Commission produced a draft constitution, it was required

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<sup>58</sup> Chapter 57, Laws of Kenya.

<sup>59</sup> Chapter 56, Laws of Kenya.

<sup>60</sup> Chapter 63, Laws of Kenya.

<sup>61</sup> Chapter 128, Laws of Kenya.

<sup>62</sup> Chapter 108, Laws of Kenya.

<sup>63</sup> See e.g. Constitution of Kenya Review Commission, *supra* note 28; Heinrich Boell Foundation (2002).

to submit it to the National Conference, which would then debate, amend it where necessary and adopt it. The Commission was then required to submit the draft to the legislature for enactment into law, or rejection. Looking at these decision-making processes, it is arguable that the Act was deliberately designed to ensure that the review process would fail. For example, the division of the power to make decisions between the legislature and the National Conference simply led to a situation where decisions of the Conference could be vetoed by the legislature. In addition, President Moi could derail the process by exercising his constitutional powers to dissolve the legislature. Once the legislature was dissolved, the process could not proceed since one third of the members of the National Conference were members of the legislature, who would cease to hold office upon the dissolution of the legislature. This is exactly what President Moi did in October 2002 as part of efforts to perpetuate his regime, although by this time the Commission had produced a draft constitution (which later came to be known as the 'Bomas Draft Constitution' after the venue of the National Constitutional Conference).

The general elections of December 2002 were therefore held under the existing constitution. This election was largely a contest between the Moi regime and a hurriedly cobbled together coalition of ethnic titans under the banner of the National Alliance Rainbow Coalition (NARC). As part of the process of building this coalition, the two main factions of the NARC entered into an informal memorandum of understanding (MoU), which, among other things, provided that Mwai Kibaki of the National Alliance of Kenya (NAK) would be the coalition's candidate for the presidency and that once NARC took office he would create the post of prime minister for Raila Odinga, the leader of the Liberal Democratic Party (LDP), one of the political parties that made up NARC. This MoU was shaped by the Bomas Draft Constitution, which had proposed the creation of the position of prime minister.

Once President Kibaki took office, however, he reneged on the MoU, claiming that it could not be implemented under the existing constitution. Further, he now opposed the Bomas Draft Constitution, which he had enthusiastically supported while in opposition. In particular, he was vehemently opposed to the creation of the position of prime minister and the devolution of power from the central government. His government thus began to derail the Bomas Draft Constitution. In this endeavour, the courts were to play a critical role.

It should be noted that the courts were now operating in an environment characterised by a more liberal judicial approach to standing, making it easier for an increasingly litigious citizenry to take grand politics to the courts. While the denial of standing under the Moi regime in the early 1990s could be interpreted as a means of denying regime opponents an opportunity to use the courts as a forum to further their political causes, liberal standing had by now arguably become, especially after the 2002 general elections, a useful political tool that could be employed equally by regime actors and their political opponents. In either case, the suits are typically prosecuted by a battery of lawyers, which makes for a sensational political spectacle.

The Kibaki regime's litigation strategy was to question the process that produced the Bomas Draft Constitution. Even before the National Conference could adopt the draft prepared by the Commission, a number of citizens, arguably acting on the instructions of the government, filed a suit in the High Court, in which they sought to stop the work of the National Conference and prevent the legislature from enacting the draft constitution adopted by the conference. The



applicants in *Timothy Njoya & 6 others v. Attorney General & the Constitution Review Commission of Kenya* (hereinafter *Njoya*) sought declarations that the Constitution of Kenya Review Act vitiated the constituent power of the people of Kenya, that it was unconstitutional to the extent that it permitted the conference to discuss and adopt a draft bill to alter the existing constitution, that the draft bill did not reflect the views of Kenyans, and that the conference should be suspended pending compliance of the review process with the existing constitution. They deprecated the equal representation of every district in the conference by three delegates irrespective of size and population, and the intolerance to the views of members of the legislature in the deliberations of the conference. The court decided that the applicants had been denied the opportunity to exercise their constituent power to make a constitution through a constituent assembly and to ratify it through a referendum.

Around the same time, other citizens who had issues with the constitutional review process also went to the High Court, this time asking the court to stop the Commission from preparing a draft bill, and prohibiting the Attorney General from receiving the final draft bill from the Commission. The court obliged, with the result that although the *Njoya* court had decided that a referendum was obligatory, there was now no document upon which such a referendum could proceed. It therefore seemed that the constitutional review process had been paralysed.

The process was subsequently revived, once the key protagonists agreed to enact a constitutional review law that complied with the decision in the *Njoya* case. This new law, the Constitution of Kenya Review (Amendment) Act of 2004 empowered the legislature to amend the Bomas Draft Constitution before submitting it to a referendum. This draft constitution was thus amended, in ways that largely suited the fancies of the government. It was then submitted to a referendum, where it was rejected by the majority of voters.

The government then put the matter of constitutional reform on the back burner, until the post-election crisis of December 2007 to January 2008 gave new impetus and urgency to the need to complete the process. The announcement of the result of the highly contested presidential election on 30 December 2007 ‘precipitated the most severe human rights crisis in Kenya’s independent history’.<sup>64</sup> As described by the Kenya Human Rights Institute, ‘communal riots and militia-driven violence broke out in various parts of the country resulting in killings, rape, mob violence, forced evictions, looting, arson and the destruction of property’.<sup>65</sup> Further, local and international human rights groups accused security agencies of serious human rights violations including extra-judicial executions. According to Human Rights Watch, for example, ‘the police response to demonstrations against the declared election results involved excessive use of force, leading to hundreds of deaths’.<sup>66</sup> As a result of the violence, about 1 200 people were killed and 600 000 displaced from their homes.<sup>67</sup>

In the wake of this unprecedented mayhem, the country became ungovernable as it rapidly became evident that state security actors were struggling to maintain law and order. At the same time, the Orange Democratic Movement (ODM) party refused to accept the result of the

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<sup>64</sup> Kenya Human Rights Institute (2008).

<sup>65</sup> Ibid.

<sup>66</sup> Human Rights Watch (2008: 8).

<sup>67</sup> Kenya Human Rights Institute, *supra* note 36 at 3.

presidential election. The ODM also refused to take its grievance to the courts, which it claimed were controlled by President Kibaki's Party of National Unity and could not therefore be a neutral arbiter. Accordingly, the ODM sought the intervention of the African Union and the international community. The African Union then appointed a panel of eminent african personalities to assist Kenya to resolve this national crisis through a mediation process, which came to be known as the Kenya National Dialogue and Reconciliation (KNDR), and which was ably led by Kofi Annan, a former Secretary General of the United Nations. The mediation process culminated in the conclusion of an 'agreement on the Principles of Partnership of the Coalition Government', which recognised the need to resolve long-standing issues such as constitutional reform. Following this agreement, the legislature amended the repealed constitution and enacted the Constitution of Kenya Review Act of 2008 to facilitate the attainment of a new constitution. The people endorsed the product of this process in a referendum held on 4 August 2007. It was then promulgated by the president at a public ceremony held on 27 August 2010, thereby bringing to a close a 20-year quest for a new constitution.

## **Adoption of international human rights standards**

Chapter IV of the new constitution incorporates most of the civil and political rights found in the International Covenant on Civil and Political Rights. It therefore guarantees: fundamental rights and freedoms of the individual (article 19), the right to life (article 26), the right to freedom and security of the person (article 29), protection from slavery and forced labour (article 30), protection from inhuman treatment (article 25), the right to property (article 40), the right to privacy (article 31), freedom of conscience (article 32), freedom of expression (article 33), freedom of assembly and association (articles 36 and 37), freedom of movement and residence (article 39) and equality and freedom from discrimination (article 27).

According to article 24 of the constitution, these rights can only be limited by law, and then only to the extent that such limitation is 'reasonable and justifiable in a democratic society', taking into account factors such as the need to ensure that one individual's enjoyment of these rights does not prejudice the rights of others. However, article 25 of the constitution declares that certain rights 'may not be limited'. Rights falling in this category are: freedom from torture and cruel, inhuman or degrading treatment; freedom from slavery or servitude; the right to a fair trial and the right to an order to *habeas corpus*.

The constitution also protects social and economic rights, such as the rights to health, housing, food, water, social security and education (article 43). Further, it prohibits all forms of discrimination, including discrimination in matters of personal law such as adoption, marriage, divorce, burial and succession (article 27).

## **Effectiveness of systems to challenge a law on the basis that it violates international law or the constitution**

The constitution grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or a threat to, the rights in the Bill of Rights (article 23). Further, this article requires Parliament to enact a law that will give jurisdiction to subordinate courts to hear and determine such applications in appropriate cases. In addition,

article 59 of the constitution establishes a National Human Rights and Equality Commission, whose main function is to promote respect for human rights in the country.

### *Access to the Constitutional Court*

Article 22 of the constitution accords a pride of place to individual rights and freedoms, and therefore allows the individual direct access to the courts to seek redress where it is alleged that these rights and freedoms have been denied, violated or threatened. It also allows persons acting on behalf of others or the public interest to institute such proceedings. While the constitution requires the Chief Justice to make procedural rules to regulate these proceedings, it states clearly that the absence of such rules do not limit access of individuals to the courts to seek redress for the violation of human rights.

### *Direct application of constitutional human rights in the courts*

For a long time, the courts have been reluctant to apply principles of international law contained in the international human rights instruments that Kenya has ratified, largely because they have adopted an extreme dualist approach to the implementation of international law. Thus in *Okunda v. Republic*,<sup>68</sup> the Chief Justice ruled that international law and domestic laws are different legal systems, explaining that '[t]he provisions of a treaty entered into by the government ... do not become part of the municipal law of Kenya, save in so far as they are made such by the Laws of Kenya'.<sup>69</sup> This position continued to prevail, and has been upheld in the more recent case of *Pattni & Another v. Republic*, where the High Court established that as much as international law could be of persuasive value, it is not binding in Kenya, unless it has been incorporated into the constitution or other written laws.<sup>70</sup>

Lately, however, this trend has begun to change and the courts have started to interpret international human rights instruments dealing with fundamental human rights protected by the constitution. For example, there are significant constitutional cases where either the litigants have invoked the provisions of the international human rights instruments or the courts have referred to such provisions. Thus in *Rev. Timothy Njoya & 5 Others v. The Attorney General, The Constitution of Kenya Review Commission, Kiriro wa Ngugi & Koimita Ole Kina, The Muslim Consultative Council and Chamber of Justice (interested parties) and the Law Society of Kenya (appearing as Amicus Curiae)*,<sup>71</sup> the applicants invoked article 21 of the Universal Declaration of Human Rights (UDHR) 1948 as being embodied and applied in section 82 of the constitution. Their motion stated: 'That a declaration be and is hereby issued declaring that article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the constitution bars the respondents from constituting the constitutional conference in a discriminatory manner.' The High Court of Kenya at Machakos also applied the provisions of CEDAW, the UDHR and the African Charter in *Andrew Manunzyu Musyoka*

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<sup>68</sup> (1970) EA 543.

<sup>69</sup> Ibid.

<sup>70</sup> (2001) Kenya Law Reports 262.

<sup>71</sup> High Court of Kenya at Nairobi, Miscellaneous Civil Appeal No. 82 of 2004 (OS).

(Deceased)<sup>72</sup> in which it found customary law to be inconsistent with the constitution and international human rights law. Other cases where the courts have interpreted provisions of certain international human rights instruments include: *Mw v. Kc*,<sup>73</sup> *JAO v. Home Park Caterers Ltd & 2 others*<sup>74</sup> and *Republic v. Ibrahim Kariuki Maina*.<sup>75</sup>

But there are also cases where the courts have given judgments which are inconsistent with the human rights instruments. For example, in *Rose Moraa & Another v. Attorney General*,<sup>76</sup> the court held that in issues relating to the upbringing of a child born out of wedlock, the parental responsibility of bringing up that child is in the first instance vested in the mother. This decision is inconsistent with the principles and obligations on states as contained in the Convention on the Rights of the Child (CRC), in particular, the best interests of the child and the principle that both parents have a primary and common responsibility for the upbringing and development of the child.<sup>77</sup> The court also contravened articles 2(1) and (2) of the CRC, especially on the issue of discrimination on the basis of sex, property and other status when it held that the parental responsibility of a child born out of wedlock is vested in the mother.<sup>78</sup>

The courts have also applied international environmental law principles in national courts and interpreted constitutional provisions to give effect to these principles. For instance, in the case of *Waweru v. Republic*,<sup>79</sup> the applicants, property owners in the town of Kiserian, had been charged with the offence of discharging raw sewage into a public water source contrary to provisions of the Public Health Act.<sup>80</sup> The applicants filed a constitutional reference against the charge, arguing that they had been discriminated against since not all land owners had been charged. While agreeing with the applicants, the court *sua sponte* (without any of the parties raising the issue) discussed the implications of the applicants' action for sustainable development and environmental management<sup>81</sup> and held that the constitutional right to life as enshrined in section 71 of the constitution includes the right to a clean and healthy environment. It also noted that:

It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together.<sup>82</sup>

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<sup>72</sup> High Court of Kenya at Machakos, Succession clause No. 303 of 1998, (2005) eKLR, High Court of Kenya at Machakos, Judge R Wendo, judgment of 15 December 2005.

<sup>73</sup> Miscellaneous Application No. 105 of 2004, (2005) eKLR, High Court of Kenya at Kakamega, Judge GBM Kariuki, judgment on 29 September 2005. Here the court interpreted article 25 of the UDHR and provisions of the Children Act 2001.

<sup>74</sup> Civil Case No. 38 of 2003, (2004) eKLR, High Court of Kenya at Nairobi, Judge MG Mugo, judgment on 3 September 2004.

<sup>75</sup> Criminal Case No. 19 of 2006, (2006) eKLR, High Court of Kenya at Nairobi, Nairobi Law Courts, Judge JB Ojwang, judgment of 11 October 2006. In this case, the court dealt with murder vis a vis right to life.

<sup>76</sup> Civil Case No. 1351 of 2002, High Court of Kenya at Nairobi, Judge JG Nyamu and M Ibrahim, judgment on 1 December 2006.

<sup>77</sup> Convention on the Rights of the Child, articles 3(1) and 18(1).

<sup>78</sup> *Ibid.*

<sup>79</sup> (2006) 1 KLR. 677–700.

<sup>80</sup> Chapter 242 of the Laws of Kenya.

<sup>81</sup> *Kameri-Mbote & Odote* (2009: 30–38, 83–84).

<sup>82</sup> (2006) 1 KLR. at 691.

## Kenya National Human Rights and Equality Commission

The Kenya National Human Rights and Equality Commission (KNHREC) is a human rights watchdog established by article 59 of the constitution; it succeeds the Kenya National Commission on Human Rights established by the Kenya National Commission on Human Rights Act of 2002. Its functions include enhancing the promotion and protection of human rights and investigating violations of human rights. Where such an investigation discloses that human rights were violated or that there was negligence in preventing the violation of human rights by a public servant, the practice has been for the Commission to recommend to the Attorney General to prosecute such persons.

Under the statutory regime that is now being revised, the Commission has quasi-judicial powers in relation to investigations and the remedying of human rights violations. It has monitored government institutions, investigated alleged violations and provided redress to those whose rights have been violated. The Commission has also advised the government on how to enhance the promotion and protection of human rights. In carrying out its work, the Commission has been required by the enabling law to 'have regard to all applicable international human rights standards and in particular, to the fact that human rights are indivisible, interdependent, interrelated, and of equal importance for the dignity of all human beings'.

Since its establishment, the Commission has received complaints and investigated violations of human rights. Between 1 July 2006 and 30 June 2007 it received and attended to reports from 2 274 persons alleging violations of their rights.<sup>83</sup> In comparison, the Commission attended to 1 499, 1 412 and 411 people in the first three years of its existence – 2005/2006, 2004/2005 and 2003/2004 respectively.<sup>84</sup>

In exercise of its quasi-judicial jurisdiction, the Commission rendered judgment in the precedent setting case of *Peter Makori v. Attorney General and Others*.<sup>85</sup> The petitioner, a journalist, alleged violations of his rights by state officials over a period spanning more than three years. He alleged that he had been detained wrongfully and tortured by police officers, and that his prosecution for murder was malicious. While the Commission took the view that the petitioner had been detained lawfully, it found that the prosecution was malicious. Further, it found that the Attorney General was liable for the malicious prosecution, noting that 'it is a cardinal responsibility of the Attorney General to foster respect for the rule of law'. It also established that the petitioner's freedom from torture was violated. In its judgment, the National Commission awarded Peter Makori compensation of KES 5 million.

In the subsequent case of *Medo Misama v. Attorney General and the Registrar of Societies*,<sup>86</sup> the petitioner challenged the exercise of powers by the Registrar General after the Registrar declined to register the applicant's proposed political party, Chama Cha Mapinduzi. The Registrar had refused to register the proposed party because she had 'reasonable cause to believe that the interests of peace, welfare or good order in Kenya would be likely to suffer prejudice' if it were registered. In its ruling, the Commission took the view that the Registrar owed the petitioner

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<sup>83</sup> Kenya National Commission on Human Rights (2007B: 2).

<sup>84</sup> Ibid.

<sup>85</sup> Complaint No. KNCHR/CHP/1/2006.

<sup>86</sup> Complaint No. KNCHR/CHP/8/2006.

a duty to furnish him with sufficient reasons for the denial of registration. According to the Commission, the right of association ‘includes the right of citizens to associate as a lawful political party, and that this includes the right to be registered as such, and that this can only be qualified where clear, specific reasons are given that will reasonably show that the said association will evidently cause a threat to peace, welfare and good order’. It ruled that the Registrar’s ‘reason for refusal to register Chama Cha Mapinduzi was insufficient, unreasonable and amounts to an infringement of a basic right’.<sup>87</sup> It therefore ordered the Registrar to register the party. These cases demonstrate that the Commission’s complaints hearing panels are gradually emerging as a key forum where significant human rights issues will be canvassed.

The Commission has also been involved in other activities to promote human rights since its inception. It has actively participated in training and capacity building of public officers on human rights, promotion of accountability in the use of public resources and electoral process, advising the government on the infusion of human rights principles into policy and legislation such as the Media Bill 2007, the Bill on hate speech, the Bill on Constitutional and Electoral Reforms, the Employment Bill, the Labour Relations Bill, the Occupational Safety and Health Bill, the Work Injury Benefits Bill and the Labour Institutions Bill.

In the execution of these obligations, the Commission has encountered different challenges such as slow political and governance reforms, inadequate finances and the lack of adequate financial independence, poor accessibility to the Commission and high public expectations.

### **c. The structure of the court system**

The constitution provides for the separation of powers between the executive, legislative and judicial arms of government. Kenya’s laws were inherited from Britain with some modifications to reflect local conditions. The Kenyan legal system is thus based on English common law but has elements of customary law and religious law (mainly Islamic law).

Chapter 10 of the constitution sets out the system of courts. It establishes two categories of superior courts. The first category consists of the Supreme Court, the Court of Appeal and the High Court. The second category consists of special courts with jurisdiction over matters relating to employment and labour relations, and the environment and land. These special courts have the status of the High Court. It then establishes the following subordinate courts: magistrates courts, Kadhi courts and courts martial. Further, the constitution allows the legislature to establish other subordinate courts. The Supreme Court has exclusive original jurisdiction over matters relating to the elections to the office of the president. Further, it has the power to issue advisory opinions on matters concerning county government. It also has appellate jurisdiction over appeals from the Court of Appeal. In turn, the Court of Appeal has jurisdiction to hear appeals from the High Court and other courts or tribunals.

The Judicature Act, which now needs to be amended in view of the new constitution, prescribes the laws to be applied by the courts in Kenya. It states that:

The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –

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<sup>87</sup> Kenya National Commission on Human Rights, *supra* note 3 at 36.

- (a) The Constitution;
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12 August 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.<sup>88</sup>

The Act further provides that:

... the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.<sup>89</sup>

Magistrates' courts are established under the Magistrates' Courts Act. They are supervised and controlled by the Chief Justice.<sup>90</sup> Section 3 of the Act establishes resident magistrates' courts with jurisdiction throughout Kenya. These courts are subordinate to the High Court, and are duly constituted when held by chief, senior principal, principal, senior resident and resident magistrates. They have jurisdiction over criminal and civil matters. In the case of criminal matters, the Criminal Procedure Code (chapter 75 of the Laws of Kenya) establishes the kinds of offences that may be tried by the different categories of subordinate courts, while reserving certain offences for the High Court.<sup>91</sup> With respect to civil matters, the jurisdiction of resident magistrates' courts is limited to matters where the value of the subject matter in question does not exceed KES 500 000.<sup>92</sup> The resident magistrates are appointed by the Judicial Service Commission. Resident magistrates' courts have jurisdiction throughout the country but with limited power of appellate jurisdiction.

District magistrates' courts, established under section 8 of the Magistrates' Court Act, also have jurisdiction in criminal and civil proceedings. District magistrates are appointed by the Judicial Service Commission. In civil proceedings, section 9 provides that a district magistrates' court shall have and exercise jurisdiction and powers in proceedings of a civil nature where either the proceedings concern a claim under customary law, or the value of the subject matter

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<sup>88</sup> The Judicature Act, Chapter 8, Laws of Kenya, section 3(1).

<sup>89</sup> *Ibid.*, section 3(2).

<sup>90</sup> The Magistrates' Courts Act, chapter 10, Laws of Kenya, section 19.

<sup>91</sup> *Ibid.*, section 4.

<sup>92</sup> *Ibid.*, section 5.

in dispute does not exceed KES 5 000 (or KES 10 000 where the court is constituted by a district magistrate having power to hold a magistrates' court of the first class). District magistrates' courts are established for every administrative district but the Chief Justice may designate two or more districts as one district. As far as criminal proceedings are concerned, they exercise powers and jurisdiction as conferred on them by the Criminal Procedure Code or any other written law. In civil matters, the pecuniary jurisdiction and powers are enshrined in section 9 of the Magistrates' Courts Act. Only first class district magistrates' courts have limited appellate jurisdiction.

With respect to customary law, the Magistrates' Court Act provides that a magistrates' court 'may call for and hear evidence of the African customary law applicable to any case before it'.<sup>93</sup> Traditional dispute settlement mechanisms which would be better suited to deal with customary law are not formally recognised in the Kenyan system. However, these do exist and are headed by community elders. They deal with such matters as land disputes, livestock disputes and some crimes such as assault and rape.<sup>94</sup>

### *Court strata*

<b>Court strata</b>	<b>Court strata in the 2010 Constitution</b>
Supreme Court	Supreme Court
Court of Appeal	Court of Appeal
High Court	High Court
Chief Magistrate	Subordinate Courts
Senior Principal Magistrate	Kadhi Court
Principal Magistrate	
Senior Resident Magistrate	
Resident Magistrate	
Kadhi Court	

### *Structure of subordinate courts*

<b>Resident magistrate court</b>	<b>District magistrate court</b>
Chief Magistrate	District Magistrate I
Senior Principal Magistrate	District Magistrate II
Principal Magistrate	
Senior Resident Magistrate	
Resident Magistrate	

<sup>93</sup> Ibid., section 17.

<sup>94</sup> Because rape is a criminal offence under the Sexual Offences Act, traditional justice systems must hand the offenders to the formal justice system. In some cases, local leaders have sought to get compensation for the aggrieved families and victims but training of these leaders has been stepped up to sensitise them to the need to hand over rape suspects to the police.

<sup>95</sup> [www.judiciary.go.ke](http://www.judiciary.go.ke).



## D. Law reform

Law making is a function that is shared by Parliament and the executive. The law-making power is exercisable by bills passed by Parliament, which consists of the National Assembly and the Senate. Article 94 of the constitution provides guidelines on how laws are to be enacted. These constitutional guidelines are buttressed by the National Assembly (Powers and Privileges) Act.<sup>96</sup> The whole process is regulated by the standing orders of Parliament. The process gives MPs an opportunity to examine the social, economic, political, civil and cultural rights and the means to protect these rights through legislation.

There are two types of bills: public and private. A private members' bill is simply a public bill promoted by an MP who is not a member of the government.<sup>97</sup> The purpose of a private bill is to confer benefits upon, or advance the interests of, particular individuals or localities, whereas a public bill, while seeking to alter the general law, may adversely affect private rights of particular persons or bodies of persons as distinct from the public at large.<sup>98</sup>

When promoting a public bill, the relevant ministry will involve the drafting department of the State Law Office at the Attorney General's chambers and the Kenya Law Reform Commission.<sup>99</sup> The bulk of the laws in Kenya are promoted by the government. Private members' bills are drafted by MPs who may get assistance from civil society organisations and other interest groups. They are then allotted time for presentation to the floor by the House Business Committee.<sup>100</sup>

Public and private members' bills follow the same legislative procedure. Once the bill has been prepared, it is published in the *Kenya Gazette* at least two weeks before presentation. It is then taken through the first reading with no debate taking place. It then goes to the second reading where debate is conducted on its contents. The bill then moves to the committee stage where the committee responsible for the particular matter in Parliament is charged with the responsibility of making any proposed amendments to the bill. The bill is then brought back to Parliament for the third reading where, if necessary, minor adjustments are made. The bill is then transmitted to the president for approval. If assented to, the bill becomes an act effective from the date it is gazetted. If the president refuses to assent to a bill, it is brought back to Parliament and if it is passed by the house, it becomes law.

### The Kenya Law Reform Commission<sup>101</sup>

Kenya has a permanent law reform commission, namely the Kenya Law Reform Commission (KLRC), which was established in 1982 by the Law Reform Commission Act.<sup>102</sup> Its main objective is to '[k]eep under review all the laws of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification

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<sup>96</sup> Chapter 6, Laws of Kenya (1980), revised in 1998.

<sup>97</sup> Jackson (1988).

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Kenya Law Reform Commission (2005).

<sup>102</sup> Chapter 3, Laws of Kenya.

and modernisation.<sup>103</sup> It also has a role in the enactment of legislation to implement the new constitution, which requires the Commission for the Implementation of the Constitution to coordinate with the Attorney General and the KLRC in preparing such legislation (section 5(6), sixth schedule, Constitution of Kenya).

The KLRC works with other sectors of society to identify areas that need legislative reform. They conduct research and then recommend appropriate legislative action.<sup>104</sup> It has worked with government ministries, Parliament and non-state organisations such as the Law Society of Kenya, the Institute of Certified Public Accountants of Kenya, the Kenya Private Sector Alliance, the Certified Secretaries of Kenya and civil society organisations such as the Federation of Women Lawyers in Kenya, the International Commission of Jurists, the Centre for Governance and Development and the Institute for Education in Democracy.

In order to fulfil its mandate, section 3 of the Act requires the KLRC to:

- Receive and consider any proposals for the reform of the law that may be made or referred to it;
- Prepare and submit to the Attorney General programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency by which the examination should be carried out;
- Undertake, pursuant to any programme approved by the Attorney General, the examination of particular branches of the law and the formulation by means of draft bills or otherwise, of proposals for reform therein;
- Prepare, at the request of the Attorney General, comprehensive programmes of consolidation to facilitate the exercise by him/her of his/her powers under the Revision of Laws Act, and to undertake the drafting of bills pursuant to any programme of consolidation approved by him/her; and
- Provide advice and information to ministries and departments in the government with regard to the reform or amendment of a branch of the law appropriate to that ministry or department.

The KLRC performs its functions under the direction of the Office of the Attorney General, which is required to approve the work programme proposed by the KLRC. In addition, recommendations for law reform made by the KLRC are supposed to be submitted to the Attorney General, who is mandated by law to take action to implement them by presenting them to Parliament for enactment into law. Further, law reform proposals from the Commission are translated into legislative drafts by a department of the Office of the Attorney General. It should also be noted that since 2003, the KLRC has been an agency of the Ministry of Justice and Constitutional Affairs (MoJCA). As far as the administrative and financial management of the KLRC is concerned, therefore, the MoJCA is the parent ministry for the KLRC, and not the Office of the Attorney General as was previously the case. This institutional arrangement has hindered the KLRC in the performance of its duties. It means, for example, that the body responsible for approving the KLRC's work programmes (the Attorney General) is different from the body

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<sup>103</sup> Ibid., section 3.

<sup>104</sup> International Commission of Jurists Kenya (ICJ-Kenya) (2005: 126).

responsible for controlling the funds allocated to it in the government's budget (the MoJCA). The Commission therefore lacks operational autonomy.

Other constraints faced by the KLRC include:

- Lack of control over staff. Its employees are officers of the Public Service Commission, who can be posted to and from the KLRC without consultation and without ascertaining their suitability to the needs of the KLRC.
- Government ministries and departments have routinely engaged consultants to help them reform laws governing their operations without consulting the Commission.
- The Attorney General has established special law reform task forces, which work parallel to the Commission. Since 1990, the Attorney General has appointed about 15 task forces to recommend changes to various laws independent of the Commission.<sup>105</sup>

In order to address some of these constraints, there is a proposal to make the KLRC autonomous through the enactment of a special constitutive law. These proposals are contained in the Kenya Law Reform Commission Bill of 2006, which is yet to be enacted into law.

Despite these constraints, the KLRC developed numerous bills which have been enacted into law. Indeed, the KLRC is now taking a leading role in law reform, thanks to concerted and ongoing efforts to enhance its capacity and autonomy. In the recent past, for example, the KLRC has either taken the lead or been actively involved in the development of important new laws such as the Sexual Offences Act (see page 50), the Political Parties Act, and the Media Council of Kenya Act. It is also actively engaged in the development of laws relating to women, which will enhance the protection of the rights of women, and the reform of laws on business associations.

## **Reforming the management of the administration of justice**

The government has made various efforts to improve the management of the administration of justice. These efforts have been carried out in the various ministries, departments and agencies that have a stake in the administration of justice. The judiciary, being a major stakeholder, has undergone some changes to enhance its ability to administer justice fairly and efficiently. There have also been reform measures in the justice sector which have targeted corruption in the judiciary,<sup>106</sup> the administration of justice,<sup>107</sup> the terms and conditions of service of the judicial officers, the construction of additional court facilities, the reconstitution of the Rules Committee, decongesting of prisons by establishing magistrates' courts in prisons and

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<sup>105</sup> The task forces had the mandate of reviewing, updating and harmonising Kenya's laws in areas such as criminal law, family law, company law, laws relating to women, public order and security, auctioneers and court brokers and children. See e.g. The Task Force on Public Collections or 'Harambees'; The Task Force Reviewing Laws Relating to the Status of Women; The Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (26 August 2003); The Task Force to Review Labour Laws in Kenya; The Task Force on the Review of the Penal Laws and the National Task Force on Media Law.

<sup>106</sup> The Integrity and Anti-Corruption Committee (The Ringera Committee) set up in 2003 whose terms of reference included investigating and reporting on the magnitude of corruption in the judiciary; identifying the nature, forms and causes of corruption in the judiciary; identifying corrupt members of the judiciary and recommending appropriate disciplinary measures to be taken against them and recommending measures for detecting corruption in the judiciary.

<sup>107</sup> The Committee on the Administration of Justice (The Kwach Committee) see Kenya, in US Department of State, Country Reports on Human Rights Practices 1999, February 23, 2000, available at <<http://www.state.gov/g/drl/rls/hrrpt/1999/252.htm>>.

remand homes, the launching of the Kenya law reports website<sup>108</sup> as well as the adoption of strategic planning to guide the activities of the judiciary. In 2008, the Chief Justice issued Practice Directions<sup>109</sup> to facilitate effective case management through, for instance, delivering judgments and rulings in a timely manner and on specified dates and requiring judicial officers to list for hearing only those cases that they can reasonably hear. The Report of the Task Force on Judicial Reforms 2010 notes that these Practice Directions could contribute to the efficient dispensation of justice. Unfortunately, many advocates and judicial officers are 'unaware of, or do not pay keen attention to them and as such their impact is yet to be felt'.<sup>110</sup>

These initiatives notwithstanding, much more needs to be done to make the citizenry trust the justice system. In this regard, there is a need to deal with case delays evidenced by the backlog,<sup>111</sup> limited access to justice, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedures, the need to establish fair and suitable recruitment and employee promotion procedures, a general lack of training, unethical behaviour, inadequate budget and lack of financial autonomy. The Advisory Panel of Eminent Commonwealth Judicial Experts, which has been called upon to advise the Constitution of Kenya Review Commission (CKRC) on constitutional reforms regarding the Kenya judiciary, concluded that:

... as presently constituted, the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform. It is our considered view that strong measures are necessary for Kenya to achieve an independent and accountable judiciary, capable of serving the needs of the people of Kenya by securing equal justice and the maintenance of the rule of law under a new constitutional order.<sup>112</sup>

The Panel reported 'a crisis of confidence' in the Kenyan judiciary. This crisis of confidence was, for example, demonstrated at the beginning of 2008 in the aftermath of the disputed presidential poll which resulted in violence leading to the loss of many lives, destruction of property and displacement of people. Those who felt aggrieved by the poll result were adamant that they would not take the matter to court as they did not trust it to dispense justice impartially.<sup>113</sup> It is, however, worth noting that in the survey conducted by Steadman for this study in December 2008, 66% of the respondents asked to rate structures and institutions for resolving disputes rated the courts best, followed by community elders with a score of 14%. The chiefs (provincial administration) were rated third with a score of 9% while the church came fourth with a score of 8%. Only 1% cited the International Criminal Court while 2% indicated they did not know. The survey suggests that Kenyans still hold the courts of law in high regard compared to other structures and institutions resolving disputes. So, Kenyans not making use of the courts as an

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<sup>108</sup> [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>109</sup> Gazette Notice 8167 of 5 September 2008.

<sup>110</sup> Republic of Kenya (2010: 45).

<sup>111</sup> *Ibid.* at 54.

<sup>112</sup> Advisory Panel of Eminent Commonwealth Judicial Experts (2002).

<sup>113</sup> *Ibid.*

avenue to access justice as attested to by an earlier observation may be attributed to other causes other than lacking confidence in them.

*Table 7: Ranking of institutions/forum for solving criminal/civil disputes (Steadman survey 2008)*

	No. of respondents	Percentage (%)
Courts	1328	66
Chiefs	178	9
Elders	285	14
Church	159	8
International Criminal Court	12	1
Mediator	1	0
Personally	2	0
Don't know	42	2
<b>Total</b>	<b>2007</b>	<b>100</b>

There was a dramatic change in this position recorded in the survey conducted by Steadman in June 2009 on whether the perpetrators of post-election violence should be tried by a local tribunal or by the International Criminal Court at The Hague. Most respondents were of the view that a local tribunal would not do and that the only hope for justice was with The Hague.<sup>114</sup> This illustrates the fact that the public perception of judicial processes varies depending on the issue under consideration.

The Draft Constitution of Kenya 2004 (here referred to as the Bomas Draft), responding directly to the perception of lack of judicial independence, had recommended that the exercise of judicial power by the judiciary be subject only to the constitution and the law and not to the control or direction of any other person or authority.<sup>115</sup> To realise this, it also proposed that the administrative expenses of the judiciary, including remuneration and benefits, be a charge on the Consolidated Fund.<sup>116</sup> Most recently, the Task Force on Judicial Reforms, which was appointed pursuant to a stakeholders' meeting in May 2009 and reporting in July 2010, identifies weak administrative structures, lack of operational autonomy and independence of the judiciary as factors that undermine the effective administration of courts.<sup>117</sup>

The new constitution reiterates the principles enunciated in the Bomas Draft. It provides that 'judicial authority is derived from the people and vests in, and shall be exercised by, courts and tribunals established by or under this Constitution' (article 159). It further provides for the independence of the judiciary, reiterating the provisions of the Bomas Draft that that the exercise of judicial power by the judiciary shall be subject only to the constitution and the law and not to the control or direction of any other person or authority, and that the administrative expenses of the judiciary, including remuneration and benefits, be a charge on the Consolidated Fund (article 160).

<sup>114</sup> See e.g. Mwanzia & Kanina (2009).

<sup>115</sup> The Draft Constitution of Kenya, article 185(1) (2004).

<sup>116</sup> *Ibid.*, article 185(3).

<sup>117</sup> Republic of Kenya (2010).

With respect to integrity of judicial officers, the new constitution provides in the sixth schedule on transitional and consequential provisions that:

Within one year ... Parliament shall enact legislation ... establishing mechanisms and procedures for vetting within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve ...<sup>118</sup>

The criteria laid out here are vague<sup>119</sup> and it is necessary to ensure that the vetting exercise does not lead to witch-hunting. This is especially the case because the new constitution provides that:

A removal or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under sub-section (1) shall not be subject to question in, or review by, any court.<sup>120</sup>

## Enactment and implementation of the Sexual Offences Act

The Sexual Offences Act (SOA) of 2006 represents, perhaps, the most successful legal and institutional reform process in Kenya. The Act was motivated by a number of factors, including:

1. The fact that the law is not dealing adequately with sexual violence, which is rampant in Kenya.
2. The multiplicity of statutes dealing with sexual offences. Prior to the enactment of the SOA, sexual offences had been strewn all over the Penal Code and other statutes, such as the Children and Young Persons Act. This multiplicity of laws led to inconsistent interpretations and application of the law, often to the detriment of the victims of sexual offences.
3. The inadequacy of the existing law, which did not, for example, criminalise sexual harassment and child trafficking.
4. The imposition of lenient sanctions on sexual offenders, which did not therefore act as a sufficient deterrent.
5. The fact that the existing law on rape was in practice prejudicial to women, who form the majority of the victims of sexual violence.
6. A desire to ensure that the state fulfils its duty to promote and protect human rights. In particular, there was a desire to ensure that the state implements the UN Declaration on the Elimination of Violence Against Women, which encourages governments to take steps to ensure women are protected from all forms of violence, be it of a physical, sexual or psychological nature.

<sup>118</sup> The Constitution of Kenya, article 23(1) (2010).

<sup>119</sup> *Ibid.*, articles 10 & 159.

<sup>120</sup> *Ibid.*, sixth schedule, article 23(2).

The Sexual Offences Bill was initially drafted by the Juvenile Justice Network (JJN), a coalition of civil society organisations working on the rights of women and children, such as ANPPCAN Kenya, the CRADLE, CREAM, WILDAF, the Child Welfare Society of Kenya, the Girl Child Network, FIDA Kenya and Action Aid Kenya. The JJN then created a technical task force, which prepared a final bill for presentation to Parliament. Their draft was informed by research and comparative analysis of legislation against sexual violence in different countries, including South Africa, Tanzania, Ghana, Australia, the United Kingdom and the United States of America. The Bill was tabled in Parliament by a nominated MP, Hon. Njoki Ndung'u, as a private member's motion. Once the Bill was before Parliament, the JJN then lobbied successfully for its enactment. Such lobbying included consultations with the relevant parliamentary committee, the Committee on the Administration of Justice and Legal Affairs. It also held workshops for MPs. At the same time, the JJN held consultations with other important constituencies outside Parliament, such as the police and religious leaders. For example, they sought to allay the fears of conservative religious groups that the Bill sought to legalise same-sex relations and abortion. It also worked hard to persuade conservative male MPs that the Bill would not encourage women to make false rape allegations in order to punish men. Further, the JJN had to deal with deep-seated cultural gender biases. Inevitably, these negotiations called for compromises, which included the removal of a clause in the Bill making rape within marriage an offence, and another that would have placed criminal responsibility on employers who know that sexual offences are being committed in the workplace but fail to do anything about them. The JJN also agreed to include in the Bill a clause to the effect that a person who makes a false allegation of a sexual offence will receive the sentence that the person against whom the false allegation was made would have received.

These processes led to the enactment of a progressive law on sexual offences, which will no doubt enhance the protection of the rights of women and children. The SOA introduces some 14 new offences, including gang rape, deliberate infection with HIV/Aids, trafficking for sexual exploitation, sexual harassment and child pornography. Its other significant provisions are the introduction of minimum sentences and the establishment of a DNA data bank and a paedophile registry.

Subsequent to the enactment of the SOA, it was quickly realised that a number of actions were required to facilitate its successful implementation. The Attorney General appointed a task force in 2007 'to prepare and recommend a national policy framework and guidelines and recommend a comprehensive policy and propose measures to secure acceptable programmes for the protection, treatment and care of survivors of sexual violence as well as treatment, supervision and rehabilitation of sexual offenders'. The task force, which consisted of state and non-state actors, completed its work and made recommendations that will hopefully contribute to the successful implementation of the Act. For example, the task force developed regulations on what should be contained in the data bank of convicted sexual offenders, which is supposed to be kept by the Registrar of the High Court.

Further efforts to enhance the successful implementation of the SOA have included:

1. The production of simplified versions of the Act (in English and Kiswahili), which have been given to police stations and other administrative officers dealing with sexual offences.
2. The preparation of a training manual for prosecutors.
3. The preparation of a training manual for law enforcement officers.
4. The popularisation of the new law in the media.

The enactment of the SOA is a milestone in the protection of the rights of women and children. Its enactment and implementation offer useful lessons that could be emulated by other law reform initiatives, including:

1. The power of information. By sensitising important constituencies such as women's faith-based groups (like the Catholic Women's Association and the women's guilds), the JIN was able to empower women at the grassroots level, who then put pressure on their MPs to enact the SOA. The JIN also developed an effective media strategy, which saw the print media and FM radio stations play a big role in getting the citizenry talking about the Act. Therefore, law reform initiatives are likely to succeed where concerted efforts are made to inform potential beneficiaries who can then make demands for change on the basis of information.
2. The importance of negotiations. Law making is always a process of give and take, and by demonstrating willingness to compromise, the JIN was able to ensure the enactment of a law that no doubt enhances the protection of the rights of women and children.
3. The possibility of incorporating international human rights standards and practices into national laws and practices even in the absence of an enabling constitutional framework. The SOA incorporates international best practices, and clearly demonstrates the need for law reform initiatives to be informed by the practices of other countries and international human rights standards.

## E. Recommendations

This chapter illustrates that there have been improvements in the normative and institutional framework supporting the rule of law especially since 2003. The government has also ratified key international human rights instruments. However, the following issues need to be addressed:

- Key international and regional human rights instruments that have not been ratified need to be ratified.
- The reporting procedures for the international human rights treaties need to be improved, and implementation mechanisms for ratified treaties should be established.
- The provisions of the new constitution that seek to improve the administration of justice should be implemented.
- The procedures for vetting judges needs to be well articulated to ensure that judges are not removed on flimsy grounds. There is a need to establish legislative and administrative mechanisms for implementing the rulings of regional courts, such as the African Commission on Human and Peoples' Rights. In this regard, the mandate



of the Kenya National Human Rights and Equality Commission could be expanded to facilitate the implementation of such rulings.

- The Kenya Law Reform Commission Bill<sup>121</sup> should be enacted into law as soon as possible since it promises to give the Commission the operational autonomy it requires to play a more prominent role in law reform.

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<sup>121</sup> Kenya Law Reform Commission Bill (2006).

# 3

## Government respect for the rule of law

In general, successive governments in Kenya have not always adhered to the prescriptions of law, especially where law is seen to be a hindrance to the attainment of political or other regime interests. Whenever this happens, the message that government sends to the citizenry is either that law does not matter and can be dispensed with whenever it is convenient to do so, or that law only matters where it serves to protect the interests of the rich and powerful. Whereas it is the executive branch of government that is typically notorious for disrespecting the law, the legislature (or Parliament) and the judiciary also, and increasingly, display a lack of respect for the law in significant respects. An unfortunate consequence of governmental disregard for the law is that the law then ceases to be authoritative, and a culture of impunity and lawlessness begins to emerge. Thus, the worrisome development of a culture of impunity in Kenya can be attributed to the government's lack of respect for the law. Indeed, this emerging culture of impunity may have been a significant contributing factor to the post-election crisis of December 2007–January 2008. Inquiries into the post-election violence indicate that both public actors (including public security forces) and private ones acted with impunity in many cases.

The executive has consistently, and in some cases contemptuously, disregarded acts of Parliament, regulations and judicial pronouncements where these are perceived to be politically inconvenient. Furthermore, the coming into force of certain laws assented to by the president as required by the constitution but deemed not to accord with the interests of the executive have been delayed. The executive has also selectively applied the law, with the result that the idea of 'equality before the law' is greatly undermined. This failure to apply the law consistently has been particularly pronounced in grand corruption investigations, where executive action has

encouraged inaction as the responsible agencies of government engage in turf wars that only result in the law not being applied. Such conspiracies by agencies of the executive to undermine the rule of law do not engender public confidence in the fairness of the law as petty corruption investigations, which are invariably taken to their logical conclusion, are seen to be treated differently to grand corruption investigations. The executive also stands accused of constantly abusing 'the spirit of the law' through dogmatic adherence to 'the letter of the law' where fairness demands a common sense approach to the issues at hand. This has particularly been the case with matters relating to the electoral process. The executive has also used commissions of inquiry to achieve short-term political goals as opposed to resolving the problems that motivate their establishment. Finally, the prerogative powers of the executive, such as the power to grant amnesties and pardons, have in significant cases been exercised in ways that greatly undermine the rule of law.

The legislature has also displayed a lack of respect for the law in significant respects. In particular, the exercise of legislative power has been characterised by: the lack of respect for the legislature's own established procedures, the passage of laws undermining the separation of powers and the deliberate failure to enact amendments to laws declared unconstitutional by the courts.

## **A. The executive and respect for the rule of law**

### **Executive disregard for legislative processes and statutory requirements**

One of the tenets of the rule of law ideal is that 'government discretion must be bounded by standards that set effective limits on the exercise of that discretion'.<sup>122</sup> Unfortunately in Kenya's case, the exercise of the immense discretionary powers wielded by the executive, especially the president, has not been fettered by any such standards. As a result, the president, government ministers and senior civil servants often act in any manner they deem fit, and in many cases irrespective of existing statutory requirements. There is thus a culture of executive impunity in Kenya, which owes its origins to the creation of an Imperial Presidency in the first decade of independence. The term 'Imperial Presidency' denotes the concentration of extreme power in the president, including the granting of unfettered constitutional powers to the president. The Imperial Presidency is a legacy of Kenya's colonial experience. In the colonial era, there were no effective mechanisms for regulating the exercise of the immense powers of the governor, which contributed to the development of autocracy.<sup>123</sup>

The culture of executive impunity has manifested itself in various forms throughout the history of the Republic of Kenya, and is a common subject of discussion in national newspapers.<sup>124</sup> In all its forms, what typically happens is that the executive actor in question behaves with total disregard for the existing statutory requirements in the comfortable knowledge that his or her actions will not be subjected to any sanctions, since the established public accountability mechanisms are weak. Executive actors also tend to stretch the boundaries

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<sup>122</sup> Whitford (2000: 724).

<sup>123</sup> See e.g. Seidman (1970).

<sup>124</sup> See e.g. Odipo (2008: 8); Wangila (2008: 11).

of their statutory powers, so that in practice that which is not expressly outlawed by any statute implicitly becomes – at least in their eyes – permissible. As far as these executive actors are concerned, the law seems to count for little; in many cases they perceive law as an inconvenience that must be cast aside when political exigencies demand it. Ironically, they are quick to embrace the law when it suits their fancies. The following examples illustrate the ubiquity and magnitude of this culture of executive impunity.

First, successive presidents have never felt the need to consult anyone while appointing individuals to occupy constitutional offices, such as the offices of the Chief Justice and judges of the High Court (puisne judges) and judges of the Court of Appeal (judges of appeal), the Attorney General, the Commissioner of Police, the Chief of General Staff of the Armed Forces, the Controller and Auditor General, members of the Public Service Commission, permanent secretaries and ambassadors. Past constitutions have failed to regulate the president's powers of appointment. In the absence of standards on how these powers are to be exercised, successive presidents have tended to appoint to the various constitutional offices persons who would serve their parochial political goals, such as regime maintenance or ethnic hegemony, as opposed to their ability to serve the wider public interest. As a result, important constitutional offices have been occupied by questionable characters, including declared bankrupts. But even where the constitution has mandated the president to consult other bodies before exercising the power of appointment, successive presidents have largely ignored such constitutional fetters with impunity. For example, successive presidents have appointed chief justices and judges without consulting the Judicial Service Commission. The unfortunate consequence of this culture of impunity is that political expediency invariably trumps the established legal processes and procedures.

A second illustration of this culture of impunity is to be found in the contemptuous disregard for established rules and procedures that government ministers display in public procurement matters. For example, although the Public Procurement and Disposal Act of 2005 does not give government ministers, other than the Minister for Finance, any role in the public procurement process, they have nevertheless intervened and influenced the award of tenders. These government ministers simply have no regard for the established rules and procedures and typically use their 'residual powers', such as the power to suspend or fire public officers, to manipulate public procurement processes. They are able to intimidate public officers in this manner because there is no fair legislative framework that regulates the public service. Instead, the public service is only regulated by an administrative code of regulations that does not establish procedures and processes that would ensure fair treatment of public officers where they are confronted with concerted intimidation by powerful government ministers or other senior officials. The threat of being suspended or fired is therefore real and has in many cases intimidated public officers into obeying illegal ministerial directives. It should also be observed that these threats are typically dispensed in the name of the president or his close associates. Again, these threats are not usually expressed in writing, which makes it difficult for threatened public officers to prove that threats were ever made.

Where government ministers want to manipulate the public procurement process, they typically use such residual powers to demand information from the public officers handling

the process. They then use such information to facilitate the award of tenders to entities of their choice. This has happened in numerous cases in the recent past.<sup>125</sup>

This contemptuous disregard for public procurement rules and procedures continues unabated, and is arguably the most important source of corruption in Kenya. Despite the glaring manipulation of these rules and procedures by a number of government ministers, none of them has been censured appropriately, which seems to encourage disrespect for established laws and procedures. Thus, the ministers who presided over the finance and justice ministries when the Anglo Leasing scandal happened were welcomed back to the cabinet after a brief sojourn that seems to have been merely calculated to cool public tempers.

Another illustration is the sale of the Grand Regency Hotel in 2008. Here, it was apparent that the Minister for Finance may have secretly disposed of the Grand Regency Hotel, a property that belongs to the People of Kenya, in disregard of the established rules and regulations. The Public Procurement and Disposal Act requires that public assets should be disposed of through competitive and transparent processes characterised by publicity, on the sound rationale that this is perhaps the best way to ensure that the public receives a fair return for its assets. The Minister for Finance arguably ignored these requirements of law when he sought to secretly sell the Grand Regency Hotel to an entity that claimed to be an agency of the government of Libya.

## The Grand Regency Hotel scandal

The Grand Regency Hotel had been built by Uhuru Highway Development Limited, a company whose directors included Kamlesh Pattni, who was the architect of 'Goldenberg Affair', which was the biggest financial scandal in Kenya. The Grand Regency Hotel was built using funds fraudulently obtained by Goldenberg from the Central Bank of Kenya (CBK) in the early 1990s. The CBK thereafter registered a charge on the property to secure its interest. Pursuant to a consent order given by the High Court of Kenya on 9 April 2008, Uhuru Highway Development Limited agreed to transfer the ownership of the Grand Regency Hotel to the CBK. In consideration, the CBK abandoned all claims against Pattni and other directors of Uhuru Highway Development Limited. But the CBK is prohibited by section 52 of the Central Bank Act from owning commercial property. The CBK was therefore obliged to dispose of the property.

The critical question here was whether the CBK was disposing of public property. If the property in question was deemed public, then the CBK was obliged to adhere to the requirements of the Public Procurement and Disposal Act. The CBK sought the advice of the Public Procurement and Oversight Authority (PPOA) on 28 April 2008. In its reply to this inquiry, the PPOA stated that 'title to the hotel is not held by the Bank but it is held by a private entity as security to a debt'. The PPOA thus seems to have been suggesting that the CBK's interest was merely that of a chargee of a private property, and that to realise this interest, the CBK could dispose of the Grand Regency Hotel by exercising its statutory power of sale by selling it either by private treaty or public auction.

<sup>125</sup> See e.g. Akech (2005).

But it is quite clear that once the court made the consent order, the Grand Regency became public property, and could only be disposed of through the mechanisms established by the Public Procurement and Disposal Act. As the Technical Committee appointed to investigate the sale of the Grand Regency observed, the CBK's declaration 'that it was exercising its statutory power of sale under the Charge was false, fraudulent and designed to deceive'. Indeed, what should have happened is that once the consent order was issued, an instrument of reconveyance should have been registered in favour of the CBK. This did not take place, and a critical procedural step was therefore ignored thereby facilitating the fraudulent transaction. It is this manipulation of the procedural requirements of property law that enabled the CBK to claim that it was dealing with private property. That is, in the absence of a reconveyance, the CBK could legally claim that the Grand Regency was still private property. In addition, in its attempts to value the Grand Regency Hotel, the CBK instructed the valuers to conduct their valuations 'on the basis of depreciated replacement cost and not on the net present value of the business as a going concern which would include goodwill and based on current and projected financial performance of the business'. It therefore appears that the Grand Regency Hotel was not valued properly.

It should also be noted that the court settlement that set the fraudulent disposal of the Grand Regency in motion was made pursuant to a non-existent provision of the Anti-Corruption and Economic Crimes Act. This court order stated that the settlement agreement was pursuant to section 56b of this Act, which supposedly empowers the Kenya Anti-Corruption Commission (KACC) to give amnesty to individuals accused of corruption. But it seems that 'there is no section 56b of the Anti-Corruption and Economic Crimes Act because Parliament deleted it when it was first proposed by the Attorney General and KACC on 13 September 2007'. It would also appear that although Parliament had deleted this provision on amnesty from prosecution, 'someone "sneaked" it back into the Anti-Corruption and Economic Crimes Act amendments signed by President Kibaki on Moi Day in 2007' without Parliament's approval.

The Grand Regency saga also raises a serious issue of procedural fairness. How should a government minister or other public officer who is accused of corruption or other impropriety be investigated? As we shall see, this issue also arose in the purge of the judiciary in 2003. In the Grand Regency saga, the Cabinet Committee which investigated the matter included the Executive Director of the KACC, the Attorney General and the Minister for Lands. First, the composition of this committee raises doubts as to whether the Minister for Finance, the main individual accused of impropriety, would receive a fair hearing given that the Committee was chaired by the Minister for Lands, his chief accuser. Second, the Executive Director of the KACC and the Attorney General were arguably guilty of neglecting their duties, and could not be expected to be fair given that they were accomplices at the very least. Finally, the Minister for Finance was not given an opportunity to present his case before this Committee. Accordingly, one of the lessons from this saga is that the country urgently needs to establish impartial administrative law mechanisms for dealing with such allegations of corruption.

**SOURCES:**

Republic of Kenya (2008); Mati (2008: 10); Gaitho (2008: 10).

It should be noted that the contemptuous disregard for rules and procedures by government ministers is not confined to the public procurement context. It is also frequently displayed in the context of political power contests. In a recent display calculated to influence the fortunes of the Party of National Unity (PNU) to which he is affiliated, the Minister for Local Government purported to gazette, as nominated councillors to local authorities, individuals whose names had not been forwarded to him by the Electoral Commission of Kenya (ECK), contrary to the clear provisions of the applicable laws.<sup>126</sup> In addition, the said minister purported to decline to gazette individuals whose names had been forwarded by the ECK. In doing so, the minister nominated about one hundred more councillors than the Local Government Act permits him to do. The Local Government Act provides that the number of nominated councillors in any local authority should not exceed one third of the elected councillors.<sup>127</sup> These irresponsible actions of the said government minister undermined the democratic process, and contributed significantly to the chaos that characterised mayoral elections in several cities and towns in February 2008. In Nairobi, for example, there was a farcical and acrimonious tie in the mayoral election that would not have occurred had the government minister in question followed the law. This is a clear example of a government minister purporting to exercise powers that are not conferred upon him by any law.

It should be noted that the successor of this minister revoked the Gazette Notice in question, albeit in a manner that also seemed to disregard the law. Nevertheless, this example demonstrates how the culture of impunity by power holders undermines the democratic process. Again, the government minister in question was not censured for abuse of office.

The culture of impunity is also evident in the treatment of the media by government ministers. Media houses and journalists critical of the government have in some cases been dealt with in highly draconian ways. This practice is perhaps best illustrated by a raid on *The Standard* in 2005 carried out by persons believed to have been acting on the instructions of senior government officials.<sup>128</sup> Here again, established legal rules and procedures for making complaints against the media were conveniently ignored. In the aftermath of the raid, an unapologetic government minister, while citing the preservation of state security as the reason for the raid, remarked that 'if you rattle a snake, you must be prepared to be bitten by it'.<sup>129</sup> Quite clearly, this government minister was stating that the government would deal ruthlessly with critical media houses, and would use illegal means if these were deemed to be appropriate in the circumstances. During the raid, the broadcasting equipment of *The Standard* was disabled and its computers were vandalised. In addition, some of its employees were assaulted by the commandoes who undertook the raid. The government minister in question was never censured for his callous and irresponsible remarks. Further, the public is yet to be informed of what transpired since the commission of inquiry established by the president to investigate the matter never made its report public. Despite taking the law into their hands, the commandoes who raided *The Standard* and their accomplices escaped punishment for their crimes.

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<sup>126</sup> See *Kenya Gazette* Notice No. 1276 of February 22, 2008.

<sup>127</sup> Local Government Act, chapter 265, Laws of Kenya, section 31(i)(d).

<sup>128</sup> See e.g. Shameful Episodes of Arturs and Kibaki Men's Blunders, *Nation*, 27 December 2006.

<sup>129</sup> *Ibid.*

The disdain with which the executive treats the Public Officer Ethics Act<sup>130</sup> is yet another illustration of this culture of impunity. This Act seeks to enhance the adoption of ethical practices by public officers as a mechanism to fight corruption, which is a perennial scourge in Kenya. Among other things, the Act prohibits public officers from ‘obtain[ing] money or other property from a person by using his official position in any way to exert pressure’.<sup>131</sup> But executive actors and MPs invariably honour this provision by breaching it. Thus the time-honoured practice, otherwise known as *harambee*, of soliciting funds from the public for ostensibly public causes continues unabated. The *harambee* culture has contributed significantly to the spread of corruption, hence the legislature’s attempts to regulate it. In a recent demonstration of executive disdain for this law, the Head of the Public Service wrote to permanent secretaries asking them to seek contributions from staff towards a national fund established to help resettle victims that were displaced in the course of the violence that accompanied the conclusion of the December 2007 elections.<sup>132</sup> In response to public opposition to this act of the government, a permanent secretary claimed that the contributions would be voluntary. But given the culture of intimidation that characterises the work of public servants, for example in the public procurement context, one can reasonably surmise that public servants were coerced into contributing to the national refugee resettlement fund. In a further act of disobedience of the Public Officer Ethics Act, the president presided at a function to raise funds for the same fund. The Act prohibits public officers from using their ‘office or place of work as a venue for soliciting or collecting harambees’.<sup>133</sup>

## Executive disregard for judicial decisions

In the context of the separation of powers doctrine, judicial review constitutes the principal instrument that courts of law use to police adherence by the other branches of government to the rule of law. Judicial review is ‘the power of the court, in appropriate proceedings before it, to declare a governmental measure either contrary to, or in accordance with, the constitution or other governing law, with the effect of rendering the measure invalid and void or vindicating its validity’.<sup>134</sup> Judicial review therefore enables the courts to keep the other branches of government within the legal limits assigned to their authority.

Despite the fact that Kenya has a written constitution, courts in Kenya have largely based their power to censure governmental measures on the English Common Law. Although it can be argued that the power of judicial review is an inherent power in a constitutional democracy, the constitution does not expressly give the courts the power to censure governmental action. It only provides that ‘any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency’.<sup>135</sup> Indeed, Kenyan courts have struck down laws for being inconsistent with the constitution.<sup>136</sup> But as far as judicial review of governmental action is concerned, the powers of the courts are regulated by the Law Reform Act and Civil Procedure

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<sup>130</sup> Public Officer Ethics Act, Laws of Kenya, 2003.

<sup>131</sup> *Ibid.*, section 13(2).

<sup>132</sup> Ogosia & Kadida (2008).

<sup>133</sup> Public Officer Ethics Act of 2003, section 13(1).

<sup>134</sup> Nwabueze (1977: 229).

<sup>135</sup> Constitution of the Republic of Kenya (2010), article 2.

<sup>136</sup> See e.g. *Margaret Magiri Ngui v. Republic* (1985).



Rules made under the Civil Procedure Act, which again borrow heavily from English practice.

The procedure for applying for judicial review is contained in order 53 of the Civil Procedure Rules, which are enacted under the Civil Procedure Act. In the first instance, the law requires an applicant to apply to the High Court for leave to institute an application for judicial review. At this stage, the applicant is required to establish standing (*locus standi*). For a long time, Kenyan courts adopted a rigid approach to standing. However, over the last decade they have adopted a much more liberal approach, and it is now possible for citizens to challenge many decisions and acts of government. For example, in the case of *Albert Ruturi & Others v. Minister for Finance & Another*, the presiding judge stated that ‘as part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*’.<sup>137</sup> If the High Court grants leave, the applicant can then make a substantive application for judicial review. Where the applicant’s application is successful, the court can issue orders stopping the offending act or decision, rescind the offending decision of the government agency in question, or ask such an agency to reconsider its decision where it had taken irrelevant factors into account when it made its decision.

The courts have exercised this common law-based power in diverse contexts, and have struck down numerous acts of government. Unfortunately, the executive has tended to ignore court orders in such cases, and there is a general perception among Kenyans that there is a ‘widespread culture of defiance of court orders’.<sup>138</sup> In 2003 for instance, the Minister for Tourism and Information defied a court injunction restraining the government from taking over a building whose ownership was in dispute.<sup>139</sup> The same government minister subsequently defied a court order requiring him to disband a committee he had constituted to investigate the affairs of a radio station.<sup>140</sup> Again in 2003, the Minister for Local Government defied a court order which sought to prevent him from revoking the nomination of a councillor of the Mombasa City Council.<sup>141</sup> In a repeat action, the same minister defied a court order quashing the nomination of an individual to serve in the Kisumu City Council.<sup>142</sup> No action was taken against these defiant government ministers.

Instead of adopting a narrow interpretation of the constitution that facilitates government disrespect for the rule of law, the courts ought to establish standards to regulate the failure, neglect or refusal of public officers to comply with court orders. After all, the constitution is supreme and the Government Proceedings Act should be interpreted in a manner that fulfils the broad intentions of the constitution, especially government respect for the rule of law. In the *Kisya* case, for instance, the court should have inquired into the reasons behind the failure of the permanent secretary to settle the decretal amount as required by the court order. It is only by doing so that the courts can ensure that public officers comply with the law.

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<sup>137</sup> (2002) 1 KLR 61.

<sup>138</sup> Mitullah et al (2005: 52–53).

<sup>139</sup> See e.g. KICC Row: Uhuru Cautions Minister, *Kenya Times*, 16 February 2003.

<sup>140</sup> See e.g. Savula (2005).

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

## The Kisya Investments case

The executive has also defied court orders by frustrating their execution. The case of *Kisya Investments Ltd v. Attorney General & Another* is a model illustration of this practice. In this case, the plaintiff initially sued the government in 1990, and subsequently obtained a decree against the government for about KES 60 000. The government stalled with the payment for about two years, and only effected payment in 1992 after the plaintiff had obtained orders against the permanent secretary in the responsible ministry, that is the Ministry of Public Works and Housing. But after receiving this payment, the plaintiff filed an application in court in 1997, seeking the amendment of the court decree issued in 1992 averring that this decree was not computed properly. The court obliged and issued an amended decree in 1998 for some KES 80 000. A year went by without the plaintiff being paid the outstanding amount. The plaintiff then applied for an order of mandamus to compel the permanent secretary in the Ministry of Roads and Public Works to pay the amended decretal amount less what had been paid in 1992. In its application, the plaintiff also sought an order committing the said permanent secretary to jail for contempt of court, on the grounds that the Permanent Secretary had failed, neglected or refused to pay the decretal amount as required by the court. This application was denied on the grounds that 'the permanent secretary could not be committed to jail for contempt of court as Section 21(4) of the Government Proceedings Act ... does not allow the same to be done'. The plaintiff then filed a constitutional reference, and the Constitutional Court was now required to determine whether the Permanent Secretary was guilty of contempt of court, and whether the Permanent Secretary was obliged by law to pay the decretal amount in compliance with the order of mandamus.

The Government Proceedings Act thus adds an interesting dimension to this case, since it precludes courts of law from issuing orders 'for enforcing payment by the government of any money or costs'. Further, this Act provides that 'no person shall be individually liable under any order for the payment by the government, or any government department, or any officer of the government as such, of any money or costs'. Interpreting these provisions of the Act, the court held that 'the applicant could not in law present an application for an order of mandamus to enforce the decree against the government by way of committing the Permanent Secretary to civil jail if there was default or non-compliance'.

At the same time, the Constitution of the Republic of Kenya envisages that individuals, including public officers, may be deprived of their personal liberty either 'in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal', or 'in execution of the order of a court made to secure the fulfilment of an obligation imposed on him by law'. In the context of these provisions of the constitution, the plaintiff contended that section 21(4) of the Government Proceedings Act is inconsistent with the constitution.

In our view these provisions of the constitution constitute a necessary mechanism for ensuring that public officers comply with the law. Nevertheless, the application of these provisions of the constitution ought to be tempered by the practical challenges that confront public officers in the performance of their duties on a day-to-day basis. Thus, for instance, the Permanent

Secretary in the present case may have failed to pay the decretal amount because the budgetary vote for the Ministry of Public Works and Housing had not been approved by Parliament, or because of other bureaucratic challenges. Accordingly, while applying the said provisions of the constitution, the courts should balance the need for compliance with the law with the practical challenges of running governmental affairs. Thus, the Permanent Secretary may require some reasonable time to comply with the law. This does not, however, mean that there will be no circumstances under which public officers should be punished for failing to implement court orders made to secure the fulfilment of legal obligations imposed on such officers. Essentially, section 21(4) of the Government Proceedings Act must therefore be interpreted in such a way that it does not defeat the intention of the constitution to secure respect for the law by all, including public officers, which is expressed in sections 72(1)(b) and (c) thereof.

Did the Constitutional Court get this balance right? First, the court rightly points out that section 72(1)(b) of the constitution does not apply here since there was no court order punishing the Permanent Secretary for contempt of court. But with respect to section 72(1)(c) of the constitution, the court then contends that ‘the Decree and certificate of order against the government, strictly, are orders against the government as a party in the suit. As a result there was no order by the court made to secure the fulfilment of any obligation on [the part of the Permanent Secretary], personally or in his official capacity.’ Thus the view of the court is that unless there is ‘a court order directed to the person and an obligation imposed on him by law to fulfil the same’, then the Permanent Secretary cannot be deprived of liberty as envisaged by section 72(1)(c) of the constitution. In our view, the approach taken by the court in this matter does not enhance respect for the law by public officers. We all know that the legal entity that we call ‘government’ acts mainly through human agents. Therefore, court orders need not be specifically addressed to particular public officers before they can be compelled to act, as the court seems to be saying. The court’s reasoning simply gives public officers an excuse for failing to act as required by law. Interestingly, this court was alert to this danger and observed that, ‘[t]he government is obliged to obey the law and discharge all of its statutory and legal obligations. It ought not abuse the privileges and immunities granted to it by law to the detriment of other parties and in particular the public and the public interest. The provisions herein granting insulation and immunity to the government were intended ultimately to protect the public interest but in this case the government has allowed it to operate against the public interest as it is the Kenyan taxpayers and the public which could ultimately be called upon to pay the colossal sums which may have accrued on the original decretal sum ...’.

**SOURCES:**

*Kisya Investments Ltd v. Attorney General & Another* (2005) eKLR; Government Proceedings Act, chapter 40, Laws of Kenya, section 21(4).

## Delayed application of laws

Government ministers have also exhibited a tendency to delay the entry into force of new laws enacted by Parliament. This abuse of power that undermines the operation of law arises because typically, whenever Parliament enacts a new legislation, there is a provision to the effect that such legislation ‘shall come into operation on such date as the Minister may, by notice in the *Gazette*, appoint’. This power is unregulated, and the minister can therefore do as he or she wishes. And even where the ministers do establish dates when such laws will come into force, they sometimes undermine such laws by failing to appoint the personnel required for the laws to be operational. This is the fate that befell the Privatisation Act of 2005, which was only operationalised in 2009.<sup>143</sup> This law was enacted in response to the concern that the government was selling public assets corruptly, cheaply and secretly, thereby undermining the public interest. However, the minister delayed its entry into force for four years. The failure to operationalise the Privatisation Act in a timely manner creates an impression that this law is seen by executive actors as an inconvenient piece of legislation. Jaindi Kisero thus remarks that ‘there are many cases where permanent secretaries and managing directors of parastatals have written to the Treasury seeking exemptions from the Privatisation Act on the grounds that the transactions were started before the Act came into effect’.<sup>144</sup>

Article 116(2) of the new constitution seeks to remedy this deficiency. It provides that, in general, acts of Parliament will take effect ‘on the fourteenth day after its publication in the *Gazette*, unless the Act stipulates a different date on or time at which it will come into force’.

## The politics of commissions of inquiry

In any legal system, it is important to establish mechanisms for dealing with extraordinary circumstances or exigencies in which the public demand immediate governmental responses. In commonwealth countries, commissions of inquiry provide this mechanism, and they are typically constituted ‘in situations so unusual that no other approach will suffice’.<sup>145</sup> Such situations include instances where there is considerable public anxiety, where the normal machinery of government or established civil and criminal processes are either inadequate or inappropriate to resolve the matter in question, or where ‘the issue is in an area too new, complex or controversial for mature policy decisions to be taken’.<sup>146</sup>

In Kenya, the legislative framework for commissions of this nature is found in the Commissions of Inquiry Act.<sup>147</sup> This Act empowers the president to appoint ‘a commissioner or commissioners and authorising him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the president, be in the public interest’.<sup>148</sup> Although the commissions typically have some latitude with respect to rules of procedure, they

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<sup>143</sup> See, e.g., Government Should Follow Privatisation Law, *East African* at 12, 7 July 2008.

<sup>144</sup> Kisero (2008: 10).

<sup>145</sup> African Centre for Open Governance (2008: 2).

<sup>146</sup> *Ibid.* at 3.

<sup>147</sup> Commissions of Inquiry Act, chapter 102, Laws of Kenya.

<sup>148</sup> *Ibid.*, section 3(1).

are judicial in nature since they are required to ‘make a full, faithful and impartial inquiry’ into the matter in question and ‘to report to the president, in writing, the result of the inquiry and the reasons for the conclusions arrived at’.<sup>149</sup> However, the president is under no obligation to make the reports of such commissions public or to implement their findings.

Since independence, successive presidents have established about 25 commissions of inquiry. Invariably, the reports of these commissions are either not made public or are publicised long after the reports were given to the president. This is especially the case with inquiries that, in the opinion of the president and broadly speaking, touch on matters of national security. In many of these cases, the commissions are used by the president as a political tool for containing volatile political situations or individuals. Because the power of the president to appoint commissions of inquiry is not regulated, successive presidents have established such commissions even where the existing legal framework arguably suffices. For example, the Miller Commission of Inquiry was appointed to inquire into the alleged subversive or treasonable conduct of Mr Charles Njonjo, a former Attorney General and Minister for Justice and Constitutional Affairs. Again, the Akiwumi Commission of 1998 was established to inquire into the participation of civilians and law enforcement officials in the tribal clashes that occurred in 1991. In both cases, the matters in question could have been handled using the existing criminal law.<sup>150</sup>

Thus, commissions of inquiry are in many cases established as a means of containing public anger where it appears the executive does not intend to implement their recommendations. This was the case with the Bosire Commission of Inquiry into the ‘Goldenberg Affair’, for example.<sup>151</sup> An interesting feature of this Commission is that it was established whilst a number of court cases revolving around the ‘Goldenberg Affair’ were pending.<sup>152</sup> Indeed, the Bosire Commission served to complicate the resolution of these cases, since they were terminated upon the establishment of this commission.

For the most part, the commission of inquiry is therefore a political instrument at the disposal of the president. Unfortunately, it has a capacity to undermine the rule of law, since successive presidents have tended to appoint sitting judges as heads or members of commissions of inquiry.<sup>153</sup> Not only are such judges drawn into political controversies when they serve on such commissions, but their determinations therein are frequently challenged in courts of law.<sup>154</sup> While it is no doubt desirable that the findings of such commissions should be subject to judicial review, appointing sitting judges as commissioners in non-judicial processes may undermine the authority of such judges and the judiciary in general. As the Bosire Commission observed, ‘judges who serve in politically motivated inquiries run the risk of being dragged into politics

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<sup>149</sup> *Ibid.*, section 7(1).

<sup>150</sup> African Centre for Open Governance, *supra* note 24 at 8.

<sup>151</sup> *Ibid.* at 9 (observing that ‘[s]ubsequent conduct on the part of the Kibaki Government reveals that opting for the Bosire and Ndung’u commissions of inquiry, instead of direct prosecutions for the suspected corruption under inquiry was a tactical political exit from a potential fratricidal war with Kenya’s power and property barons implicated in the reports and who were cast on both sides of the political divide.’).

<sup>152</sup> Republic of Kenya (2005; para 767).

<sup>153</sup> African Centre for Open Governance, *supra* note 24 at 9.

<sup>154</sup> *Ibid.* at 10.

and having their reputation for impartiality ruined'.<sup>155</sup> It therefore recommended, among other things, that 'no sitting judge should be appointed to participate in a public inquiry unless the Chief Justice has satisfied himself that the nature of the intended public inquiry has no political implications'.<sup>156</sup>

The case of *Republic v. Judicial Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti*<sup>157</sup> illustrates why it may not be desirable for sitting judges to serve on commissions of inquiry, and why increasingly these commissions are not suitable forums for the resolution of national exigencies. The Goldenberg saga revolved around the activities of a company called Goldenberg International Limited (GIL), which from about 1990 had fraudulently obtained about KES six billion from the Central Bank of Kenya by manipulating export compensation laws and regulations by making it appear that it had exported gold, while no gold was in fact exported. George Saitoti was the Minister for Finance when the government approved GIL's scheme. Once word got out that GIL had swindled the government, a huge outcry followed and several initiatives were launched to unravel what quickly became a conundrum. These initiatives included investigations by committees of Parliament, criminal investigations and public and private attempts to prosecute the architects of the fraud. The Bosire Commission was established by President Kibaki in 2003, shortly after the new NARC government assumed office.

George Saitoti was unhappy with the Report of the Bosire Commission, as he was mentioned in unfavourable terms. Among other things, the Bosire Commission reported that Mr Saitoti 'knowingly and illegally allowed GIL an enhanced rate of export compensation contrary to the provisions of the Local Manufacturers (Export Compensation) Act. Further, the Commission thought that the minister abused his powers by not subjecting this application to technical evaluation as he had done others.'<sup>158</sup> Mr Saitoti quickly moved to court, seeking judicial review orders to quash 'the findings, remarks and decisions' of the Bosire Commission and to prohibit the Attorney General from bringing criminal charges against him. The court obliged, on the basis that the Bosire Commission erred by purporting to review a decision of Parliament, which had concluded that Mr Saitoti had acted according to the law. The court also argued that Mr Saitoti could not be accorded a fair trial under the circumstances.

In this respect, the court likened Mr Saitoti's case to that of *Stanley Munga Githunguri v. the Republic*,<sup>159</sup> where the court held that it is an abuse of court process to charge a person after a decision had been made not to prosecute him, and with this decision communicated to him and assurances given that he would not be prosecuted again. In likening Mr Saitoti's circumstances to those of Mr Githunguri, the court argued that the Attorney General's statement in Parliament – to the effect that the government's decision to grant export compensation to Goldenberg International was procedural – created an 'implied representation' that criminal proceedings would not subsequently be brought against Mr Saitoti.<sup>160</sup> Even if one were to say that the court

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<sup>155</sup> Republic of Kenya, *supra* note 31 at 25.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Republic v. Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti* (2006) eKLR.

<sup>158</sup> Republic of Kenya, *supra* note 31 at para 547.

<sup>159</sup> *Githunguri v Republic* (1986) KLR 1.

<sup>160</sup> *Republic v. Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti* (2006) eKLR at 36.

ultimately made the right decision, this kind of reasoning arguably stretches legal interpretation beyond reasonable bounds. Quite simply, the circumstances of Mr Githunguri and Mr Saitoti are as similar as day and night.

In addition, this decision arguably sets a bad precedent since it renders the Report of the Bosire Commission worthless. In all likelihood, any person now adversely mentioned in the report of a commission of inquiry will rush to court,<sup>161</sup> and where such a person obtains favourable orders, it means that no courts of law can try them for any offence they may have committed.<sup>162</sup> This is precisely what happened in the *Kotut* case.<sup>163</sup> That only leaves the political option of implementation of the report by the president, which will not happen unless there is political will to act. In all likelihood, the social ill that the commission of inquiry was in the first place established to deal with would therefore not be addressed.

As far as the war against grand corruption is concerned, the decision in the *Saitoti* case will make it much harder for the country to deal with this debilitating ill.<sup>164</sup> In addition, the *Saitoti* and *Kotut* decisions reinforce public perceptions that the courts make political rather than legal decisions so as to protect the interests of the rich and powerful. The fact that the two decisions are not easy to rationalise legally also undermines the authority of the judiciary as a legitimate forum for the resolution of political and other disputes.

To make matters worse, commissions of inquiry have an inherent weakness in that they are ad hoc and become *functus officio* once they have delivered their report to the president. They do not therefore have an opportunity to correct their mistakes should a court of law subsequently determine that their decisions, or the manner in which their decisions were arrived at, were wrong or unreasonable. In many ways, commissions of inquiry are therefore a waste of time, effort and money.

A further limitation of commissions of inquiry is that their recommendations are hardly ever implemented. As a result, there has been a fatigue among the public and loss of belief in their usefulness. For this reason, it is critical for the recommendations of the Waki Commission to be implemented fully, if only because it gives the country an opportunity to deal with the culture of impunity and help the country lay a firm foundation for the rule of law.

The Commissions of Inquiry (Amendment) Bill of 2009 now seeks to address some of the deficiencies of commissions. The Bill seeks to give the legislature an oversight role in the conduct of the activities of commissions of inquiry. If enacted, the Bill will mandate commissioners to report their findings to the legislature for debate, thereby giving the public, through their elected representatives, an opportunity to deliberate on the results of the inquiry. It will also enhance transparency and accountability in the functioning of the inquiry system.

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<sup>161</sup> Ibid. at 14. See e.g. *Wilfred Karuga Koinange v. Commission of Inquiry into Goldenberg* (2006). It should be noted that in this case the court declined to issue the orders of *certiorari* and prohibition, and reasoned that the public interest demanded that the issues raised by the applicant 'should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago.'

<sup>162</sup> See e.g. *Kadida* (2008); *Ogututu* (2008).

<sup>163</sup> *Eric Cheruiyot Kotut v. S.E.O. Bosire & 2 Others* (2008) eKLR.

<sup>164</sup> See *Mwangi* (2007).

## Amnesties and pardons

In Kenya, the power to grant pardons is a prerogative of the president. In the repealed constitution, it was conferred by provisions dealing with the 'prerogative of mercy'.<sup>165</sup> These provisions empowered the president to pardon a person convicted of an offence, to grant a person respite from execution of a punishment imposed for the commission of an offence, to substitute a less severe form of punishment for a punishment imposed on a person for an offence, or to remit the whole or part of a punishment imposed on a person for an offence or of a penalty or forfeiture. The president could also pardon a person convicted by an election court under the National Assembly and Presidential Elections Act.<sup>166</sup> In practice, successive presidents also granted amnesties to groups of prisoners through orders that are typically announced as part of the annual national celebration of the attainment of independence on 12 December (Jamhuri Day).

The repealed constitution also established an Advisory Committee on Prerogative of Mercy consisting of the Attorney General and (at most) five other members appointed by the president.<sup>167</sup> This Committee was supposed to advise the president in exercising the prerogative of mercy, although the president was not obliged to act in accordance with the advice of the Committee.<sup>168</sup>

The prerogative of mercy has typically been exercised in a subjective manner, and successive presidents have been criticised by human rights organisations and the media for abusing this power. The pardons of Charles Njonjo in 1984 and Margaret Gachara in 2004 are good illustrations of how the subjective exercise of this power undermines the faith of the citizenry in the rule of law.

In the case of Charles Njonjo, President Moi established a commission of inquiry in 1983 to inquire into allegations of treason and subordination made against him. Although this commission found him 'guilty' of these offences, he was pardoned by the president on the occasion of Jamhuri Day in 1984. Margaret Gachara was the head of the National Aids Control Council (NACC). On 27 August 2004, she was convicted of abuse of office and obtaining KES 27 million from the NACC by false pretences. She was then jailed for 12 months for each of the three counts and ordered to serve the sentences concurrently. But on 12 December 2004, she was released pursuant to a presidential order giving amnesty to a group of prisoners. Upon her release, the head of the Langata Women's Prison, where she had been detained, was quoted as saying that Margaret Gachara's 'name was forwarded to the prison headquarters alongside others having met all qualifications, including attaining and retaining remarkable character while in prison'.<sup>169</sup> The short sentence and the subsequent speedy pardon of Margaret Gachara reinforce public perceptions that there are different sets of laws for the rich and the poor. As we shall see in our analysis of the criminal justice system, Kenyan prisons are full to the brim with poor individuals convicted of much less significant offences for much longer sentences. Indeed, there

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<sup>165</sup> Constitution of Kenya 1963, section 27.

<sup>166</sup> *Ibid.*, section 27(e).

<sup>167</sup> *Ibid.*, section 28(1).

<sup>168</sup> *Ibid.*, section 29(2).

<sup>169</sup> Amnesty Saw Dr Gachara Get Off the Hook, *Nation*, 21 February 2005.



are many cases of persons charged with petty offences who have been languishing in remand prisons for many years. In our view, these shortcomings of the exercise of the prerogative of mercy can only be remedied by establishing transparent and accountable mechanisms for how it is used. Further, the constitution should be amended to oblige the president to consult the Advisory Committee on Prerogative of Mercy, whose deliberations also need to be transparent. Indeed, this Committee performs an important function and should also be accountable to the people of Kenya. Up until now, Kenyan courts have treated prerogative powers as a preserve of the president. These powers ought to be subject to judicial review.

It is therefore encouraging that article 133 of the new constitution imposes the much-needed obligation of the president to consult the Advisory Committee in exercising this power. Further, the new constitution requires the enactment of a law that will provide for the tenure of the members of this committee, its procedures and the criteria that it shall use in formulating its advice to the president. In addition, it provides that the committee may take into account the views of the victims of the offence in respect of which it is recommending the exercise of the prerogative of mercy by the president.<sup>170</sup>

## **B. Parliament and respect for the rule of law**

For a long time, the Kenyan legislature (Parliament) was subservient to the executive, and it was thus difficult to distinguish its actions from those of the executive. Over the last decade, however, Parliament has increasingly asserted itself. Generally speaking, while parliamentary assertiveness has been instrumental in enhancing the accountability of the executive, Parliament has not always demonstrated respect for the rule of law. Specifically, Parliament has undermined the separation of powers doctrine by passing laws that give MPs executive powers. Even worse perhaps, Parliament has not taken steps to amend such laws even after the courts have ruled that they are unconstitutional.

Again, MPs have demonstrated a particular proclivity to enact laws that seem to only secure their parochial interests, and not the interests of the general public. This is especially the case with a series of laws that enhance the salaries and financial benefits of past and present members of parliament.<sup>171</sup> The very first legislative act of the MPs of the 9th Parliament (2002–2007) was to increase their salaries and allowances by amending the National Assembly Remuneration Act of 1975.<sup>172</sup> The MPs were at it again in 2007 when they enacted the Gratuity Act of 2007, which also amended the National Assembly Remuneration Act, this time without adhering to the established procedures.<sup>173</sup> The Gratuity Act of 2007 provided for the payment of a KES 1.5 million gratuity to each MP and to the *ex officio* members of the 9th Parliament, including the Attorney General. This Act was part of the Statute Law (Miscellaneous Amendments) Bill 2007, but which did not, contrary to the established procedure, indicate that it proposed to amend the National Assembly Remuneration Act.<sup>174</sup> In effect, the Gratuity Bill was introduced without giving the

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<sup>170</sup> Section 133(4).

<sup>171</sup> See e.g. Mars Group Kenya (2007). See also Shiundu & Leftie (2010).

<sup>172</sup> See National Assembly Remuneration (Amendment) Act, No. 2 of 2003.

<sup>173</sup> Mars Group Kenya, *supra* note 50 at 15.

<sup>174</sup> *Ibid.* at 15–16.

requisite notice in Parliament. The 10th Parliament is now threatening to sabotage government operations unless the government accedes to its demands for yet another exorbitant pay rise.<sup>175</sup>

Further, while the established procedures require that such bills must go through three reading stages before being enacted, the Gratuity Bill skipped the first two stages.<sup>176</sup> Instead, its provisions were inserted into the Statute Law (Miscellaneous Amendments) Bill 2007 by a notice of motion introduced at the committee stage of the enactment of the Statute Law Bill.<sup>177</sup> It was also introduced without first obtaining the consent of the president, contrary to the requirements of the constitution and the standing orders of Parliament.<sup>178</sup>

MPs who are members of the Law Society of Kenya (LSK) have also secured exemption for themselves from the requirements of the LSK's continuing legal education programme.<sup>179</sup> Such abuse of the power to make law also undermines the rule of law, since it creates two sets of laws that apply to the powerful and the powerless, which cannot be justified in principle.

Since 1999, Parliament has enacted two laws that give MPs executive powers. These laws are the Kenya Roads Board (KRB) Act<sup>180</sup> and the Constituency Development Fund (CDF) Act.<sup>181</sup>

The KRB Act establishes a Kenya Roads Board to oversee the maintenance, rehabilitation and development of roads.<sup>182</sup> More specifically for present purposes, the KRB Act establishes a district roads committee (DRC) for every district<sup>183</sup> and provides that all the MPs from the district are members of this agency of government.<sup>184</sup> Shortly after this law was enacted, one John Harun Mwau moved to court to challenge its constitutionality in the case of *Republic v. Kenya Roads Board ex parte John Harun Mwau*.<sup>185</sup> The applicant sought the judicial review order of prohibition to stop the implementation of the KRB Act and a declaration that it is unconstitutional on the grounds, among others, that 'it confers executive powers on legislators contrary to the doctrine of separation of powers and that it is unconstitutional for the legislators to enact and enforce the laws'.<sup>186</sup>

The court obliged, observing that 'it would be against the constitutional principle of separation of powers for members of Parliament to take part in actual spending, then submit their annual estimates to themselves in Parliament for approval, then query themselves through the Public Accounts Committee or the Public Investment Committee'.<sup>187</sup> However, Parliament

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<sup>175</sup> MPs Run Amok Over New Pay, *Standard*, 9 July 2010.

<sup>176</sup> Mars Group Kenya, *supra* note 50 16.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> See Statute Law (Miscellaneous Amendments) Bill No. 20, 2007 proposing the introduction of a new section 81(3) of the Advocates Act, to provide that '[n]o rule made under this section shall require an advocate who is the Speaker, or who is a member of the National Assembly, and who holds a practicing certificate, to undergo continuing legal education during his tenure as such Speaker or member.'

<sup>180</sup> Kenya Roads Board Act, Laws of Kenya, No. 7 of 1999.

<sup>181</sup> Constituency Development Fund Act, Laws of Kenya, No. 10 of 2003.

<sup>182</sup> Kenya Roads Board Act, section 6(1).

<sup>183</sup> *Ibid.*, section 17(1).

<sup>184</sup> *Ibid.*, section 17(2)(b).

<sup>185</sup> *Republic v. Kenya Roads Board ex parte John Harun Mwau*, Nairobi High Court Misc. Civ. Application No. 1372 of 2000.

<sup>186</sup> *Ibid.* at 2.

<sup>187</sup> *Ibid.* at 30–31.

was unmoved, while the executive chose to do nothing. The illegality therefore persists to date.

Emboldened by the powerlessness of the judiciary and the acquiescence or indifference of the executive in the case of the KRB Act, Parliament then enacted the CDF Act, which gives MPs even more significant powers. It should be noted at the outset that the CDF Act has noble objectives, as it seeks to enhance the participation of Kenyans in the initiation and implementation of development projects at the local level, but it violates the separation of powers doctrine in a number of respects. In particular, the CDF Act gives MPs the power to simultaneously expend public resources and account to Parliament for such expenditure. Two principal institutions of the CDF Act are important in this respect, namely the Constituency Development Committee (CDC) and the Constituency Fund Committee (CFC). The CDC is arguably the most critical institution of the CDF Act; the idea of devolution that informs the CDF initiative would not be realised without it. The Act requires the establishment of a CDC in every constituency. But this critical organ, whose functions are executive in nature, is constituted, convened and chaired by the MP.<sup>188</sup> While the Act makes an attempt to regulate what kind of persons can serve as members of the CDC, the ultimate decision of which individuals are to be appointed is the prerogative of the MP. In addition, the CDF Act gives MPs the power to identify the projects which are to be funded by the CDF.<sup>189</sup> The CDF Act therefore makes the MP a grand political patron at the local level.

On the other hand, the CFC is an oversight body. It is established as a select committee of the National Assembly, and consists of 'a chairman and not more than ten other members of Parliament who are not Ministers or Assistant Ministers of Government'.<sup>190</sup> Its functions include overseeing the policy framework, the legislative framework and the implementation of the CDF Act.<sup>191</sup> MPs therefore audit their work under the Act and account to themselves through the CFC.

In practice, MPs have not always been transparent in exercising their powers under the CDF Act, and locations opposed to the MPs tend to be bypassed and may not therefore benefit from the CDF.<sup>192</sup> The CDF Act may therefore be enhancing sub-ethnic, regional and class differences.<sup>193</sup> Cases of misappropriation of funds and poor implementation of projects have also been reported.<sup>194</sup> The Act also undermines the democratic process by giving MPs exclusive control over a key local resource.

Above all, the CDF Act fuses legislative and executive powers thereby undermining the separation of powers doctrine. More particularly, the Act facilitates the arbitrary exercise of power by MPs, contrary to the tenets of the rule of law. It is also unrealistic to expect that MPs will objectively oversee their own actions. The limitations of the CDF Act are perhaps best captured by a commentator who writes that 'the scenario presented by the Act whereby the legislator makes a law ... participates in implementing the law ... and then accounts for the expenditure to

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<sup>188</sup> Constituency Development Fund Act, section 23(1).

<sup>189</sup> *Ibid.*, section 12(1).

<sup>190</sup> *Ibid.*, section 27(1).

<sup>191</sup> *Ibid.*, section 27(4)(d)(e).

<sup>192</sup> Kenya Private Sector Alliance (2006: 4).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

Parliament (in this case to himself) throws democratic accountability overboard'.<sup>195</sup>

Many people have opposed the CDF Act since it was enacted.<sup>196</sup> The judiciary has also had occasion to review the Act in the case of *John Onyango Oyoo & 5 others v. Zadock Syongo & 2 Others*, where the applicants complained of inequitable distribution of the funds allocated to the Gwasi constituency. The court noted that 'there is no clear mechanism in the Act to control abuse or excessive use of authority by the sitting member of Parliament under the powers given to him under section 23 of the Act'.<sup>197</sup> In response to the public outcry, Parliament made some changes to the Act in 2007. But these changes do not address the separation of powers concerns, and do not significantly alter its provisions.

The persistence of Parliament in enacting legislation that violates the separation of powers doctrine and undermines the democratic process is quite worrisome. Even where courts of law have pronounced legislation unconstitutional, as in the *Mwau* case, Parliament has failed to take any steps to amend such laws. The failure to amend such laws may be contributing to public perceptions that MPs are greedy, selfish and unruly.<sup>198</sup> Parliament is then seen as becoming a law unto itself as it is perceived to be answerable to no one. This situation does not bode well for the rule of law, as it promotes a culture of anarchy. In addition, it leads to the enactment of laws that are not legitimate since they do not have the public's approval.

Indeed, the failure of Parliament to amend such laws goes against the practice in the past where the executive quickly whipped MPs to amend laws that were declared unconstitutional by courts of law. The case of *Margaret Magiri Ngui v. Republic*<sup>199</sup> provides a good example of such executive respect for the rule of law, even if it was an isolated occurrence given the despotic proclivities of the government at the time. If there is to be fidelity to the culture of law, it is important for both the executive and the legislature to move quickly to amend laws which do not conform to the constitution. To facilitate such fidelity to law, it may be important to establish procedures and processes to facilitate the correction of laws that violate the constitution.

It is comforting that the new constitution now seeks to enhance the accountability of the legislature, thereby ensuring that it respects the rule of law. Article 118 imposes a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees, while article 119 gives every person the right to petition Parliament 'to consider any matter within its authority'. Article 104 also gives the electorate the right to recall the MP representing their constituency, and imposes a duty on Parliament to enact legislation that will establish the grounds and procedures according to which an MP may be recalled. Although these provisions may constitute useful mechanisms for holding the legislature and legislators to account, they will need to be accompanied by mechanisms to regulate lobbying, conflicts of interest, misconduct and abuse of power in Parliament. In this context, the provisions of the proposed constitution dealing with leadership and integrity, including those governing conflicts of interest, provide a much-needed framework for regulating the conduct of legislators.

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<sup>195</sup> Ibid. at 22.

<sup>196</sup> See e.g. Gachomo (2007: 87); Kabage (2006).

<sup>197</sup> *John Onyango Oyoo & 5 others v. Zadock Syongo & 2 others* (2005) eKLR.

<sup>198</sup> See e.g. Lacey (2006).

<sup>199</sup> Criminal Application No. 59 of 1985, High Court, Nairobi (unreported).

In addition, article 230 of the new constitution establishes a Salaries and Remuneration Commission, whose main function will be to 'set and regularly review the remuneration and benefits of all state officers', including MPs. Furthermore, article 116(3) provides that legislation that confers 'a direct pecuniary interest on members of Parliament' cannot take effect during the life of the parliament that enacts it. Thus, the proposed constitution takes away the power of MPs to enact legislation that raises their salaries and benefits.

## **C. Recommendations**

The need to eradicate the culture of impunity that has taken root in Kenya is urgent if the public is to have faith in the law. In particular, there is a need to:

- Encourage the media and civil society actors to highlight instances where the three branches of government disregard the rule of law.
- Ensure, through legislation, that the decision-making processes of the Advisory Committee on the Prerogative of Mercy are transparent and accountable. In addition, the presidential prerogative of mercy should be subjected to judicial review.
- Establish mechanisms and procedures to facilitate the amendment or repeal of laws found by court decisions to be in violation of the constitution.
- Establish guidelines to enable the courts to regulate the failure, neglect or refusal of public officers to comply with court orders. For example, the courts should only excuse failures to comply with the law where public officers provide adequate administrative explanations for their failure.
- Amend the law to prohibit MPs from administering the Constituency Development Fund.

# 4

## Management of the justice system

The judiciary has only recently institutionalised the principles of proper planning and management through strategic planning. The implementation of plans in the justice sector has, however, been hindered by the absence of adequate funding and sufficient qualified human resources. There is broad recognition in the executive and legislature that the judiciary requires greater financial allocation to effectively carry out its mandate. However, at less than 1% of total gross budget allocation, the judiciary remains underfunded and under-resourced. There have been numerous proposals made to improve the management of the judicial system over the years. These include: enhancing the independence, operational autonomy and effectiveness in the management of the judiciary; securing merit-based appointments for judges and promoting high standards of conduct and discipline in the judiciary; addressing the backlog and delay of cases; enhancing the performance and accountability of the judiciary; promoting ethical conduct and preventing corruption in the judiciary; institutionalising law reporting; increasing the number of judicial officers and restructuring the management of the judiciary. Some of these proposals are already being implemented with the expectation that they will change the way in which the justice system is managed. The Report of the Task Force on Judicial Reforms released in July 2010 has summarised the key recommendations of various commissions set up over the years to reform the judiciary. The new constitution provides firm anchorage for the reforms proposed in the judiciary and contributes to enhancing the efficiency and effectiveness of the institution.

### A. Strategic planning

Strategic planning in the public sector in Kenya is a fairly new phenomenon and it is not surprising that the judiciary had no strategic plan prior to 2005. It has, however, become a

normal way of doing things since 2003. The Government of Kenya Economic Recovery Strategy (ERS) 2003–2007 identified the need to prepare strategic plans for the various government organisations as one of the ways to enhance economic recovery. The preparation of strategic plans by various government ministries/departments has been going on since then. The Economic Recovery Strategy Paper for Wealth and Employment Creation (ERS) 2003–2007 required the various ministries and departments to identify their core functions, policy priorities and develop appropriate organisational structures and optimal levels. These ERS requirements together with limited resources at the government’s disposal are the reasons for the preparation of the judiciary’s strategic plan.

The first ever strategic plan in the history of Kenya’s judiciary was launched in March 2005.<sup>200</sup> Other legal and justice sector institutions have also put in place their own strategic plans. The challenge is to create synergies in the operations of different legal and justice sector actors so as to facilitate the operationalising of the tenets of the rule of law. The adoption of the Judiciary Strategic Plan 2005–2008 was one of the initiatives aimed at facilitating efficient administration of justice. Efficient and accessible administration of justice has been identified as critical in providing an enabling environment for investment. Various economic and poverty reduction papers and strategies have identified the delivery of justice as one of the measures to reduce poverty and assist in the creation of more wealth. The ERS listed the achievement of a predictable and impartial justice system and speedy prosecution of cases targeted at clearing the backlog in order to improve service delivery by the judiciary as some of its objectives. Vision 2030,<sup>201</sup> the follow up to the ERS, has its economic, social and political pillars undergirded by improvement in governance, access to justice, respect for the rule of law and human rights. These require an effective justice system.

The Poverty Reduction Strategy Paper (PRSP) 2001–2004, which outlined priority measures necessary for poverty reduction and economic recovery, also identified administration of justice as one of the national priorities to be addressed. It identified corruption, delays in administration of justice, lack of specialised courts and lack of access to courts as some of the causes and reasons for inefficient administration of justice.<sup>202</sup>

The judiciary’s plan was aimed at reforming the judiciary and ensuring effective delivery of justice. This was reflected in the mandate, core functions, policy priorities, vision, mission and core values. Under the plan, the judiciary aims at ensuring greater access to justice through a more decentralised court system, simplified court procedures, law-reporting and reduced costs of the process of the court; strengthened integrity, competence and independence of the judiciary through improved human resource policies, legislative and judicial measures; and improved

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<sup>200</sup> Republic of Kenya (2005B), Judiciary Strategic Plan 2005–2008, March 2005. The Judiciary Strategic Plan was developed through the following process: appointment by the judiciary of a core team to steer the process comprising of representatives from all the departments; review of documents to familiarise the team with the mandate, functions, policy priorities, achievements and constraints of the judiciary; preparation of an action plan for preparing the Strategic Plan which was disseminated to the core team, discussed and agreed upon; preparation of the Strategic Plan conceptual framework; brainstorming retreat; dissemination of draft plan to all stations to obtain input of the staff outside the headquarters; interviews of selected top management staff of the judiciary and key stakeholders.

<sup>201</sup> Republic of Kenya (2007).

<sup>202</sup> Republic of Kenya, *supra* note 1 at 1.

infrastructure of court-houses and facilities – physical and electronic – that are consistent with modernised judicial function under international best practices.<sup>203</sup>

The judiciary also sees the strategic plan as a tool it can use to overcome challenges such as ‘access to court, appropriate staffing and motivation, proper resource mobilisation and utilisation, objective appraisal, strategic direction, policy priorities, strategic issues, activities, monitoring and evaluation’.<sup>204</sup>

The Judiciary Ethics and Governance Sub-Committee<sup>205</sup> was established on the day that the judiciary strategic plan was launched to:

- Collect information relating to the integrity of the entire judiciary staff and court processes;
- Investigate all cases of alleged corruption, unethical behaviour and other cases of lack of integrity;
- Study and report on the case for in-house intermediary disciplinary measures, and the process of punishment for breaches not warranting removal of a judge from office;
- Examine and report on the orderly and efficient method consistent with the rules of natural justice for conducting investigation or inquiry into the fitness of a judicial officer to hold office or the guilt of paralegal staff in corrupt or unethical practice;
- Deliberate and report on the contents of a ‘litigants’ charter’ to aid the comprehension of the process of the court by litigants;
- Study and rationalise the previous committees’ reports on the reforms in the judiciary and recommend a codified and comprehensive reform matrix to entrench integrity; and
- Report on its findings and recommend to the Chief Justice any remedial action and necessary reforms for governance and the entrenchment of integrity in the judiciary.

Among the major recommendations of this committee were:

- Computerisation of court registries;
- Facilitation of expeditious handling of cases;
- Digitising the recording of proceedings;
- Delivery of rulings or judgements to be transacted in open court in the interest of transparency;
- Need for practice guidelines on bail and bond and on sentencing and the management and disposal of exhibits;
- Strict supervision and enforcement of the judicial code of conduct and incorporation of integrity and anti-corruption strategies throughout the work of the judiciary;
- Need to clarify disciplinary process for judges, magistrates, Kadhis and the paralegal staff of the judiciary;
- Need for security of tenure for magistrates and Kadhis;
- Need for a litigant’s charter, in all major languages, on:

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<sup>203</sup> Republic of Kenya, *supra* note 1.

<sup>204</sup> *Ibid.* at 2.

<sup>205</sup> See Republic of Kenya (2005B).



- structure and functions of the judiciary;
- services provided by the various offices in the judiciary;
- court system;
- rights and obligations of litigants in the court process;
- obligations and responsibilities of the judiciary and its staff to litigants;
- court fees and payment;
- role and responsibilities of other agencies in the administration of justice;
- court procedures (criminal, civil, petitions, family matters);
- legal aid;
- where to direct complaints relating to advocates;
- complaints procedure; and
- contacts of various judicial offices and officers.
- Need for a broad public information and education policy and a public relations and communications department; and
- Information desks.

Since the launch of the plan, the judiciary has managed to achieve limited success in the achievement of its key goals and objectives such as the establishment of a Public Relations Department, the construction of more courtroom facilities in some parts of the country and the division of the High Court in Nairobi into several arms to ease delivery of justice. However, the plan also faced some challenges, the most prevalent being: the lack of an appropriate mechanism for implementation; absence of a monitoring and evaluation system; inadequate staffing; lack of sufficient funds to carry out the proposals to completion and a lack of sufficient political goodwill for judicial reforms.<sup>206</sup>

The judiciary launched its second strategic plan for 2009–2012<sup>207</sup> on 20 March 2009 to replace the 2005–2008 plan. The new plan sought to build on the achievements of the previous plan and to take on issues that had been planned for in the previous plan but had not been achieved. The plan starts with an evaluation of the previous planning period and notes the major achievements and points out what still needs to be done.

The stated vision of the judiciary in this plan is ‘to be the best judiciary in Africa, setting the highest standards in the delivery of quality justice and leading in the development of jurisprudence’.<sup>208</sup> Its mission is ‘to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the Constitution of Kenya’.<sup>209</sup> The objectives of the plan are:<sup>210</sup>

- To enhance judicial independence to enable the judiciary to carry out its key functions effectively;
- To improve the image of the judiciary to restore public confidence in the institution;

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<sup>206</sup> Republic of Kenya (2009: 19).

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.* at 2.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.* at xii.

- To build capacity in human resource management and development to achieve higher performance;
- To improve access to justice to ensure that litigants have easy and affordable justice for a fair and just society;
- To improve institutional structures to ensure efficient delivery of services;
- To adopt and institutionalise appropriate information and communication technology (ICT) and other facilities to improve efficiency in operations; and
- Enhance and streamline financial management and procurement to optimise allocation and use of resources.

The estimated cost of implementing the plan is KES 5,627 billion which the judiciary expects to get from the government and development partners.<sup>211</sup> The judiciary recognises the fact that effective ICT policies are imperative for improved efficiency and has set up an ICT committee to develop a strategy for implementation of the activities under the plan. The membership comprises: a judge of appeal; two High Court judges; the Registrar of the High Court; the Deputy Chief Finance Officer; the Chief Executive Officer of the National Council for Law Reporting; the Principal ICT Officer; the ICT secretary in charge of e-government and the Deputy Chief Executive Officer of the Kenya ICT Board. The main mandate of the committee is to oversee ICT investments and coordinate ICT projects so as to move the judiciary towards the creation of an Integrated Justice Management Information System. This will bring together all the agencies involved in the delivery of justice including the judiciary, the State Law Office, the prisons and the police. The specific objectives are to:

- Formulate a policy on modernisation and automation of the judiciary;
- Draw up an action plan with appropriate phasing for time-bound implementation;
- Stipulate physical and financial targets;
- Monitor and evaluate the action plan on a periodic basis;
- Suggest methods for making access to justice and availability of information more citizen-friendly through the use of ICT; and
- Carry out any other tasks and activities as may be directed by the Chief Justice from time to time.

So far, the Committee has:<sup>212</sup>

- Completed a situation analysis and needs assessment;
- Drawn up an ICT Policy and Strategic Plan clarifying its vision and mission;
- Begun the process of conversion of Court of Appeal and High Court files into electronic format;
- Established local area networks (LANs) in all High Court stations in the country and initiated plans for wider area networks (WANs) to link different court stations;
- Re-designed and launched the judiciary website;

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<sup>211</sup> Ibid.

<sup>212</sup> Republic of Kenya (2010B).

- Purchased computers and other ICT hardware for courts around the country;
- Developed a new scheme of service for ICT officers;
- Established the first tele-presence link (video conferencing) in the Court of Appeal between Nairobi and Mombasa; and
- Developed a short message system (SMS) for cause list alerts.

With respect to capacity building in human resource management, it has already rolled out and is implementing schemes of service for staff that had none before.

The other arms of the justice sector such as the police and prisons departments have also been involved in strategic plans. The emphasis in these two plans has centred mainly on the question of welfare and working conditions of the officers. The pace of implementation has, however, been too slow.

The judiciary is also a part of the government reform programme for the Governance, Justice, Law and Order Sector (GJLOS), whose institutions are undergoing similar reforms in a sector-wide reform initiative. The planned reforms through the strategic plan will ensure that the judiciary will play its role as an integral partner in Vision 2030 as well as entrench itself as an independent judicial authority for the provision of quality justice for all.

## **B. Financial management**

The challenge of combining fiscal responsibility with judicial independence is not unique to Kenya. The control of the budget process by the executive in a system where there is separation of powers makes one arm of government subservient to another in the critical area of financial management. The requirements of the executive for restraint and accountability can be construed as infringing on core principles of the judiciary, namely fairness and independence.<sup>213</sup> The fact that the judicial sector is perceived as traditionally conservative and reluctant to accept change even when performance is challenged does not help matters.

One of Kenya's setbacks in the administration of justice is inadequate financing and cumbersome accounting and financial procedures. Kenya's judiciary receives budgetary allocation from the Treasury. The new constitution, like the Bomas Draft Constitution, provides that the administrative expenses of the judiciary be directly charged on the Consolidated Fund.<sup>214</sup> The constitution also establishes a judiciary fund to be used for administrative expenses.<sup>215</sup> This was among the measures thought to be necessary to ensure that judicial power be exercised independently. It makes the judiciary autonomous with regard to its finances with the Chief Registrar, making annual estimates of expenditure and submitting them directly to Parliament for consideration.<sup>216</sup> Other measures included: putting the judiciary under the constitution directly, as opposed to being under the authority of any person or authority;<sup>217</sup> the office of a judge of a superior court of record would not be abolished while there is a substantive holder of

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<sup>213</sup> Webber (n.d.).

<sup>214</sup> Constitution of the Republic of Kenya (2010), section 160(3).

<sup>215</sup> *Ibid.*, section 173(1) & (2).

<sup>216</sup> *Ibid.*, section 173(3) & (4).

<sup>217</sup> *Ibid.*, section 160(1).

the office<sup>218</sup> and the remuneration and benefits payable to members of the judiciary would not be varied to their disadvantage.<sup>219</sup>

At the district level, the judiciary’s finances are kept at the District Treasury like other government ministries and departments. Retrieval of these funds, more specifically the legal deposits which are expected to be refunded to the litigants, is very cumbersome leading to a lot of delays and a dent in the image of the judiciary.

The allocation to the judiciary has not been adequate to overcome the various challenges facing the justice system, such as inadequate staffing, facilities and equipment. The judiciary is one of the major institutions that collects revenue for the government but still does not receive adequate finances (see Table 8 below).

*Table 8: Recurrent and development vote 2009/2010*

Institution	Net Budgetary allocations in KES.	Allocation as % of total gross allocation	Appropriation-in-Aid (A-I-A) in KES
Executive	598 720 812 637	98.2	41 203 725 920
National Assembly	7 688 893 530	1.3	
Judiciary	3 054 800 000	0.5	546 000 000
<b>Total</b>	<b>609 464 506 167</b>	<b>100.0</b>	<b>41 752 725 920</b>

Source: Government of Kenya, *Final Report of the Task Force on Judicial Reforms*, Government Printer, July 2010 p.20

Consequently, the judiciary does not have financial autonomy, and the Ministry of Finance controls its budget. As a result, the courts have been in a perpetual resource crunch even as the demand for judicial services increases. Over the years, the judiciary reached an agreement with the Treasury to retain part of the monies collected by the courts in court fees and recovered costs. However, fines collected through criminal proceedings must be surrendered to the Treasury. Fines, together with budgetary appropriations, have always been subjected to scrutiny by the Controller and Auditor General, whose reports have in the past disclosed evidence of financial mismanagement in the judiciary.

The 2010 Task Force on the judiciary noted that while the ‘optimal expenditure of the Judiciary is KES six billion, over the years, the allocation has been between KES 800 million and KES 1.2 billion constituting 0.3% or less of the total budget’.<sup>220</sup> This constrains the judiciary’s effective performance of the task assigned to it. For instance, the funds for infrastructure development for the judiciary to create more space and thus facilitate expeditious handling of matters were allocated through the Ministry of Public Works in the 2009/2010 budget and not directly to the judiciary. This violates the independence of the judiciary and could affect the timeous delivery of buildings planned by the judiciary.<sup>221</sup> The government budgeting system is fairly elaborate. Heads of different departments are requested to submit their requirements for the year with each sector coming up with its amalgamated budget and submitting it to Treasury.

<sup>218</sup> Ibid., section 160(2).

<sup>219</sup> Ibid., section 160(4).

<sup>220</sup> Republic of Kenya (2010A: 20).

<sup>221</sup> Ibid.

This is followed by budget hearings at which different sectors are represented. The budget given to each sector is not necessarily tied to the needs as different interests are balanced. The judiciary is in the governance, justice, law and order sector (GJLOS), which has twelve other agencies including the offices of the president and vice president; the Attorney General's chambers and the Kenya Anti-Corruption Commission (KACC). The offices of the president and vice president consume a whopping 80% of the entire sector budget, leaving the other eleven a paltry 20%. Historically, the judiciary and the Attorney General's chambers have not got enough resources. It is worth noting that in the 2009 budget, the judiciary's budget was for the first time ever discussed by the National Assembly, with the allocation increasing from 0.01% of the national budget to 0.05%.<sup>222</sup>

## **C. Court administration**

### **Inadequate management structure**

The judiciary is divided into two units, namely the Technical Unit and the Administrative Unit.

#### *Technical Unit*

The Technical Unit is made up of the courts. The administration of courts in Kenya is managed by judicial officers. This system is not very efficient because judicial officers are not sufficiently trained to handle administrative issues. They lack proper managerial training and consequently managerial skills. They also have heavy workloads and are not provided with adequate financial and human resources to enable them to efficiently perform their duties. Past reform measures have failed to effectively address this problem. Several reform suggestions that have been made, including separating the structure of the courts into two, namely the administrative part and the judicial part.

Under section 61(3) of the repealed constitution, the criteria for appointment as a judge were laid out as:

- A person who 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; or
- He is an advocate of Kenya of not less than seven years standing.

This has been changed by the new constitution which has laid out the criteria for the appointment of judges as follows:

- The Chief Justice and the judges of the Supreme Court: (a) at least fifteen years' experience as a superior court judge; or (b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.<sup>223</sup>

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<sup>222</sup> Ibid.

<sup>223</sup> Constitution of the Republic of Kenya (2010), section 166(3).

- The judges of the Court of Appeal: (a) at least ten years' experience as a superior court judge; or (b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or (c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.<sup>224</sup>
- The judges of the High Court: (a) at least ten years' experience as a superior court judge or professionally qualified magistrate; or (b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.<sup>225</sup>

### *Administrative Unit*

The Administration Unit consists of various departments of the judiciary. These departments include the:

- Administration Department;
- Personnel Department;
- Accounts Department;
- Procurement Department;
- Planning and Library Services Department;
- Information and Communication Technology Department; and
- The National Council for Law Reporting.<sup>226</sup>

With respect to administration, courts are administered by: the Chief Justice, who is appointed by the president,<sup>227</sup> the Registrar of the High Court and the Chief Court Administrator (CCA). The Judicial Service Commission addresses the terms and conditions of service for the judiciary. The administration and executive functions of the courts are performed at court registries. They provide, inter alia, the following services:

- Documentation, storage and retrieval centre for files, exhibits and other documents in every court;
- Registration and processing cases at every stage until they are finalised;
- Assessment and collection of court fees, deposits and fines;
- Processing of typed proceedings;
- Dispatch and handling of correspondence;
- Processing of bonds/bail documents;
- Preparation of cause lists;
- Provision of a link between courts and litigants;
- Execution of court orders and/or decrees;
- Service of summons at the counter;

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<sup>224</sup> Ibid., section 166(4).

<sup>225</sup> Ibid., section 166(5).

<sup>226</sup> See Republic of Kenya (2005B: 89).

<sup>227</sup> Constitution of the Republic of Kenya (1963) (as amended), section 61.

- Issuance of summons;
- Submission of judicial returns;
- Custody of court seals;
- Housing court registers; and
- Receiving and stamping documents.

The Registrar of the High Court is equivalent to a Permanent Secretary and is responsible for the finances and administration of the judiciary. The Registrar is responsible for the judicial officers who work in the subordinate courts and also all the non-judicial personnel. The Registrar is assisted in the regions by the resident judges, deputy registrars, magistrates in charge of court stations and the executive officers.

The current structuring of administrative duties needs to be changed to increase the effectiveness and efficiency of the court. First, the range of duties performed by the officers can be redefined. For instance, the Chief Justice deals with many mundane issues such as leave and transfers that could easily be delegated to a deputy, leaving the Chief Justice to deal with policy matters. The Registrar also deals with mundane matters such as vehicles and buildings while the CCA has no clearly defined role and acts as deputy to the Registrar. There is a need to clearly define the role of the Registrar. The deputy registrars at the regions who are mainly senior magistrates are the *de facto* deputy registrars. They have the authority to incur expenditure but have to write to the Registrar with respect to major decisions.

Second, the holders of all the administrative offices are lawyers and do not have the requisite training in public administration.<sup>228</sup> The new constitution provides for the establishment of the Office of the Chief Registrar of the judiciary to act as the chief administrator and accounting officer of the judiciary.<sup>229</sup> It also establishes the Office of the Deputy Chief Justice to be the Deputy Head of the judiciary.<sup>230</sup>

## The Judicial Service Commission

The Judicial Service Commission was formed to enhance the independence of the judiciary. It derives its mandate from sections 68 and 69 of chapter 4 of the constitution. It is responsible for appointments of the Registrar or Deputy Registrar of the High Court; chief magistrates, principal magistrates, senior resident magistrates, resident magistrates, district magistrates; persons holding offices in subordinate courts exercising criminal jurisdiction; Chief Kadhi, Kadhis; and such other offices of any court or connected with any court as may be prescribed by Parliament.<sup>231</sup> It is responsible for ensuring that the judiciary has adequate and motivated staff for efficient service delivery and is expected to handle all matters relating to human resource management and development. It also has power to exercise disciplinary control over persons holding or acting in

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<sup>228</sup> Personal interviews with judges and Government of Kenya, *Final Report of the Task Force on Judicial Reforms*, Government Printer, July 2010.

<sup>229</sup> Constitution of the Republic of Kenya (2010) section 161(2)(c).

<sup>230</sup> *Ibid.*, section 161(2)(b).

<sup>231</sup> Constitution of the Republic of Kenya (1963) (as amended), section 69(3).

those offices and to remove them from office.<sup>232</sup>

The Judicial Service Commission as provided for in the repealed constitution was made up of five members as follows:

- the Chief Justice;
- the Attorney General;
- two judges, one from the High Court and another from the Court of Appeal; and
- the chairman of the Public Service Commission (PSC).

The JSC has been criticised for consisting only of persons appointed by the president, giving the appearance of a lack of independence from the executive.<sup>233</sup> The JSC has also been perceived as lacking operational autonomy and effectiveness in the management of the judiciary. Not surprisingly, the 2010 Task Force recommended an expanded membership of the JSC to enhance independence and promote accountability of the judiciary.<sup>234</sup> The new constitution<sup>235</sup> revamps the Commission's membership to consist of:

- the Chief Justice as the chairperson of the Commission;
- one Supreme Court judge elected by the judges of the Supreme Court;
- one Court of Appeal judge elected by the judges of the Court of Appeal;
- one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
- the Attorney General;
- two advocates, one a woman and one a man, each of whom has at least 15 years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
- one person nominated by the Public Service Commission; and
- one woman and one man to represent the public, not being lawyers, appointed by the president with the approval of the National Assembly.

The Chief Registrar of the judiciary is the secretary of the Commission.<sup>236</sup> The constitution has also clarified the functions of the Commission as including:<sup>237</sup>

- Promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice;
- Recommending to the president persons for appointment as judges;
- Reviewing and making recommendations on the conditions of service of judges and judicial officers (other than their remuneration), and the staff of the judiciary;
- Appointing, receiving complaints against, investigating and removing from office or otherwise disciplining registrars, magistrates, other judicial officers and other staff of

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<sup>232</sup> Ibid., section 69(1).

<sup>233</sup> Republic of Kenya (2010: 16).

<sup>234</sup> Ibid.

<sup>235</sup> Constitution of the Republic of Kenya 2010, section 171(2).

<sup>236</sup> Ibid., section 171(3).

<sup>237</sup> Ibid., section 172(1).



- the judiciary, in the manner prescribed by an act of Parliament;
- Preparing and implementing programmes for the continuing education and training of judges and judicial officers; and
- Advising the national government on improving the efficiency of the administration of justice.

At section 172(2), the constitution provides that in the performance of its functions, the Commission should be guided by:

- Competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
- The promotion of gender equality.

The 2010 Task Force on Judicial Reforms also proposed similar functions for the JSC to enable it:

- To be more involved in the appointment, disciplining and removal of magistrates, Kadhis and other judicial staff;
- To participate in the preparation and implementation of programmes for the continuing education and training of judges, magistrates and other judicial staff; and
- To advise the president on the membership of the tribunal deciding on the removal of persons from the office of a judge.<sup>238</sup>

## The Rules Committee

Detailed rules and practice directions are useful tools in ensuring that trials are expeditiously and appropriately conducted. The Rules Committee is established under section 81 of the Civil Procedure Act (chapter 21). It is comprised of two judges of the Court of Appeal, two judges of the High Court, the Attorney General and two advocates, one nominated by the Law Society of Kenya and the other by the Mombasa Law Society. Under section 81 of the Civil Procedure Act and section 5 of the Appellate Jurisdiction Act, the Committee is empowered to make rules not inconsistent with the Civil Procedure Act and to provide for any matters relating to the procedure of civil courts. The Committee is also mandated to make rules for regulating the practice and procedure of the Court of Appeal.<sup>239</sup> The objectives of the Committee are:<sup>240</sup>

- To make, improve and simplify rules of civil procedure to improve access to justice at a cost effective and affordable rate;
- To revise and update rules of civil procedure even though they have not been overhauled since 1948;
- To translate the Civil Procedure Act and Rules into Kiswahili; and
- To entrench and popularise the use of Alternative Dispute Resolution methods.

Rules should be revised from time to time to ensure expeditious management of the justice system. The limited mandate of the Rules Committee has been identified as one area requiring

<sup>238</sup> Republic of Kenya (2010: 16).

<sup>239</sup> [http://www.judiciary.go.ke/knowledge\\_base/index.php?id=3](http://www.judiciary.go.ke/knowledge_base/index.php?id=3).

<sup>240</sup> Ibid.

reform.<sup>241</sup> It was clear from consultations with stakeholders that the Civil Procedure Act, the Civil Procedure Rules and the Court of Appeal Rules did not reflect the purpose of what civil litigants expected from courts – just, expeditious and affordable resolution to their disputes. The overriding objective in going to court for litigants is certainty on the determination of disputes without undue delay and without undue regard to technicalities and formalities of procedure.

Act No. 6 of 2009 amended the Civil Procedure Act, seeking to facilitate the making of rules of procedure that are effective in answering the demands of the present and the desired objective of a just determination of civil disputes.<sup>242</sup> Under the amendment, Parliament enacted sections 1A and 1B of the Civil Procedure Act. Section 1A states that the ‘overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes’. Courts are bound to give effect to this overriding objective in interpreting the provisions of the Act and parties and their advocates are obliged to assist the court in furthering this objective. Under section 1B the court has to take the following factors into account in furthering the overriding objective:

- The just determination of proceedings;
- The efficient disposal of the business of the court;
- The efficient use of the available judicial and administrative resources;
- The timely disposal of the proceedings at a cost affordable to the parties; and
- The use of suitable/appropriate technology.

Similar provisions were introduced into chapter 9 of the Appellate Jurisdiction Act as sections 3A and 3B. The Rules Committee has since reviewed and published new Civil Procedure Rules<sup>243</sup> and new Court of Appeal Rules<sup>244</sup> which came into effect on 17 December 2010 and 24 December 2010 respectively.

It is noteworthy that the 2010 constitution clearly stipulates that courts and tribunals in exercising judicial authority should ensure justice is done to all irrespective of status;<sup>245</sup> should not delay justice<sup>246</sup> and most fundamentally that justice should be administered without undue regard to procedural technicalities.<sup>247</sup>

## Personnel shortage

Twenty-five court stations share 245 or 70.8% of the judiciary’s professional staff,<sup>248</sup> leaving 101 or 29.2% for the remaining 85 court stations. Nairobi Central law courts have the lion’s share with 97 or 28.1% of the professional staff, followed by the Milimani courts with 19 or 3.5%.

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<sup>241</sup> Ibid.

<sup>242</sup> Omolo (2010).

<sup>243</sup> Special Issue of the Kenya Gazette Supplement No. 65, 10 September, 2010 (Legislative Supplement No. 42).

<sup>244</sup> Special Issue of the Kenya Gazette Supplement No. 70, 17 September, 2010 (Legislative Supplement No. 43).

<sup>245</sup> Constitution of the Republic of Kenya (2010), section 159(2)(a).

<sup>246</sup> Ibid., section 159(2)(b).

<sup>247</sup> Ibid., section 159(2)(d).

<sup>248</sup> According to the Judiciary’s Strategic Plan, lawyers comprise 290 or 86.8% of the professional staff. They are followed by administrators/executive officers who account for 26 or 7.8% of the total professional staff. The other professional staff are accountants (7 or 2.1%) and human resources personnel (6 or 1.8%). Others are economists, a public relations officer and librarians with 2, 1, and 2 people respectively.

Mombasa is a distant third with 14 or 4.0%. The rest of the court stations have between one to five magistrates. The 2010 Task Force Report notes that:

... the total number of vacant positions in the Judiciary stands at 1 456 against an establishment of 4 681 ... there are eleven (11) Court of Appeal Judges out of an establishment of fourteen (14) Judges and forty-six (46) High Court Judges out of an establishment of seventy (70). The total number of magistrates in post is two-hundred-and-seventy-seven (277) against an establishment of five-hundred-and-fifty-four (554).<sup>249</sup>

The tables that follow show the distribution of professional staff among the court stations (Table 9) and the distribution of judges and other judicial officers in High Court stations (Table 10) in the country.

*Table 9: Distribution of professional staff by court station*

Station	Judges	CM	SPM	PM	SRM	RM	DM	KAD	ACNTS	Others	Total
Nairobi	29	3	4	4	9	2			7	39	97
Milimani	6	1	1	3	5	2		1			19
Mombasa	3	1		1	3	2	1	2			13
Nyeri	2	1		1	2	1	1	1			9
Kiambu			1	1	2		1				5
Makadara				1	3	1					5
Kibera			1		1	2					4
Kisumu	2	1		1	1	2	1	1			9
Nakuru	3		1	2	2	1		1			10
Eldoret	2			1	6	1	1	1			12
Kitale	1		1	1		2					5
Meru	2	1			2						5
Kisii	1		1	1	1						3
Kakamega	1		3	1	1	1					5
Kericho				1	1	1					3
Nyahururu				1	2	1					4
Kerugoya					2	1					3
Thika		1			2	2					5

Source: The Judiciary Strategic Plan 2005–2008, March 2005, p.10.

Key: CM – Chief Magistrate, SPM – Senior Principal Magistrate, PM – Principal Magistrate, SRM – Senior Resident Magistrate, RM – Resident Magistrate, DM – District Magistrate, KAD – Kadhi, ACNTS – Accountants

<sup>249</sup> Republic of Kenya (2010: 33–34).

Table 10: Distribution of judges and other judicial officers in High Court stations

Court/Division	High Court Judge	Chief Magistrate	Senior/Principal Magistrate	Senior/Resident Magistrate	Chief/Kadhi
Nairobi (JT)	1		2		
Nairobi (Kibera/Makadara Juvenile/City Court)		5	13	17	
Nairobi (Milimani/ Commercial)	3	1	5	4	1
Nairobi (Family)	2				
Nairobi (Constitutional and Judicial Review)	2				
Nairobi (Civil)	5				
Nairobi (Criminal)	4				
Nairobi (Environment/ Land)	3				
Mombasa	4	1	2	8	2
Malindi	1	1	1	1	1
Machakos	1	1	2	2	
Embu	1		1	2	
Meru	2	1	2	2	
Kakamega	2	1	1	3	
Bungoma	1	1	2	2	1
Busia	1		1	3	
Kericho	1		2	2	
Nakuru	3	1	3	6	1
Eldoret	2	1	2	5	1
Kitale	1	1	2	2	
Kisii	2	1	2	4	
Kisumu	2	1	2	3	1
Nyeri	1	1	1	4	1
<b>Total</b>	<b>45</b>	<b>19</b>	<b>46</b>	<b>70</b>	<b>9</b>

Source: See Government of Kenya, Final Report of the Task Force on Judicial Reforms, Government Printer, July 2010 at 34.

Delays and backlogs are the bane of judicial practice in Kenya.<sup>250</sup> The situation does not seem to have improved going by the 1998 Committee on the Administration of Justice statistics which gave the cases pending figures as 117 386 civil cases and 1 944 criminal cases at the time in the High Court in Nairobi, with a full strength of 15 judges. In addition to the workload issues arising from this heavy docket, the Committee also noted other practices that were aggravating delays. High on that list was the practice of giving judgments on notice at the whims of the presiding

<sup>250</sup> Case backlog is cited as a great challenge in the judiciary and 2 372 cases were estimated as pending before the Court of Appeal in Nairobi and its circuit stations; 115 344 in the High Court stations and 792 297 in magistrates' courts in December 2009 making a total of 910 013. Some of these have been pending for up to five years. See *ibid.* at 33.

judge as opposed to within a particular period of time. The Committee lamented that the practice engenders laxity and attendant delay in finalising cases and rulings. The Kwach Committee identified the causes of delays and backlogs as: insufficient judicial capacities including both the number of officers as well as courts; internal administrative and registry problems; insufficient training for registry staff; low levels of capital development and financial commitment to the judiciary; and uneven distribution of judicial services and officers in the country so that while some courts are congested, others are seriously understaffed.<sup>251</sup>

The Ringera Committee reported that ‘the legal process was replete with both deliberate and non-deliberate delays in the conclusion of hearings and delivery of rulings and judgments’.<sup>252</sup> The Committee concluded that the delay had the effect of inducing anxiety on the part of litigants and that such anxiety leads them to make corrupt approaches to judicial officers.

The effectiveness of the judiciary has also been eroded by the lack of an internal support infrastructure, law clerks to assist with legal research, stenographers or electronic devices to record proceedings and a full computerisation of registry services to ensure integrity in file storage and management. The 2010 Task Force on Judicial Reform also looked at the issue of backlog and proposed the establishment of court-users’ committees in all court stations with the mandate of addressing backlog and other challenges in the administration of justice at the local level. Noting that some courts had established court-users’ committees made up of key agencies at the court station level, the Task Force recommended these committees as a correlative and necessary reciprocation of increased independence of the judiciary that will increase transparency and accountability.<sup>253</sup> It also recommended that ‘Commissioners of Assize be appointed for an initial period of one (1) year to hear and determine cases in the High Court that are pending for over 5 years or as may be directed by the Chief Justice’.<sup>254</sup>

## System of record keeping

Record keeping in Kenyan courts is manual. Judges and magistrates take notes by hand as cases proceed. Their judgments are also largely handwritten. Information on cases or any disputes brought to the courts are filed. The registry maintains a file for every case that is before the court. The files are confidential and the courts do not allow access to these files except to authorised parties to the case. Perusal of a file is allowed to authorised people at a cost. These records indicate the progress of the case and contain all particulars of the cases including all the documents. Information on ongoing cases is only available from the registries. Such information is not available online. Information on the legal system is available in the judiciary’s website or in commentaries on Kenya’s legal system. There have been ongoing reforms to ensure that there is enough to enhance record keeping and easy delivery of justice to all.

The filing system is laborious because of all the paperwork that has to be done. This leads to a lack of space and inefficiencies such as the misplacement of court files. The inefficiencies have also led to a bribe culture because access to court files for perusal is a cumbersome matter.

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<sup>251</sup> See Republic of Kenya (1998).

<sup>252</sup> Integrity and Anti-Corruption Committee Report, *supra* note 106 at 16.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.* at 38.

Record keeping needs to be upgraded to a computerised system. This will facilitate easier record keeping as well as enhanced access to information. It will reduce the inefficiencies occasioned by missing files. Networking of the record keeping systems with other law enforcement institutions will be beneficial to all involved.

## **Physical conditions and facilities**

A survey carried out by the ICJ<sup>255</sup> on the public perceptions of the Kenyan judiciary revealed that most of the courts do not have adequate physical facilities. Of all the people interviewed, 58% considered the current lack of physical facilities a serious problem that needs to be addressed. This survey also revealed that the High Court building in Nairobi, the Kibera law courts, Makadara courts and the city court have no waiting rooms, washrooms, and accessible desks for public use. Only the Milimani commercial courts are equipped with these facilities, which are not themselves adequate. The respondents perceive the absence of comfortable facilities as deliberate.

There are efforts to have them cleaned and they have been equipped with amenities such as toilets for the magistrates and judges and separate ones for members of the public. However, the construction of the facilities does not take into account the special needs of physically challenged persons. They are not all provided with wheelchair ramps and some of those that are, only serve the ground floors. They do not have elevator services to enable access to the topmost floors. There are other facilities such as waiting rooms which are yet to be renovated and thus the courts' corridors are usually used as waiting areas. There is also the issue of access to courts for women with children since there are no amenities to accommodate young children. The High Court and other city courts have better facilities than magistrates' courts, which are found upcountry especially in the marginalised areas. It is also notable that most reforms have mainly targeted the High Court.

## **Attempts at improving court administration**

Since 2003, there have been various reforms relating to the administration and management of the judiciary. Courts have continued to exercise their powers without interference from the government. Other reforms have been carried out especially with regard to ridding the judiciary of corruption. Such measures include the suspension of, and disciplinary measures taken against, judicial officers who have been implicated in corruption. There are other reforms which have been ongoing which are being carried out under the GJLOS Reform Programme.<sup>256</sup>

There have also been reports and recommendations on improving the administration of justice in Kenya. For example, in 1998 the then Chief Justice appointed a committee chaired by a judge of the Court of Appeal, the Hon. Mr Justice Kwach, to review and report on the administration of justice in Kenya. The Kwach Report proposed several far-reaching recommendations, including proposals to:

- Increase judicial personnel and improve employment terms and conditions;
- Develop and implement a code of conduct for judicial personnel backed by an inspectorate unit;

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<sup>255</sup> ICJ-Kenya (2003).

<sup>256</sup> <http://www.gjlos.go.ke/gjinner.asp?cat=aboutus>.

- Improve facilities within the judiciary, 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.

Some of these reforms have taken place, such as the splitting of the High Court into four divisions. Physical facilities have been improved and complaints mechanisms have been established. Other reforms, such as developing a code of conduct for the staff, have been ongoing. Reforms in the judiciary have been noted by the bribery index reports, which have shown a considerable drop in corruption within the judiciary. The ongoing reforms have continued to enhance the independence of the judiciary and the delivery of justice to all. The judiciary nonetheless continues to rely on the government for financial assistance.

To improve court administration, the 2010 Task Force recommended the restructuring of the team managing the judiciary. More specifically, it recommended that:

- The position of the presiding judge of the Court of Appeal and the principal judge of the High Court be created and formalised administratively;
- The duties of the Registrar and the Chief Court Administrator (CCA) be clearly defined;
- Judges be specifically mandated to supervise the courts in their respective regions;
- The Central Planning and Project Management Unit (CP&PMU) be strengthened to enhance its effectiveness in monitoring and evaluation programmes and data collection in the judiciary.

The offices of the presiding judge of the Court of Appeal and the principal judge of the High Court have been created.

The Task Force further recommended the passing of the Administration of Courts Act, the implementation of the Kwach Report and the institutionalisation of the office of personal assistant to the Chief Justice. It also points out that ‘performance management, incorporating performance appraisal of individual judicial officers and staff and performance evaluation of systems and process of the entire judiciary as a whole should be introduced’<sup>257</sup> as a measure to enhance performance and accountability. The members of the judiciary are aware of the need for performance targets and judges have called for a number of measures to be taken,<sup>258</sup> such as:

- Implementing the recommendations of the 2005 and 2007 reports on ethics and governance of the judiciary and the proposed performance evaluation mechanisms such as peer review, self assessments, stakeholder surveys and court inspections to ensure the accountability of the judiciary as an institution, and the accountability of courts and individual judicial officers;
- Designing a suitable performance evaluation system for the judiciary;
- Using performance evaluation reports to enhance the management of the judiciary,

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<sup>257</sup> Republic of Kenya (2010: Annex VIII).

<sup>258</sup> Republic of Kenya (2010B).

including motivating judicial staff, identifying training needs, facilitating self-improvement and enhancing service delivery;

- Developing mechanisms for identifying and rewarding hard-working judicial personnel, including establishing annual awards for judicial and paralegal staff; and
- Preparing an annual judiciary performance report and making it available to the public.

Court administrative staff has to meet certain educational and professional qualifications before they can be employed. The staff is employed, recruited, promoted or disciplined by committees under the personnel department of the court. Clerks have to have a minimum of a C+ grade in their Kenya Certificate of Secondary Education (KCSE). There is a committee that handles complaints concerning the administrative staff and also disciplines them. The judiciary also organises workshops in order to offer more training to their staff. The Kenya Judicial Training Institute was established in 2008 to offer induction and continuing judicial education to judges, magistrates and paralegal officers in the judiciary. A number of courses have been held to meet the needs of different cadres of staff. The courts have continued to recruit more personnel to cater for the increased demand for court services and there have been no reports of instances where cases have failed to be heard due to lack of administrative staff. As mentioned earlier, the courts are in the progress of developing their own set of rules of conduct. They rely on and are governed by the public service rules and code of conduct. The judicial code of conduct developed in 2003 needs to be reviewed and widely publicised as some judicial officers have never seen it. At the 2010 Judges' Colloquium, the need to review the code was emphasised, particularly with a view to aligning it with international and regional standards and the new constitution. The judges were also of the view that a code of conduct should be developed for paralegal staff and that judicial officers and paralegal staff should be trained on ethics.<sup>259</sup>

## **D. Access to information about the law and the courts**

For a long time, there was no law mandating the government to make information accessible to the public. The government decided what information to give to the public and kept most information secret. Access to Kenyan laws and case law is based on the government's good will. The Access to Information Bill<sup>260</sup> that would provide the legal basis for requiring such access is yet to be promulgated into law. The object of the bill is stated as:

to provide for the establishment of the Kenya Freedom of Information Commission; to enable the public to access information in the possession of public authorities; to establish systems and processes to promote proactive publication and dissemination of information.<sup>261</sup>

In the interpretation section, public record is defined to include court records.<sup>262</sup>

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<sup>259</sup> Ibid.

<sup>260</sup> Freedom of Information Bill 2007 (Kenya).

<sup>261</sup> Ibid., preamble.

<sup>262</sup> Ibid., section 2.



The new constitution now grants every citizen the right to access information<sup>263</sup> held by the state and requires the state to publish and publicise any important information affecting the nation.<sup>264</sup>

## Availability of legislation and jurisprudence

### *Laws*

The publication of government information such as legislation is done by the Government Printers. The Government Printer is responsible for publishing and revising the Laws of Kenya. The Laws are published on both a set of 15 loose-leaf bound volumes and on *Kenya Gazette* supplements produced yearly. These publications are sold to all people who need them at relatively reasonable prices that vary depending on the size of the act. They also publish amendments to laws but they have not completely amended the laws. Amendments to the existing laws are done manually. Amendments to laws are also available online through [www.kenyalaw.org](http://www.kenyalaw.org), which contains the only up-to-date and most comprehensively revised library of the Laws of Kenya available on the internet. This provides access to all acts of Parliament, subsidiary legislation and the index of amendments, which are all amended and up-to-date.

Until the government gave the National Council for Law Reporting the mandate of updating laws, this task was performed by librarians employed by the courts who would simply cut and paste the amended sections in the old copies of the affected statutes. Access to amended statutes was also available online for those who could afford the fees levied by the private companies who offered the service. These laws are printed in English, which is Kenya's official language. Each court is supposed to have a library with all the latest amendments to the law, law reports and expert law commentaries. These materials are made available by the government. There are currently no comprehensive copies of the Laws of Kenya in Swahili, which is the national language. The laws are also not available in the vernacular languages on account of the wide number of languages spoken as well as the complexity of translating the legislation into these languages.

Courts are open to the public and the media. This enables all the interested parties to follow their case as well as allow the media to report on cases of public interest. There are, however, certain instances where the media is not allowed to broadcast court proceedings live on television or radio. The courts have an archive where reports, particulars and judgments on cases are kept. These records are for public use and there are no restrictions on accessing such files. They also keep a record of the cases that the court has adjudicated.

### *Law reporting*

Law reporting in Kenya has had a chequered history. Kenya's first law reports were the East African Law Reports (EALR). Seven of these volumes were compiled by Chief Justice of the Protectorate Hon. Mr Justice RW Hamilton. These reports covered all courts of different jurisdictions. Between 1922 and 1956, 21 volumes of the Kenya Law Reports (KLR) were published. These included only the decisions of the High Court.<sup>265</sup>

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<sup>263</sup> *Ibid.*, section 35(1)(a).

<sup>264</sup> *Ibid.*, section 35(3).

<sup>265</sup> Nicholas Okemwa, researcher with the National Council for Law Reporting, personal interview on 9 September 2009 and supporting write up titled, 'A History of Law Reporting in Kenya', on file with the authors.

The period between 1934 and 1956 saw the birth of the famous Court of Appeal for Eastern Africa Law Reports, which reported the decisions of the then Court of Appeal for Eastern Africa and of the Privy Council. They covered only those appeals filed from the territories. Twenty-three volumes were compiled. Between 1957 and 1975, the East Africa Law Reports (cited as EA) were published in 19 consecutive volumes and covered the decisions of the Court of Appeal for East Africa and the superior courts of the constituent territories, namely Kenya, Uganda, Tanzania, Aden, Seychelles and Somaliland. They were published under an editorial board consisting of the chief justices of the territories and the presiding judge of the Court of Appeal for Eastern Africa. Following the collapse of the East African Community under whose auspices the reports were published, the publication of the reports ceased.<sup>266</sup>

Between 1976 to 1980, six volumes, named the New Kenya Law Reports, were published by the East African Publishing House Ltd. They included the decisions of the High Court and Court of Appeal of Kenya but ceased when the publishing house closed, ostensibly on account of lack of funds.<sup>267</sup> The next reports were published between 1982 and 1992. Two volumes of the Kenya Appeal Reports were published by Butterworths and edited by the then Chief Justice Hon. Justice ARW Hancox (Hancox Reports). These reports included only the decisions of the Court of Appeal of Kenya.

There were no law reports published between 1982 and 2002. However, the Government in 2001 established the National Council for Law Reporting (NCLR). This led to the 2002 re-launch of the Kenya Law Reports which are the official law reports of the Republic of Kenya. The NCLR began publishing back-dated volumes from 1981. The NCLR has since published law reports for the periods between 1981 and 1994 and 2000 to 2007, including a reference index for the years 1976 to 1986. The volumes for the periods between 1992 and 1994 and 2000 to 2008 are available online.<sup>268</sup>

Through the website,<sup>269</sup> all national legislation and access to the latest court decisions have been made available free online. Most notably, NCLR now provides revisions of laws online making them easier to access than the 'cut and pasted' strips that have been the norm. Other online services available include:

- Verbatim records of the proceedings of Parliament (The Hansard);
- Bills pending before Parliament;
- Gazette and legal notices;
- A schedule of daily hearings updated daily and the daily cause list;
- Articles and commentaries on contemporary legal issues submitted by judicial officers, lawyers, academics and students;
- Bench update/case of the week – a presentation of a court ruling that is making the headlines; and
- Practice notes and directions issued by the Chief Justice.

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<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> See <http://www.kenyalaw.org/>

<sup>269</sup> Ibid.

The NCLR has also compiled the Laws of Kenya Grey Book, an important resource for judges, magistrates and legal practitioners comprising of selected acts of Parliament that are most commonly used. It has also compiled and published decisions on land and environmental law and gender<sup>270</sup> and is in the process of preparing a Commercial Law Grey Book.<sup>271</sup>

There are also some private companies that provide copies of the laws through their websites, which one can subscribe to at a fee. For example, Laws of Kenya is an online resource which provides a comprehensive up-to-date collection of laws and subsidiary legislation on a pay-per-minute basis. Laws can be downloaded at a fee with an option to purchase updates. LawAfrica<sup>272</sup> also has an online resource that has East Africa Law Reports, Africa Law Reports, East Africa Court of Appeal Reports and the Laws of Kenya. There is, however, no system of reporting the decisions of magistrates' courts.

### *Expert commentary on the law*

There are a few Kenyan authors who have written commentaries on the legal system in Kenya. There are also some legal journals in circulation in Kenya. However, most of the expert commentaries relied upon are written by foreign authors and as such the books are quite expensive to purchase. This makes it hard to provide copies of the books to every court complex.

The National Council for Law Reporting has a database on its website with expert commentaries on the law in the *Kenya Law Review*, the country's inaugural official law journal. It is published annually and provides a forum for the scholarly analysis of Kenyan law and interdisciplinary academic research on the law. It features research papers and peer-reviewed articles from legal scholars, judicial officers, legal practitioners, students, law and society scholars as well as articles on finance and economics.

The Kenya Law Society has a digest which is published sporadically. The School of Law University of Nairobi has two journals, the *University of Nairobi Law Journal* and the *East Africa Law Journal*. Both are intermittently published because of lack of funds and the failure of commentators to submit articles. The Moi University Law School also has a journal. The availability of these journals to judicial officers is difficult to gauge. It is, however, noteworthy that the High Court library writes to faculties and schools of law to get information on law journals.<sup>273</sup>

The NCLR also has specific services for judicial officers. These include the Bench Bulletin and the Bench Research Hotline (BRH). The Bench Bulletin is a monthly digest of recent developments in law, particularly case law, new legislation in the form of acts of Parliament, rules and regulations, pending legislation contained in bills tabled before Parliament and selected *Gazette* and legal notices. The BRH is a research help desk at the secretariat of the NCLR with a team of four legal researchers and a fully equipped call-centre dedicated to receiving research queries from judicial officers conducting legal research and providing feedback on the queries. The objective of this service is to support the administration of justice by providing judicial

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<sup>270</sup> Ibid.

<sup>271</sup> Interview with Nicholas Okemwa, supra note 65.

<sup>272</sup> <<http://www.lawafrica.com>>.

<sup>273</sup> As editor-in-chief of the *East African Law Journal*, one of the authors (P Kameri-Mbote) had occasion to deliver an order of about 60 copies of an issue of the journal.

officers, especially the judges of the High Court and the Court of Appeal, with dedicated research facilities. The BRH utilises an online ticketing system for logging and managing research queries from judicial officers and applies online legal research tools. The BRH has, since its inception in 2007, handled over 500 queries.<sup>274</sup> Considering that there are about 360 judicial officers, usage of this facility remains low. Three out of 15 Court of Appeal judges, about 15 out of 60 High Court judges and 15 out of 285 magistrates, are regular users of the service.<sup>275</sup> The low usage is attributed to lack of awareness of the service.<sup>276</sup> It may also be attributable to unreliable telephone and internet connections.

## **Availability of information about the justice system to the public**

The justice system remains a mystery for most members of the public. This has been pointed out by the different committees established to evaluate the system. The judiciary held its first Open Day in 2007 and has made this an annual event. The purpose is to demystify the court and to provide an avenue to advise the public on the various options available to access justice through the courts. Such days can thaw the ice or create even bigger barriers where the judicial officers – particularly the judges – attend in their robes. This can create distance between the public and the judges. It can also open judges up to situations that can lead to the appearance of lack of independence since they do not know who they are likely to meet as members of the public and these people may have ongoing cases before them. All in all, the courts remain an intimidating place to the public and are widely viewed as a reclusive club. Most of the information on the courts available to the public is through the media, with the daily publications reserving certain pages to report on court cases in progress. The courts are also exposed to the public when a sensational story breaks out and intense media attention is focused on the proceedings.

In October 2007, the Chief Justice published the Litigant's Charter in 'an attempt to consolidate and build on the gains made by the open policy ... adopted ... at the judiciary as exemplified by the Judiciary Open Day that was held on 16–17 February, 2007'.<sup>277</sup> The Charter was aimed at promoting litigants' understanding of their rights, obligations and court processes in the course of the litigation or other interaction with the court. The Chief Justice describes it as a 'Litigation-Made-Easy handbook which renders the otherwise technical procedures of the court into a user-friendly simplified prose in common parlance'. It was expected that it would be made available in Kiswahili but this is yet to be done. It describes the judiciary, its functions, structure and organisation; different courts and their jurisdiction, including specialised courts and tribunals; court registries; criminal procedure; civil procedure; what to expect in the judiciary; the obligations of litigants; how to channel complaints against the judiciary among other issues.<sup>278</sup> This is expected to go a long way towards making information available about the justice system to the public, to clarify procedures and make the justice system more user friendly. In the words of the Chief Justice, the Charter is 'a "Title Deed" to the acquisition of justice through our courts'.<sup>279</sup>

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<sup>274</sup> Interview with Nicholas Okemwa, *supra* note 65.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> Government of Kenya (2007: 1).

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

## Getting information from the judiciary

We were pleasantly surprised by the ease with which we got the information for this part of the questionnaire. There is a deluge of information on the justice sector in Kenya that we drew on even before we set out to interview the actors in the judiciary. We wrote to the Chief Justice requesting permission to interview persons in the judiciary. We picked on Nairobi, Machakos, Nakuru, Kisii, Kisumu and Marsabit. We expected to carry out the interviews between January and March 2009 immediately after getting the results of the Steadman Survey. By a letter dated 13 February, permission was granted with copies of the letter sent to the stations we had chosen. What was difficult was scheduling the interviews because of the workload of the judicial officers and the availability of the researchers. The judges, magistrates, the Registrar and other judicial staff were very forthcoming with information and shared freely. The coincidence of some of the interviews with the period during which the Task Force on Judicial Reforms was constituted, carried out its work and reported, provided a good context for conducting the research.

## E. Recommendations

Many reforms have taken place in the judiciary in the last ten years, such as the hosting of open days to the public; the appointment of a presiding judge in the Court of Appeal and a principal judge in the High Court; more court houses have been built; specialised divisions of the court have been established such as Land and Environment, Anti-Corruption, Commercial and Family; increased access to and use of information communication technologies; amendments to the procedure rules to give effect to the overriding objective of litigation; enhanced access to laws through information communication technologies and the re-invigoration of law reporting, which had lapsed. The judiciary has also established a Judicial Training Institute and carried out courses for different cadres of staff. There is awareness among the judicial officers of the need to have performance appraisals as a way to gauge the performance of individual officers as well as the entire judiciary. Tying performance appraisals to the identification of training needs will facilitate improvement of service delivery by this vital arm of government.

Quite a number of committees and task forces (Kwach; Onyango Otieno; Ringera; 2010 Task Force) have been established to look at ways to reform the judiciary, and they have made detailed recommendations. These recommendations have not been implemented, however, and there is an urgent need to implement the proposals of the commissions set up to inquire into different aspects of the judiciary. The proposals of the 2010 Task Force incorporate what prior task forces and committees had recommended. They are also in line with the provisions of the new constitution. They include:

- Putting in place mechanisms to deal with backlog and delay of cases such as providing enough judicial officers and space for the judiciary to carry out its role;

- Mainstreaming and reforming court administration for increased efficiency and effectiveness;
- Devising criteria for enhancing performance and accountability in the judiciary;
- Promoting ethical conduct and preventing corruption in the judiciary;
- Promoting access to justice for Kenyans;
- Implementing the Litigants' Charter;
- Making laws accessible to all judicial officers;
- Improving communication within the judiciary;
- Improving the terms and conditions of employment of judicial officers;
- Restructuring the administration of the judiciary; and
- Restructuring the Judicial Service Commission to enhance the independence, operational autonomy and effectiveness in the management of the judiciary.

Some of these proposals have been implemented. Those that have not should be implemented fully to facilitate the realisation of the rule of law ideal, improve the effectiveness of the judiciary and facilitate access to justice for Kenyans.

# 5

## Independence of judges and lawyers

The need for an independent judiciary has been recognised and various measures have been proposed to effect this principle. However, concerns still abound about the independence of the judiciary. The process through which judges and the Chief Justice are appointed are seen as pointers to an absence of autonomy. The Judicial Service Commission has limited powers and autonomy. Its power to appoint judges extends only to a limited number of low-ranking judicial officers and its composition limits its independence from the executive. The control of the judiciary's budget by the Ministry of Finance is also viewed as an assault on the independence of the judiciary. The need for better trained and disciplined lawyers cannot be overstated in the quest to promote the rule of law ideal. However, the disciplinary system for lawyers has limited effectiveness, both because of its lack of its autonomy and because of the complexity of its procedures.

### A. Judges

#### Constitutional and legal guarantees

##### *Institutional independence*

Judicial power was not defined in the repealed 1963 constitution, nor was its exclusive function vested in the judiciary. In contrast, the constitution expressly vested executive authority and legislative powers in the president and Parliament respectively.<sup>280</sup> It has been argued that notwithstanding lack of express vesting provisions in the constitution, the judicial power of the government does lie in the courts, that the judicial power exists independently and coordinately

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<sup>280</sup> Constitution of the Republic of Kenya (1963), sections 23 & 30 respectively.

with the sovereignty of Parliament and that the legislature's power to make laws and the executive's power to implement them does not entitle these two institutions of government to usurp the judicial power of the judicature.<sup>281</sup> The exclusivity of judicial power in the judiciary can thus only be inferred, and the Privy Council in *Liyana v. R*<sup>282</sup> decided that the arrangement of the constitution in parts among them one headed 'Judicature' demonstrates an intention to separate the judicial power from the legislature and the executive. The repealed constitution permitted Parliament to create and abolish subordinate courts and this lent further weight to the argument that failure to vest judicial authority exclusively in the judiciary can and has led to other arms of government usurping judicial powers.<sup>283</sup>

The new constitution includes provisions expressly stipulating the vesting of judicial power in the judiciary. Section 159(1) provides that 'judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution'.

A Judicial Service Commission created under the repealed constitution, was not to be controlled by any person or authority in the performance of its duties.<sup>284</sup> However, the protection accorded the JSC is eroded by provisions as to its establishment, composition, powers and resources.<sup>285</sup> The Commission has five members: the Chief Justice as Chair, the Attorney General, two judges chosen by the president and the Chair of the Public Service Commission. The Chief Justice, the Attorney General and the Chair of the Public Service Commission are appointed by the president at his/her discretion. The other judges are also appointees of the president upon nominal advice by the JSC.

The powers of the JSC are to appoint, discipline and remove from office a select group of judicial officers, namely the Registrars of the High Court, magistrates, the Chief Kadhi and Kadhis. It therefore only oversees the lower cadre of judicial officers and not judges. The JSC's role in relation to judges is to give advice to the president as to their appointment. No specifics or procedures as to how the advice is given and heeded are provided and the perception is that in fact no effective advice is given. The JSC is not accorded any role in the promotion and discipline of judges.

The insufficient powers of the JSC are compounded by insufficient resources. No constitutional or statutory provisions exist that give financial autonomy or allocation to the JSC to facilitate the discharge of its functions. This has resulted in organisational and operational weaknesses in the JSC, and it operates without a secretariat. The judiciary has been lobbying for and involved in the drafting of the Judicial Service Bill aimed at empowering and expanding the JSC through adequate representation of key stakeholders and the establishment of a secretariat. However, there is also a need for constitutional amendments in this respect to secure complete independence of the JSC. As noted in chapter 3, the 2010 Task Force on Judicial Reforms and the new constitution provide for a revamped JSC with an expanded membership and more

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<sup>281</sup> See Gicheru (2007).

<sup>282</sup> (1967) 1 A.C. 259

<sup>283</sup> Constitution of Kenya 1963, sections 65 & 66. Parliament enacted the Magistrates Courts Act that sets up Magistrates Courts, and the Kadhis Courts Act, which regulates the creation of Kadhis Courts.

<sup>284</sup> *Ibid.*, section 68(2).

<sup>285</sup> *Ibid.*, sections 68 & 69.



operational autonomy. The constitution provides for independence of the judiciary and that it 'shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'.<sup>286</sup>

### *Power of courts to punish for contempt*

The courts have power to punish for contempt. Section 5(1) of the Judicature Act gives the High Court and the Court of Appeal 'the same power to punish for contempt as is for the time being possessed by the High Court of Justice in England'. The purpose of this power is to uphold the authority and dignity of the courts, including the subordinate courts. Judges punish for contempt to protect the public from losing confidence in the judiciary.

The judiciary has been accused of being intolerant to public criticism, and of using its power to punish for contempt to suppress public debate of its decisions. Two cases decided in the 1990s provide a useful illustration of how the courts have exercised their power to punish for contempt.

The first case is that of *Republic v. David Makali & 3 Others*,<sup>287</sup> which arose out of public criticism of the decision of the Court of Appeal in the *UASU* case discussed above (also known as the *Dons* case). A week prior to the court's ruling in this case, President Moi had addressed a political rally in which he declared that the government would not allow the registration of the University Academic Staff Union (UASU), the public university lecturers' union. In its ruling, the court ordered that the lecturers could remain in university housing 'until 31 March, 1994 when they must be evicted if they failed to reach an accommodation with the university over their dispute'.<sup>288</sup> In this ruling the Court of Appeal declined to follow precedent. It is this ruling which invited the criticism that was the subject of contempt of court proceedings in the *Makali* case. In an article in the *People* magazine entitled 'Court of Appeal Ruling on *Dons* case Reeked of State Interference', the first respondent had criticised the ruling, claiming that it was 'a sign of indecision and dishonesty by the court'.<sup>289</sup> The article quoted the fourth respondent, a lawyer, as saying that the court's ruling amounted to 'judicial lynching and blackmail tailored to meet the political expedience of the executive'.<sup>290</sup> These comments elicited a furious reaction from the judiciary, and the Attorney General commenced contempt of court proceedings in the Court of Appeal against the respondents.

Counsel for the respondents contended that the article was fair comment on a matter of general public interest. While the court acknowledged that this argument had some merit, it stated that the court's complaint was not that the president could have interfered with its decision, but that 'even if the president were to be inclined to interfere, this court should not be able to resist him. The complaint is about the allegation of spinelessness on the part of the court which was unable to withstand the alleged interference and which in the end gave a judgment described as reeking with State interference'.<sup>291</sup> The court therefore found the article

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<sup>286</sup> Constitution of Kenya 2010, section 160(1).

<sup>287</sup> *R. v. Makali and 3 Others*, Court of Appeal Criminal Application No. 4 & 5 of 1994.

<sup>288</sup> *Ibid.* at 32, per Omolo, JA.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.* at 14.

<sup>291</sup> *Ibid.* at 36.

contemptuous since it ‘clearly imputed an evil motive to the Court of Appeal for its decision’, namely that the court ‘involved itself in lynching and blackmailing the dons so as to suit the executive, that the judiciary has lost its independence and has become subservient to the executive’.<sup>292</sup> The court then imposed very stiff penalties on the respondents.

The second case is that of *Republic v. Gachoka & Another*,<sup>293</sup> which concerned allegations of corruption in the judiciary. Here, the Attorney General had instituted contempt of court proceedings against the respondents for publishing articles in the *Post of Sunday*, alleging that they had contravened the sub judice rule by commenting on an ongoing case, and that they were scurrilous and malicious attacks on the character of the judiciary and the Chief Justice. One of the articles, entitled ‘Chesoni Implicated in an Orgy of Judicial Anarchy and a Kshs 30 million Bribe’, had claimed that the Chief Justice had received a bribe to influence the outcome of a decision in a suit relating to the Goldenberg scandal. In response to this article, the said Chief Justice had instructed a firm of advocates to sue the first respondent, Mr Tony Gachoka. This is when the first respondent wrote the second article, entitled ‘Judiciary in Panic as Chesoni Falls Out of Favour ... Sues Tony Gachoka’. In this second article, the first respondent published his response to the advocates of the Chief Justice, in which he had written that ‘[i]f in the case of Kamlesh Pattni you [the Chief Justice] hand-pick magistrates and judges to decide cases in his favour are you not going to also hand-pick a judge to decide this impending case in your favour?’

At the conclusion of these proceedings, the court held that Mr Gachoka was in contempt of court, reasoning that ordinary persons reading the articles ‘would conclude that this judiciary including the highest court in the land is not only corrupt but is weak-kneed enough to lend itself to manipulations by the Honourable Chief Justice’.<sup>294</sup> Further, because Mr Gachoka had offered no evidence for his allegations, the court felt compelled to punish him for contempt if only to prevent interference with the administration of justice.

For the rule of law ideal to be realised, it is important that the public respect the processes and decisions of the courts. But for courts to be respected, their processes and decisions should be such that they command respect. The courts are clearly in danger of losing public respect when obviously irrational decisions are made. For example, in the *Dons* case, or when judges further their own cause as in the *Makali* case, or when courts fail to guarantee a fair trial as in the *Gachoka* case. In the *Makali* case, for example, it was arguably in order for a citizen to question the independence of the judiciary, given the manner in which the powers of the president to appoint and remove judges have been exercised throughout the history of the Republic. And given the immense and unregulated powers of the Chief Justice, it was equally in order for Mr Gachoka to entertain the possibility that the Chief Justice could hand-pick judges to decide a case in which he would be a party, for the simple reason that he had the power to do so.

We should also analyse the *Gachoka* case in the context of a contemporaneous inquiry that the Kwach Committee had made into allegations of judicial corruption. In 1998, the Chief Justice had appointed a Committee on the Administration of Justice (also known as the Kwach Committee after its chair) to inquire into ‘judicial rectitude, moral uprightness, righteousness

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<sup>292</sup> Ibid. at 25.

<sup>293</sup> *R. v. Gachoka & Another*, Court of Appeal, Criminal Application No. 4 of 1999.

<sup>294</sup> Ibid. at 30, per Shah, JA.

or correctness of judicial officers in the discharge of their judicial functions'. The Committee established the existence of various practices that made the judiciary and judicial officers vulnerable to corruption, including engagement in business activities, the lack of proper vetting in the appointment process, the lack of transparency in the discharge of the judicial function and the lack of a transparent and merit-based judicial appointment system.<sup>295</sup> In particular, the Kwach Committee reported cases of 'actual payment of money to judges and magistrates to influence their decisions'.<sup>296</sup> Evidently, Mr Gachoka's words were arguably reckless and scornful even, but he was probably right to question the sincerity of the Kwach Committee process, which he perceived to be a cosmetic attempt by the judiciary to police itself in response to public outcry over judicial corruption, and whose report was in any case not made public.<sup>297</sup>

In these circumstances, it is not enough for the judges to claim that they punish for contempt to protect the public from losing confidence in the judiciary. In this respect, it is worth quoting Shah, JA in the *Gachoka* case, where he observed that the purpose of the power of the court to punish for contempt is 'to see to it that the ordinary people of this country look up to judges as men and women of integrity and honesty who could therefore be trusted to judge the disputes before them judicially, judiciously and impartially'.<sup>298</sup> However, in the circumstances prevailing at the time, including allegations of judicial corruption which necessitated the Kwach investigation, it could hardly have been said that the citizenry, in the first place, saw their judges as men and women who met these lofty standards of ethical and professional conduct. In such circumstances, it is not enough for the courts to take the view, as they did in the *Gachoka* case, that 'the power to punish for contempt is the *only* weapon at the disposal of the court to put the matters right'.<sup>299</sup> As we have suggested, because the judiciary is not elected by the citizenry, it can only play its role legitimately if it is perceived to be independent and impartial. Indeed, the Bangalore Principles of Judicial Conduct provide that 'a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but *must also appear to a reasonable observer* to be free therefrom'.<sup>300</sup> Thus, where its independence or impartiality is questioned, it should not quickly resort to its power to punish for contempt, however tempting, but should instead put its house in order so that the public have no justifiable cause to doubt its integrity and professionalism. In this regard, the judiciary also needs to rethink its policy preference for internal accountability mechanisms.<sup>301</sup>

### *Decisional independence*

Constitutional provisions on decisional independence relate to the independence of judicial officers that administer justice in the courts. The repealed constitution provided that all courts and adjudicating authorities that are established by law are required to be independent and

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<sup>295</sup> See Republic of Kenya (1998).

<sup>296</sup> *Ibid.* at 10.

<sup>297</sup> *Ibid.* at 19.

<sup>298</sup> *Ibid.* at 31.

<sup>299</sup> *Ibid.*, per Shah, JA. (emphasis supplied).

<sup>300</sup> Bangalore Principles of Judicial Conduct, para. 1.3. (2002) (emphasis supplied).

<sup>301</sup> See Gicheru, *supra* note 2 at 7 (stating that '[i]n order to guard against interference with our judicial independence, we in the Kenyan Judiciary have preferred internal accountability mechanisms rather than the external institutions.').

impartial,<sup>302</sup> but there were no constitutional provisions on immunity of judicial officers. The provisions on immunity are instead found in the Judicature Act. The Act provides that no judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for something done or ordered by him or her in the discharge of his or her judicial duty. This is conditional on the provision that the judge or magistrate believed that he or she had jurisdiction to make a decision.<sup>303</sup> The new constitution elaborates on the independence of the judiciary by providing that ‘the office of a judge of a superior court shall not be abolished while there is a substantive holder of the office’;<sup>304</sup> ‘the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund’;<sup>305</sup> ‘the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge’;<sup>306</sup> and ‘a member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function’.<sup>307</sup>

This constitutional status and protection for judges and magistrates has not, however, ensured immunity from executive-branch pressure in the past. In terms of the constitutional normative structure, the president could control judicial power via the appointment of subservient judges, and there were also considerable weaknesses in the provisions on procedures for appointment of judges and magistrates by the JSC. An example often quoted is one of a ‘government-friendly’ magistrate who conducted the criminal trial of *Koigi wa Wamwere & others* on charges of robbery with violence. Many observers felt this trial was politically motivated, as Koigi wa Wamwere was at the time an ardent critic of the government and in self exile. These beliefs were reinforced by the admitted fact of Mr Koigi’s kidnapping by security agents from Uganda. In the end, the state failed to adduce sufficient evidence to convict Mr Koigi and his co-accused. However, rather than render an acquittal as per the law, the magistrate substituted the charges and convicted Mr Koigi of robbery, even though no evidence had been led for that charge. The magistrate was rewarded by being appointed as a judge of the High Court.

Conversely, judges and magistrates who acted with independence and impartiality to the executive’s detriment have been penalised mostly by transfers to outlying stations. For example, in September 1994 the Nairobi Chief Resident Magistrate was transferred to Kitui, 130km east of Nairobi, shortly after he refused to accept the confessions of six men who had been tortured following a raid on the chief’s camp, Ndeiya. The magistrate censured the police and directed the Commissioner of Police to take immediate action against the men responsible for the torture of the defendants.

Judges have and continue to be appointed by the executive to serve in lengthy, politically controversial inquiries since independence. Examples are:

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<sup>302</sup> Constitution of Kenya (1963), section 77(9).

<sup>303</sup> Judicature Act, chapter 8, Laws of Kenya, section 6.

<sup>304</sup> Constitution of Kenya (2010), section 160(2).

<sup>305</sup> *Ibid.*, section 160(3).

<sup>306</sup> *Ibid.*, section 160(4).

<sup>307</sup> *Ibid.*, section 160(5).

- An inquiry into the conduct of a disgraced politician (the Miller Inquiry into the Conduct of Mr Charles Njonjo, former Minister for Constitutional Affairs);
- An inquiry into political murder (the Gicheru Inquiry into the Assassination of Robert Ouko, Minister for Foreign Affairs);
- An inquiry into politically instigated ethnic violence (the Akiwumi Inquiry into the Land Clashes);
- And an inquiry into government-backed looting of public money through a fictitious gold and diamonds export scheme (the Bosire Inquiry into the Goldenberg Scandal). Each of these commissions drew judges into politics – an inappropriate role – and kept them for long periods from their judicial duties – a pernicious consequence.

It is, perhaps, for this reason that the final report of the Bosire Commission recommended that judges be excluded altogether from such inquiries. The High Court also applied the doctrine of separation of powers to invalidate the secondment of a judge of the Court of Appeal, Justice Aaron Ringera, to an executive agency, the Kenya Anti-Corruption Authority, a statutory body.<sup>308</sup> But for the moment, the executive remains free to draw judges away from their jobs into non-judicial executive roles, and in 2008 the president appointed a judge-led commission of inquiry into the 2007 post-election violence (the Waki Commission on Post-Election Violence).

Although legislative manipulation of the jurisdiction of the High Court for political purposes is rare, it has happened. In 1988 the provisions of security of tenure were eliminated from the constitution by Parliament after a rift between the executive and a number of judges over human rights cases. In addition, after the High Court's decision in *Margaret Magiri Ngui v. Republic*, wherein it had, to the ire of the president, declared provisions of the Criminal Procedure Code unconstitutional, Parliament amended the constitution to remove the court's discretion in bail matters in capital offences.

At the administrative level, decision-making power in the judiciary is concentrated in the Chief Justice. The Chief Justice: creates divisions of the court; allocates judicial work; transfers judges and magistrates; approves participation in workshops and seminars by judges and magistrates; approves international travel courses; approves housing and travel schemes for judges; influences hiring and firing and negotiates salaries with magistrates; is the spokesperson and chief liaison officer of the judiciary; determines work stations; swears in the president and helps to monitor his health.<sup>309</sup>

There have been allegations of jurisdictional manipulation by the Chief Justice as a result of procedural rules that the Chief Justice issues, particularly under section 84 of the constitution. Hearing the case of *Gibson Kamau Kuria v. The Attorney General*<sup>310</sup> in 1988, the Chief Justice argued that his own failure to make rules raised the question of whether, in fact, the High Court had jurisdiction at all to hear applications to enforce rights under sections 70 to 83. New rules

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<sup>308</sup> In *Stephen Mwai Gachiengo @ Albert Muthee Kahuria v. Republic*, Misc. Application No. 302 of 2000.

<sup>309</sup> See 'Judges Press for Judicial Reforms', *Nation*, 15 June 2008. (This article reports concerns raised by judges, including lack of clear guidelines on transfer and promotion of judges, allocation of cases within the divisions of the High Court and appointments of judicial commissions of inquiry.)

<sup>310</sup> High Court Miscellaneous Civil Application of No. 55 of 1988.

that were issued by the Chief Justice in 2007 on Constitutional References and on Judicial Review applications have been criticised as unconstitutional. The potential for direct interference with judicial independence from the Chief Justice does exist (see case study).

The independence of the judiciary is further compromised and weakened by poor conditions of service, poor funding and the severe shortage of qualified personnel. One of the reasons that has been found by various investigative machineries to cause corruption in the judiciary has been poor terms and conditions of service, and bad deployment and transfer policies and practices. The changes provided for in the new constitution and discussed in chapter 4 will go a long way towards improving the conditions of judicial officers. Whether this translates into greater independence for the judiciary is yet to be seen.

## **Appointments, promotions and dismissal of judges and magistrates**

The constitution provides for appeal and puisne judges to preside over the Court of Appeal and High Court respectively, while the Chief Justice sits in both courts. The Chief Justice is appointed by the president, as are the appeal and puisne judges, upon recommendations made by the JSC. Other judicial officers, namely the magistrates, Chief Kadhi and Kadhis are appointed by the JSC. The constitution also permits Parliament to prescribe the number of judges and their terms under statute and also define terms for magistrates. There is no system for periodic review of either the number of judges needed. The number of Court of Appeal judges was only recently increased from 11 to 14 and High Court judges from 50 to 70 in 2007.<sup>311</sup> The qualifications for a person to be appointed a judge are that he or she should be a judge in a commonwealth country or an advocate of the High Court of Kenya of not less than seven years standing. The advice of the JSC to the president does not appear to be mandatory, and no procedures are provided as to its exercise, and no standards or criteria are provided for vetting qualified persons.

In the absence of this constitutional clarity, past appointments have lent themselves to the appearance of being politically motivated (the example of the magistrate promoted to a judge in the foregoing section is a case in point). The Kwach Committee identified the shortcomings of the present appointments system and recommended rigorous vetting before appointment of judicial officers and a transparent and merit-based judicial appointment system tailored to identify individuals of the highest integrity for recruitment. An Advisory Panel of Eminent Commonwealth Judicial Experts established by the Constitution of Kenya Review Commission (CKRC) to advise it on constitutional reforms regarding the judiciary was more explicit.<sup>312</sup> It noted that the current practice relating to the appointment of judges is a matter of grave concern, and that judicial appointments have regularly been made without public exposure and consultation. Further, it noted that lawyers with disciplinary proceedings pending before the Law Society have been appointed to high judicial office. This situation was found to be unacceptable and bound to undermine public confidence in the judiciary, and the Panel of Experts stated specifically that judges should not be appointed for political, tribal or sectarian reasons as appears to be the current practice.

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<sup>311</sup> Judicature Act, section 7 (as amended).

<sup>312</sup> See Constitution of Kenya Review Commission (2002).

The Panel of Experts recommended the adoption of a clearly established, transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission. They did not agree with the suggestion that nominations to the bench ought to be subjected to full-scale debate and majority vote by Parliament for reasons that such a process carries an undue risk that the appointment of judges will be politicised. The new constitution has however provided that the appointment of judges be subjected to Parliament's approval.<sup>313</sup> The concern about the politicisation of judges' appointment and retention has been noted in chapter 2 with respect to the idea of vetting all sitting judges.<sup>314</sup> Our argument is that the constitution is vague on the criteria for vetting.<sup>315</sup>

There were some attempts by the Judicial Service Commission in 2003 and 2004 to consult with a wider circle of legal stakeholders about recommendations for judicial appointments. The International Federation of Women Lawyers–Kenya (FIDA) and the Law Society of Kenya were asked to nominate candidates from their ranks for the vacant judicial positions. Although accounts differed about how the nominations were dealt with, such consultations were a radical departure from past, more secretive practices, and should be strengthened by being formalised in legislation.

The JSC lacked clearly-defined and transparent criteria and procedures in the exercise of its powers of appointment and promotion of magistrates. While vacancies in the magistrates' courts and minimum qualifications required by law for applicants are publicly advertised, the actual process in selection and recruitment is not transparent. There is also the lack of an institutionalised process to evaluate the performance of magistrates. The practice of promoting magistrates to positions in the superior courts of Kenya is, however, becoming more common.

Security of tenure was provided for the judges of the Court of Appeal and the High Court in the repealed constitution.<sup>316</sup> Judges vacated their office only upon retirement age which was set by Parliament at 74.<sup>317</sup> They could be removed while in office only on grounds of inability to perform the functions of his or her office or for misbehaviour.<sup>318</sup> In any of these cases, and upon advice of the Chief Justice, the president was required to appoint a tribunal to inquire into the matter and recommend whether the judge in question should be removed.<sup>319</sup> The president could remove the judge only upon the recommendation of such a tribunal.<sup>320</sup> With regard to other judicial officers in subordinate courts (magistrates), the Judicial Service Commission has the authority to appoint and remove judicial officers as well as exercise complete disciplinary control over them.

However, the repealed constitution provided for the appointment of acting judges by the president where the office of a puisne judge was vacant, if a puisne judge was appointed to act as Chief Justice or was for any reason unable to discharge the functions of his office, or if the

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<sup>313</sup> Constitution of Kenya 2010, section 166(1).

<sup>314</sup> *Ibid.*, sixth schedule, Transitional and Consequential Provisions, section 23(1).

<sup>315</sup> *Ibid.*, sections 10 & 159.

<sup>316</sup> Constitution of Kenya (1963), section 62.

<sup>317</sup> Judicature Act, section 9.

<sup>318</sup> Constitution of Kenya (1963), section 62(3).

<sup>319</sup> *Ibid.*, section 62(4)–(8).

<sup>320</sup> *Ibid.*, section 62(9).

Chief Justice advised the president that the state of business in the High Court so required. Such an acting judge continued to act for the period of his appointment or, if no period was specified, until his appointment was revoked by the president.<sup>321</sup> Though contract judges have not been hired since 1993, temporary judges were appointed in 2003 to replace those who had been suspended in the radical surgery of the judiciary although they were eventually confirmed in 2004. The concept of an acting judge goes against the main rationale for granting security of tenure which is to ensure judicial independence, and introduces the risk of deferential judges. Under the new constitution, retirement age for judges is set at 70 but judges have the option of retiring at 65.<sup>322</sup>

When it comes to the removal of judges, the repealed constitution did not specify the scope of impermissible misbehaviour. In addition, before the question of a judge's removal could be referred to a tribunal, the Chief Justice was required to first intimate to the president, under section 62(5) that 'the question of removing a puisne judge under this section ought to be investigated'. The key question raised by the 2003 suspension of judges under this section is how the Chief Justice comes to the conclusion that the question of removing a judge has arisen and that the president should therefore appoint a tribunal to investigate it. In this instance, the Chief Justice appointed an investigatory committee and subsequently used its report to advise the president to appoint tribunals. However, no clear provisions exist to guide the Chief Justice in this respect, and this raises concerns that the Chief Justice could use his powers to silence judges with threats to have them investigated. This is especially of concern if the Chief Justice is politically compromised, and in the light of the precedent set by the radical surgery in the judiciary that happened in 2003, this must be monitored.

The 'radical surgery' carried out on the judiciary was principally focused on the removal of allegedly corrupt judges and magistrates and the appointment of new persons to replace them. While the radical surgery initially had public approval and was seen as a commitment to tackle corruption in the judiciary, it has been criticised for ignoring constitutional guarantees of security of tenure for judges and international principles on the independence of the judiciary that state that the examination of the matter at the initial stage shall be kept confidential unless otherwise requested by the judge. Some judges were not informed of the action that was to be taken against them.

The premature public naming and admonition of individual judges and magistrates as corrupt and the subsequent pressure on them to resign through an ultimatum, constituted such a violation of the security of tenure. Such undue pressure was amplified by the immediate withdrawal of salaries and benefits from judges and magistrates and the clear warnings that they could retain their benefits only if they accepted retirement. Furthermore, the ultimatum to magistrates to resign or defend themselves expired long before they were even notified of the accusations by the Judicial Service Commission. After they submitted written defences to the JSC, the majority of the magistrates had been retired ostensibly in the public interest, but without any hearing.

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<sup>321</sup> Ibid., section 61(5) & (6).

<sup>322</sup> Constitution of Kenya (2010), section 167(1).



The violation of security of tenure and due process rights of judges and magistrates has engendered a low sense of morale among members of the judiciary and the legal profession. During a mission by the ICJ,<sup>323</sup> some of the judges conveyed a distinct and continuing sense of insecurity about their tenure, which was affecting the way they carried out their judicial functions. The possibility that they could be next in line to be publicly castigated and removed from office without due process has lowered the 'general *esprit de corps* of the judiciary as a whole'.

The new constitution requires that all serving judges and magistrates be vetted 'within one year after the effective date' in line with legislation that Parliament should enact to establish mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159.<sup>324</sup> The Vetting of Judges and Magistrates Bill 2010 is yet to become law but as framed, it raises the question of the sustainability of the process. The Bill establishes a time-limited process that is not conducive to building the institutional capacity of the judiciary to police itself. Apart from its commendable due process mechanisms, this ad hoc approach is comparable to the radical surgery of 2003 which resulted in the removal of judges without enabling the judiciary to institutionalise complaints mechanisms. The Task Force on Judicial Reforms 2010 recommended the creation of a complaints sub-commission in the JSC to continuously receive and investigate complaints against judicial officers and staff and discipline judges. The fact that the radical surgery of 2003 has not obviated the need for vetting judicial officers barely seven years later indicates that vetting should be an ongoing mechanism for safeguarding the integrity of the judiciary.

Under the constitution and Laws of Kenya, magistrates do not enjoy the same protection of their independence as judges. While security of tenure is explicitly guaranteed for the judges of the superior courts, this is not the case with regard to the magistrates. Moreover, magistrates can be dismissed without recourse to a tribunal, with only the opportunity to defend themselves before the JSC. Magistrates also suffer poor working conditions, especially in comparison with those enjoyed by judges. While salaries and other benefits have been regularly increased for judges of the Court of Appeal and the High Court, there have been no equivalent improvements for magistrates and other judicial officers. In March 2004, 32 lawyers in private practice turned down government offers of appointments as magistrates because of poor working conditions in magistrates' courts. This was followed by threats and protests by lawyers in different parts of the country against the shortage of magistrates and judicial staff. In 2005, magistrates from two areas went on strike to protest against their low salaries and poor working conditions.

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<sup>323</sup> ICJ-Kenya (2005).

<sup>324</sup> Constitution of Kenya (2010), sixth schedule, Transitional and Consequential Provisions, section 23(1).

## The radical surgery of the judiciary

2002

- Incoming President Mwai Kibaki acts on his election promise to tackle corruption by carrying out what he calls 'radical surgery' on the judiciary.

2003

- The president suspends Chief Justice Bernard Chunga and sets up a tribunal to investigate him on charges of corruption. Judge Evans Gicheru is appointed Acting Chief Justice. Chief Justice Chunga resigns from office in February.
- The Acting Chief Justice revives the Judiciary Committee on Reforms and Development. A sub-committee, called the 'Integrity and Anti-Corruption Committee' headed by Justice Aaron Ringera, is established in March. Its mandate is to investigate and report on 'the magnitude and level of corruption in the judiciary, its nature and forms, causes and impact on the performance of the judiciary' and to identify corrupt members of the judiciary.
- In June, President Kibaki appoints eight new High Court judges.
- The Ringera Report is published in September and officially transmitted to the Acting Chief Justice. Part I of the Ringera Report sets out evidence of corruption, unethical conduct and other offences at the highest levels. It discusses the nature and forms of both petty and grand corruption in the judiciary. The report identifies poor terms and conditions of service amongst the major causes of judicial corruption. Part II of the report identifies five out of nine Court of Appeal judges (56%), 18 out of 36 High Court judges (50%), 82 out of 254 magistrates (32%) and 43 paralegal officers are implicated in 'judicial corruption, misbehaviour or want of ethics.'
- Parallel to these efforts, the Law Society of Kenya (LSK) appoints a committee to investigate judicial corruption. Its report is completed in October and confidentially submitted to the Acting Chief Justice. It contains the names of a number of judges who need to be investigated. The judiciary does not act on the report.
- In October, a 'List of Shame' is published in the media, naming judges and justices implicated in the Ringera Report. The Acting Chief Justice publicly advises them to resign quietly within two weeks from 6 October, or be suspended without pay and privileges and face tribunals.
- Upon the recommendation of the Chief Justice, President Kibaki appoints two tribunals, one for the Court of Appeal and one for the High Court.
- In October, President Kibaki appoints 11 judges in an acting capacity, followed by another seven judges in December.
- In October, the Attorney-General announces that implicated magistrates must resign or face the law. The Kenya Magistrates and Judges Association (KMJA) states that its members have not been officially informed of the charges against them.

- In December, the media announces that six High Court and two Court of Appeal judges have decided to face the tribunals. Their salaries are indefinitely withdrawn and reinstated only in July 2004.
- President Kibaki revokes the tribunals constituted in October and establishes new tribunals with different panel members.
- In early November, all 82 magistrates are given until 17 November to respond in writing to the Judicial Service Commission (JSC) to 'show cause' why they should not be removed.

2004

- The media reports in January that all implicated magistrates and paralegals have filed their defences with the JSC. In mid-March, 50 of the implicated magistrates, followed by another 20, are 'retired' by the JSC in the public interest.
- After the reinstatement of 10 implicated magistrates and the promotion of one to Acting High Court Registrar, the Law Society demands to know how they were cleared of the charges. The JSC provides no explanation.
- In June, following protests by the KMJA, Chief Justice Evan Gicheru accuses the association of acting as a trade union and threatens to ban it.
- The tribunal for the Court of Appeal judges, which commenced the hearings in April, clears Justice Philip Waki of corruption charges. President Kibaki reinstates him into office.
- In December, President Kibaki confirms the permanent appointment of two Court of Appeal justices and 16 High Court judges out of 20 judges appointed in an acting capacity.

2007

- The president dissolves the High Court tribunal hearing corruption charges against Justice Roselyn Nambuye and reinstates her to office.
- The tribunal for the High Court judges clears Justice Daniel Anganyanya of corruption charges. President Kibaki reinstates him into office.

2008

- The tribunal for the High Court judges finds Justice JV Juma and P. Mbaluto guilty of corruption charges. President Kibaki fires them as judges.

2010

- The tribunal for the for the Court of Appeal judges clears Justice Moijo Ole Keiwa of corruption charges. President Kibaki reinstates him into office.

**SOURCES:**

The processes from 2002–2004 adapted from ICJ-Kenya (2005); the processes from 2007–2010 sourced from media reports

## Composition and qualification

While the constitution sets out the minimum qualifications for judges, no legislation provides criteria for magistrates. There is therefore no mechanism to ensure the appointment of appropriately qualified and experienced candidates. The perception in Kenya is that appointments to public office are driven by patronage based on ethnic and personal constituencies, which provide incentives for corruption. Appointments to the judiciary are not exempt from this general practice. An additional concern relates to the fact that there are far too few women occupying judicial positions. There is a higher, but still insufficient, ratio of women in the magistracy. An affirmative action legislative amendment was rejected by Parliament in 2007 and was followed by a presidential directive that at least one-third of all appointments to public office should be of women. The directive, however, lacks legal backing, and the Judicial Service Commission or the judiciary do not appear to have any policy to actively increase the number of qualified women in the judiciary. However, the new constitution now requires that ‘not more than two-thirds of the members of elective or appointive bodies shall be of the same gender’.<sup>325</sup> This gives constitutional anchorage to the quest for gender equality in the judiciary.

New magistrates undergo a two-week induction training course, which is insufficient to prepare them for their new positions or to enable them to eventually manage cases and deliver decisions with adequate judicial reasoning. There is no clear policy or legal requirement for continuing judicial education of both judges and magistrates. There are efforts being made currently by the judiciary to institute continuing judicial education. The establishment of the Judiciary Training Institute as noted above signals a move towards institutionalised judicial education for both induction purposes as well as performance enhancement through continuing education.

There is one Court of Appeal situated in Nairobi with court circuits at Mombasa, Kisumu, Nakuru, Nyeri and Eldoret. There are 15 High Court stations in the country, 110 magistrates’ court stations and 17 Kadhis’ court stations. The magistrates’ courts are established up to divisional levels. In terms of provincial distribution, there are five magistrates’ courts in Nairobi while Nyanza, Western and Rift Valley have 17, 11 and 20 respectively. Central has 18, Coast 10, Eastern 20 and North Eastern 3. The High Court operates in 14 court stations, namely Nairobi, Milimani, Kisumu, Kisii, Bungoma, Kakamega, Nakuru, Eldoret, Kitale, Nyeri, Mombasa, Malindi, Meru, Machakos and with sub-registries at Kericho, Busia and Garissa. There are 9 Court of Appeal judges against an establishment of 11 and 45 High Court judges against an establishment of 50. There are a total of 221 magistrates; 10 chief senior resident magistrates, 45 resident magistrates and 15 district magistrates. There is one Chief Kadhi and 14 Kadhis.<sup>326</sup>

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<sup>325</sup> Constitution of Kenya (2010), section 27(8).

<sup>326</sup> The statistics are as at March 2005 as provided for in the Judiciary Strategic Plan 2005–2008. There have since been additional appointments of judges and magistrates.

Table 11: Gender parity in the judiciary

Designation	Male	Female
Chief Justice	1	0
Court of Appeal judges	11	0
High Court judges	27	18
High Court Registrar	0	1
Chief Court Administrator	1	0
Magistrates	168	109
Kadhis	17	0
Paralegal staff	1865	1531

Source: Republic of Kenya (2010).

The 2010 Task Force on Judicial Reforms<sup>327</sup> noted the gender imbalance and proposed that this be rectified. It is noteworthy that women are under-represented in the higher echelons of the judiciary and predominate in the lower cadres.

On the overall staffing in the judiciary, chapter 4 has highlighted the personnel shortage and the 2010 Task Force on Judicial Reforms noted that:

... the total number of vacant positions in the judiciary stands at 1 456 against an establishment of 4 681 ... there are eleven (11) Court of Appeal judges out of an establishment of fourteen (14) judges and forty-six (46) High Court judges out of an establishment of seventy (70). The total number of magistrates in post is two hundred and seventy-seven (277) against an establishment of five hundred and fifty-four (554).<sup>328</sup>

## Conduct of judges and magistrates

Every judicial officer is, on appointment, supplied with a copy of the Judicial Service Code of Conduct and Ethics established under section 5(1) of the Public Officer Ethics Act 2003. Judicial officers are expected to observe the Judicial Service Code of Conduct and Ethics coextensively with their holding of judicial office. It has been noted that the Kenyan Code does not expressly provide for impartiality both in the process of arriving at the decision and in the decision itself – both have merit so as to ensure that public confidence is fostered during all stages of the decision-making process. The code neither provides explicitly for equality, which under the Bangalore Principles includes race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like cause, and refraining from manifesting bias or prejudice based on irrelevant grounds.<sup>329</sup>

The Kenyan judiciary has preferred internal accountability mechanisms rather than external institutions. The judiciary conducts biennial reviews on the integrity and performance of judges and magistrates through its Ethics and Governance Sub-Committee. There is also the

<sup>327</sup> Republic of Kenya (2010).

<sup>328</sup> Ibid. at 33–34.

<sup>329</sup> Republic of Kenya (2010B).

continuous complaints system under the Office of the Chief Justice, through which litigants are able to seek corrective redress on the workings of the process of the court. The judiciary is also considering the establishment of a disciplinary procedure to deal with breaches of the Judicial Code of Conduct that do not warrant the ultimate process for the judge's removal from office.

A survey conducted by the ICJ in 2003 concluded that in Kenya there is, among the courts, a 'casual disregard for binding authority and precedents'.<sup>330</sup> This disregard is compounded by incompetence, defined by one commentator as 'the inability to synthesise, comprehend and understand the facts before the court and the derivative legal issues raised in the case'.<sup>331</sup> Moreover, even when precedents have been applied, the judges have not always been effective in explaining their reasoning. As regards complaints, the public in Kenya have no means to express their grievances against judges or judicial administrators. This means that even minor complaints that undermine judicial integrity cannot be addressed unless they form a pattern that could be read as judicial misconduct.

On this issue the 2006 Onyango Otieno Sub-Committee on Ethics and Governance of the Judiciary<sup>332</sup> recommended the establishment of an Ethics and Integrity Committee for Magistrates and Kadhis. The Committee reinforced this recommendation with a proposal for setting up peer committees to consider disciplinary issues that do not warrant removal. The Onyango-Otieno Report also recommended a Litigant's Charter, which has since been implemented by the judiciary and consists of a compilation of user-friendly basic information on the judiciary including information on the court system, filing of complaints, rights and obligations of the litigants, the relevant court procedures and general information on other relevant aspects of the judiciary.

## **B. Lawyers**

Kenya has about 7 500 qualified legal practitioners to serve a population of close to 40 million people, making the ratio of lawyers to the population of Kenya stand at one lawyer to 5 400 people. This is far below the internationally recommended ratio of one lawyer to 600 people. Kenya requires about 50 000 lawyers currently and this need is going to rise as the population increases. The dearth of legal capacity is exacerbated by the fact that Kenyan lawyers are mainly found in the cities and major towns, leaving out most of the country where access to legal services is absent.

## **Regulation**

A number of laws regulate lawyers in Kenya. The Law Society of Kenya Act sets up the Law Society of Kenya, which has an extensive mandate to advise and assist members of the legal profession, the government and the public in all matters relating to the law and administration of justice in Kenya. The Law Society of Kenya membership consists of all practicing advocates in Kenya. By law, one must be a member of the Law Society of Kenya in order to practice as an advocate of the High Court of Kenya. In *Kenneth P. Kiplagat v. The Law Society of Kenya*,<sup>333</sup> an advocate challenged

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<sup>330</sup> See ICJ-Kenya (2003B).

<sup>331</sup> See Abdullahi (2002).

<sup>332</sup> See Republic of Kenya (2005C).

<sup>333</sup> Civil Case No. 542 of 1996.

the provision that requires all advocates of the High Court of Kenya to be members of the Law Society. Members have to pay annual fees, which may be used for purposes that a member may not agree with. This can be seen as an infringement of a person's freedom of association provided for in section 80 of the repealed constitution. He also sought to have the Law Society permanently prevented from engaging in activities that were not germane to the practice of law – in this particular case, political activities. The court declined to give the remedies sought by the applicant, arguing that some of the matters raised were internal matters that could be handled within the Law Society context while the remedy sought was too broad. It would need to relate to a particular activity.

The Advocates Act is the key legislation for the admission and regulation of advocates, while the Council for Legal Education Act establishes the Council for Legal Education, which is in charge of controlling standards and the quality of legal education in Kenya. A number of rules made by the Council of the Law Society of Kenya and approved by the Chief Justice under the Advocates Act further regulate the conduct of advocates with respect to client property and client money.<sup>334</sup>

For one to be qualified as an advocate one must have passed the relevant examinations of any recognised university and be a holder of a degree in law of that university or another university or institution that the Council of Legal Education may from time to time approve. In addition one must be a pupil of a qualified advocate for instruction in the proper business, practice and employment of an advocate, and attend courses and pass examinations set by the Council of Legal Education. The law curriculum of most universities provides courses in legal theory and practice, including human rights courses. However, the human rights courses that are offered are not compulsory. The Council of Legal Education curriculum taught at the Kenya School of Law concentrates more on practical courses relevant to legal practice and professional ethics.<sup>335</sup>

The Law Society introduced continuing legal education (CLE) for advocates in 2004,<sup>336</sup> under the Advocates (Continuing Legal Education) Regulations, which is conducted by its Council or by accredited institutions. Programmes of continuing legal education conducted by the Council or accredited institutions emphasise ethical as well as practical and professional aspects of legal practice. Every member of the Law Society is required to obtain, in each year of practice, no less than five units of continuing legal education by attending and participating in at least two continuing legal education programmes organised by the Council. In addition, every application by an advocate for the annual practising certificate should be accompanied by proof that the applicant has secured five units of continuing legal education during each practising year. The Kenya School of Law is also implementing a continuing professional development programme.

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<sup>334</sup> The rules are made pursuant to powers given under section 83 of the Advocates Act and are The Advocates (Practice) Rules, The Advocates (Accounts) Rules, The Advocates (Deposit Interest) Rules and The Advocates (Accountant Certificate) Rules.

<sup>335</sup> See Ojienda (2005); Republic of Kenya (2005D).

<sup>336</sup> This programme was introduced under the Advocates (Continuing Legal Education) Regulations, 2004 made by the Council pursuant to powers it is given under section 81(1)(h) of the Advocates Act.

## Legal practice

Advocates in Kenya are in excess of 7 000.<sup>337</sup> This number will continue to rise as there is an increase in the number of public and private universities offering law degrees.<sup>338</sup> There are also many Kenyan students studying law in foreign countries and expecting to come back to work in Kenya. Most qualified lawyers, however, prefer employment in private legal practice or in the corporate sector, while very few join the public service, either in the government ministries, state law offices or the judiciary. The exceptions in this respect are the commercial and industrial state parastatals and corporations, whose legal work is handled by private legal firms. One of the major reasons for this state of affairs is the poor pay in the public sector as compared to the private sector, and there is a problem attracting competent lawyers to the public service. A minority join academia, which is also becoming increasingly competitive.

Within private practice there is also a hierarchy. Most successful legal firms are based in the capital city (Nairobi) and are organised in partnerships that offer specialised legal services. The European- and Asian-led law firms have, in this respect, tended to monopolise the top end of legal work from large transnational corporations, banks, insurance companies and parastatals. While a number of African legal firms have achieved eminence and are organised as partnerships of considerable size, for many African lawyers the competition from established firms is strong and they are excluded from lucrative commercial and financial work. Many young lawyers are now moving to other urban towns outside Nairobi, and most of them are solo practitioners with a general law practice.<sup>339</sup> However, given the general low economic performance in the country over the last two decades, private practice has also become increasingly unable to absorb all the qualified lawyers.

Advocates have on various occasions faced prosecution and threats when they have acted for clients in cases against the state or powerful political officials. Between 1989 and 1991 when Kenya was experiencing some of the worst human rights violations in its history, advocates for multi-party politics were accused of subversion, and a number of the champions of multi-party politics, some among them lawyers,<sup>340</sup> were detained under inhuman conditions and without trial. Human rights lawyers like Gibson Kamau Kuria and Kiraitu Murungi, fled to the United States to avoid being jailed. More recently, during the political violence witnessed after the 2007 general elections, death threats were made against Kenyan human rights defenders and

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<sup>337</sup> See <http://www.lsk.or.ke/membership.php>.

<sup>338</sup> Initially only two public universities, namely University of Nairobi and Moi University, offered law degree courses, and in recent years the intake of law students in the two universities has increased following the introduction of modules for self-sponsored modules, and three additional public universities, (Kenyatta University and Jomo Kenyatta University of Agriculture and Technology) and a number of private universities (Catholic, Nazarene, Mount Kenya University and Kabarak) have also introduced law degree courses. Strathmore University, Inoorero University, Kampala International University and KCA University are also planning to open schools of law in the near future.

<sup>339</sup> See Ghai (1981); Odenyo (1981).

<sup>340</sup> John Khaminwa, Mohammed Ibrahim and Gitobu Imanyara.



pro-democracy activists,<sup>341</sup> who received threats by text messages, telephone calls and emails because they had spoken out publicly about the results of the Kenyan elections or about human rights abuses that occurred after the elections. According to an alert issued by Amnesty-USA, a pamphlet was also distributed naming them as 'traitors' to the Kikuyu community and containing veiled threats that they would be killed.

## Disciplinary systems

There has been growing concern about standards and professional ethics among lawyers, especially in the area of safeguarding clients' funds and property. The Advocates Act provides for two main disciplinary processes for advocates. The first is by establishing the Advocates Complaints Commission with powers to investigate and provide redress in cases of complaints made against advocates. The Commission has power to award reimbursement of loss or damage not exceeding KES 100 000 (approximately US\$ 1 500). It can also refer complaints to the Disciplinary Committee, set up under the same Act, or to courts for appropriate redress. The Disciplinary Committee investigates and makes rulings on complaints against advocates for professional misconduct, including those made by the Law Society of Kenya. The Disciplinary Committee has wide-ranging powers, including ordering that an advocate be fined, pay compensation not exceeding KES 5 million (approximately US\$ 62 500), be suspended from practice or be struck off the roll of advocates (deregistered).

A number of factors limit the independence and effectiveness of these mechanisms. Firstly, all the members of the Commission and some of the Disciplinary Committee are presidential appointees.<sup>342</sup> Other than the provision of discretionary representation in the Disciplinary Committee, the Law Society of Kenya is not given any prominent role in the appointment of members despite its legal mandate to regulate the legal profession. The Attorney General determines the operational structures of the Commission and is a member of the Disciplinary Committee and can also recommend some of the appointees to the Disciplinary Committee. In addition, there are certain operational constraints – the procedures involved in both mechanisms make the processes complex and cause delays, while the Commission and Disciplinary Committee are also not well-equipped and staffed.<sup>343</sup> In addition to these disciplinary processes, the Council of the Law Society of Kenya has powers under its parent Act to undertake disciplining advocates. The Council has, however, also not been free of political influence, with the election of Council members increasingly being decided along ethnic and political party lines.

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<sup>341</sup> Those who received threats included Muthoni Wanyeki, Executive Director of Kenya Human Rights Commission, Maina Kiai, Chairman of Kenya National Commission for Human Rights, Haroun Ndubi, human rights lawyer, member of Kenya Domestic Observers Forum, David Ndi, author of report on electoral irregularities, Gladwell Otieno, Director of Africa Centre for Open Government, Ndung'u Wainaina, staff member of National Convention Executive Council, Njeri Kabeberi, Executive Director of the Centre for Multi-Party Democracy, Nahashon Gachehe, employee of Independent Medico-Legal Unit and James Maina, member of People's Parliament (Bunge La Mwananchi).

<sup>342</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, while the Disciplinary Committee consists of the Attorney General; the Solicitor General; six advocates; the Chair, Vice Chair and Secretary of the Law Society of Kenya and three other persons who are not advocates and who are appointed by the Attorney General.

<sup>343</sup> See Ojienda, *supra* note 56.

## C. Recommendations

The issue of the independence of judges has formed part of the discussions on constitutional review. There have been concerns about executive control of the judiciary through the appointment of judges and members of the JSC. The new constitution and the 2010 Task Force on Judicial Reforms have proposed mechanisms to make the judiciary enjoy greater independence, which is deemed critical for the administration of justice. The latter noted that ‘the integrity, efficiency and effectiveness of the judicial process are not only functions of the judiciary, but also the Bar’. It underscored the need to ensure that advocates are diligent and conduct themselves in a way that does not sabotage the work of the courts.

In this regard it is important that:

- The constitutional provisions, specifically section 161, are enforced and extended to cover other judicial officers of the courts established under the constitution;
- The proposals of the 2010 Task Force on Judicial Reforms are implemented;
- Mechanisms for dealing with judicial officers who are alleged to be incompetent or inefficient are well articulated to avoid victimisation of the officers and failure to respect their rights;
- Any attempt to deal with judicial corruption or inefficiency also looks at the conduct of lawyers and paralegals who are also critical actors in the judicial process;
- The vetting of judges and magistrates should be institutionalised to avoid the mistakes made with the ‘radical surgery’ and to ensure that there is no witch-hunting;
- There should be synergy between legal education providers in universities, the Council for Legal Education and the Bar and Bench to ensure that the requisite technical competence is assured at each level;
- The Judicial Code of Conduct should be revised to reflect international best practice and a code of conduct for paralegal staff crafted to ensure high standards for all levels and overall improvement in service delivery and rating by the public;
- There should be vetting of lawyers seeking to join the judiciary to ensure both equality of treatment of judicial officers as well as to admit the very best lawyers into this critical department;
- Performance evaluation mechanisms should be instituted for individual judges as well as for the entire judiciary; and
- Induction and continuing legal education should be made mandatory for both lawyers and judicial officers.

# 6

## Criminal justice

The criminal justice system in Kenya is characterised by wide but unregulated discretionary powers. These powers include the power to arrest or not arrest, the power to detain or not detain, the power to investigate or not investigate, the power to charge a person with committing an offence or not to charge, the power to charge that person with committing a grave offence or minor offence, the power to prosecute or not prosecute and the power to terminate or not to terminate a prosecution. The exercise of these powers often leads to the criminalisation of poverty and the persecution of the citizenry. In addition, the existing policy and legal framework has served to ensure that public security agencies only serve the interests of the political regime in power, to the detriment of the realisation of the rule of law in the administration of criminal justice. The officers of key institutions such as the police and prisons also work under deplorable conditions and terms of service, which may predispose them toward oppressing the public they are supposed to serve. In these circumstances, it can hardly be said that the rule of law prevails in the Kenyan criminal justice system.

### A. Protection from crime

#### Incidence of crime

There has been a rapid increase in the levels of crime in Kenya over the last two decades.<sup>344</sup> Bank robberies, car-jacking, burglaries and murders are a common feature of Kenya's crime map. In addition, there has been a rise in white collar crimes. These high crime levels have been attributed to a number of factors, including rapid growth in urban populations coupled with acute housing shortages, declining economic prosperity, rising urban unemployment,

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<sup>344</sup> See e.g. UN Habitat (2002); Ngugi et al (2004).

the collapse of municipal institutions of governance, the emergence of vigilante groups and perceptions of impunity among criminals.<sup>345</sup> The Kenya Police Force (KPF) however points out that in 2007 there was a historic 13% reduction in reported crimes.<sup>346</sup> It notes further that insecurity was heightened during the post-election period but in the immediate aftermath there was a 4% decrease in crime rates.<sup>347</sup> Table 12 below shows a breakdown of the crime rates between 2007 and 2008.

*Table 12: Crime trends 2007–2008*

Category	2007	2008	% decrease/increase
Corruption	176	126	-28
Dangerous drugs	5 155	3 888	-25
Offences against morality	3 500	2 727	-22
Other offences against persons	16 735	14 809	-12
Vehicle and other thefts	1 153	1 244	-08
Robbery	3 295	3 056	-07
Economic crimes	1 820	1 705	-06
Homicide	1 769	1 851	-05
Theft of stock	1 464	2 006	+37
Criminal damage	2 601	3 460	+33
Theft by servant	2 045	2 188	+07
House breaking	5 953	6 027	+01

Source: Kenya Police Force (2009).

Whereas the police statistics reveal a decrease in crime rates, levels of insecurity are still high and it has to be taken into account that many crimes remain unreported. These crime statistics do not, for example, reflect the heightened criminal activities during the post-election violence in December 2007 and early 2008. The Commission of Inquiry into Post-Election Violence (CIPEV) estimates that during this period, about 1 133 people were killed.<sup>348</sup> With respect to policing operations during this period, the CIPEV established that the police often used excessive force and even killed many citizens using live bullets in efforts to maintain law and order.<sup>349</sup> In some cases, victims were ‘shot whilst in and around their own homes’.<sup>350</sup> As a result, 405 people died of gunshot wounds, while 557 people were treated for gunshot wounds.<sup>351</sup> The Commission also found credible evidence of criminal behaviour by the police, including murder, gang rape and looting.<sup>352</sup>

<sup>345</sup> See e.g. Anderson (2002).

<sup>346</sup> Kenya Police Force (2009: 1).

<sup>347</sup> *Ibid.*

<sup>348</sup> Republic of Kenya (2008B: 346).

<sup>349</sup> *Ibid.* at 386–395.

<sup>350</sup> *Ibid.* at 395.

<sup>351</sup> *Ibid.* at 386.

<sup>352</sup> *Ibid.* at 398–400, 403.

Several factors have been attributed to the increased sense of insecurity in Kenya. The Kenya Police Crime Report particularly notes the current threat to national security posed by organised criminal gangs like the Mungiki and the sustained proliferation of firearms from countries such as Somalia and Southern Sudan.<sup>353</sup>

## Poor data collection

Most Kenyans would confess to having very little (if any) information about the prevention of crime.<sup>354</sup> They perceive the criminal justice system as one that responds to crime and handles criminals rather than one that prevents crime. This clearly illustrates the extent to which information on crime prevention is either inaccessible or unavailable. Even where such information exists, there is much reluctance to publicise it.

Existing information is, therefore, scarcely available and what normally exists is usually based on official records produced by the criminal justice administration.<sup>355</sup> These records are, however, not conclusive since many crimes are never reported to the police. Several factors have contributed to the failure to report crimes. First, the reluctance with which the police handle certain cases discourages the reporting of crimes. Some cases are normally labelled 'unfounded' claims even where investigations have not been instituted. To a large extent, this has discouraged many people, especially the poor and the vulnerable, who opt out of the formal criminal justice system. For example, domestic violence cases are trivialised and offenders are not always charged when victims report to the police.<sup>356</sup>

Secondly, the lack of adequate resources and infrastructure impacts adversely on the efficiency of the police in responding to crime. For example, sexual offences require immediate medical examination and collection of evidence for a conviction to be obtained. This ideal envisages a speedy collection of evidence. Unfortunately, some victims do not have easy access to police stations and hospitals to obtain the required evidence in good time. The longer this takes the harder it is to obtain sufficient evidence warranting a conviction. Low conviction rates thus discourage victims from reporting such crimes.

Thirdly, the criminal justice system is not designed to give the complainant any form of compensation. Unlike the civil system, which is compensatory, the Kenyan criminal justice system is punitive. The complainant is thus compelled to institute civil proceedings for compensation; these proceedings are quite lengthy and costly, especially for the poor. The procedures governing civil proceedings are also complicated and in most cases litigants require legal advice; this discourages litigants who cannot afford legal services. Cognisant of this bottleneck, the Domestic Violence Bill of 2001 expressly provided for a compensation and protection mechanism for domestic violence victims. Unfortunately, this Bill lapsed in its second reading. Subsequently, the Family Protection Bill now seeks to similarly address the lack of a compensation and protection scheme for domestic violence victims but it is still in the pipeline.

Fourthly, victims and witnesses shy away from the criminal justice system due to the lack

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<sup>353</sup> Kenya Police Force, *supra* note 3 at 5–6.

<sup>354</sup> Section 14(1) of the Police Act enumerates prevention of crime as one of the roles of the police.

<sup>355</sup> UN Habitat, *supra* note 1 at 9.

<sup>356</sup> Interview with Moses Otsieno, Officer at FIDA Kenya.

of a victims and witnesses protection scheme. A Witness Protection Act, which establishes a framework for the protection of witnesses, has now been enacted by Parliament. At the same time, it should be noted that the Sexual Offences Act of 2006 gives the court the power to invoke appropriate measures to protect a witness in cases involving sexual offences.<sup>357</sup>

The collection of information on crime can assist in preventing crime. However, it is hampered by a number of factors. For example, the collection of information on crime is largely confidential and not much is available in the public domain. Chapter 43 of the Kenya Police Force Standing Orders sets out the procedure of collecting information on crime and the subsequent production of annual reports. Police stations are required to dispatch daily crime reports to the divisional headquarters by 08h30 every day and the divisional commander is then required to dispatch the daily divisional crime reports to the provincial headquarters by 09h00 every day. The daily provincial crime reports are then dispatched to the police headquarters by 09h30 every day.<sup>358</sup> However, reports of crimes of major importance are to be dispatched immediately and need not wait for the next dispatch of daily crime reports.<sup>359</sup> Crimes of major importance include, 'murder, manslaughter, rape, suicide, indecent assaults on women and children, serious traffic accidents, armed robbery, civil disturbance, strike reports, tribal clashes, international border raids and transgressions, earthquakes, floods and other major disasters, aircraft crashes'.

Annual reports are also to be produced and forwarded to the Commissioner of Police. However, these annual reports are confidential and can only be disclosed with the express authorisation of the Commissioner of Police.<sup>360</sup> Thus, although the Kenya Police Force Standing Orders set out the procedure for the collection of this strategic information, consistent analysis of the performance of the police in this process and the nature of the reports is difficult since these are not easily accessible. It is worth noting, however, that the Kenya Police Force has made attempts to publish selected crime statistics on its website.<sup>361</sup> Although the website does not provide the most recent statistics and only publishes selected statistics, it nevertheless is a step towards informing the public of the role played by the police in curbing insecurity.

The Criminal Intelligence Unit (CIU) of the Criminal Intelligence Department within the Kenya Police Force plays a big role in the identification of crime trends in Kenya. The CIU collects criminal data, analyses the same and disseminates it to the relevant security organs for action. All these activities are undertaken under high secrecy. However, civilians or informants are utilised during the process of data collection. The resultant reports on the criminal activities are, however, not disclosed. According to a former Criminal Intelligence Officer (CIO) in charge of Eastern province, not even your colleagues get to know your report.<sup>362</sup> The CIU is an effective tool that has been used in other countries not only to deal with crimes already committed but also to prevent crime. This has proved difficult to achieve in Kenya for two reasons. First, the programme is not well-funded. In fact, the police recruited in this unit are not well-motivated,

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<sup>357</sup> Sexual Offences Act, section 31 (2006).

<sup>358</sup> Kenya Police Force, Force Standing Orders, chapter 43, section 6 (i, ii, iii).

<sup>359</sup> *Ibid.*, chapter 38, section 8.

<sup>360</sup> *Ibid.*, chapter 43, section 3.

<sup>361</sup> See [www.kenyapolice.go.ke](http://www.kenyapolice.go.ke).

<sup>362</sup> Interview with Joseph Kaberia, former CIO head of Eastern Province.

hence they prefer remaining in other departments where they can augment their incomes from corrupt activities. Secondly, there is a lot of animosity from other departments in the police who are always suspicious of CIU staff.

## Arrest and prosecution

The criminal justice system is governed by a legal framework which is made up by statutes such as the Penal Code, the Sexual Offences Act, the Anti-Corruption and Economic Crimes Act, the Criminal Procedure Act and the Evidence Act. The framework has various flaws. One notable flaw is to be found in criminal procedure and concerns investigation and prosecution. Many criminal cases have been thrown out of court on grounds of poor investigations and uncoordinated evidence<sup>363</sup> which do not meet the set standards of criminal cases.<sup>364</sup> Two factors can be said to be contributing to this unfortunate situation. First, most prosecutions are conducted by police officers whose legal knowledge is not comparable to advocates acting for the defendants. Second, it is therefore quite challenging for these officers to ensure that all legal gaps in their cases are addressed.

The Kenya Police Force Standing Orders provide that 'all police officers of or above the rank of inspector are public prosecutors'.<sup>365</sup> The rationale is that by the time an officer becomes an inspector, he or she would have undergone sufficient in-service training which equips him or her to carry out such roles.<sup>366</sup> That notwithstanding, the Standing Orders provide that in certain cases officers of a subordinate rank may be selected to prosecute in district magistrates' courts.<sup>367</sup> According to the Kenya Police Deputy Spokesperson, the force has, however, been phasing out police prosecutors of below the rank of inspector. There is, therefore, a need to amend the Standing Orders to reflect this policy. However, it remains a challenge for police officers to rival advocates to secure convictions of offenders. In an interview on the Kenya Television Network, the Commissioner of the Kenya Police stated that they would be happy to relinquish the role of criminal prosecutors if the Attorney General's office had enough capacity to carry out prosecutions.<sup>368</sup>

Another issue of concern is that the practice of transferring investigating officers from one station to another negatively impacts on the criminal proceedings.<sup>369</sup> When transferred, it becomes difficult to ensure the court attendance of these officers, who are normally key witnesses in the cases. Thus, court cases drag on until the investigating officer is available and the liaison between the prosecutor and the investigating officer is hampered.

In addition, problems have always arisen with regard to the implementation of the law. Justice seems a very elusive concept especially for the poor and vulnerable, while the rich who are politically connected get their way. For example, the Kenya Anti-Corruption Unit has time and again been blamed for undertaking 'small fish' prosecutions while the 'big fish' are left free.

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<sup>363</sup> For example, in *R v. Kamlesh Patni*, the accused was charged with murder of his bodyguard. The case was, however, dismissed for want of evidence. *Wesangula* (2008).

<sup>364</sup> The required standards in criminal cases is beyond reasonable doubt.

<sup>365</sup> Kenya Police, Force Standing Orders, chapter 48, section 7 (i).

<sup>366</sup> Interview with Charles Owino, Deputy Police Spokesperson.

<sup>367</sup> Kenya Police Force Standing Orders, chapter 48, section 7 (ii).

<sup>368</sup> Commissioner of Police, KTN interviews, 26 June 2009.

<sup>369</sup> Interview with Moses Otsieno, Programmes Officer, FIDA Kenya.

It is no wonder then that many Kenyans are strongly disenchanted with the criminal justice system and deeply distrust the KPF. To make matters worse, the Attorney General, who has the sole and constitutional responsibility of determining who should be prosecuted for the commission of an offence, has often exercised the power to prosecute very selectively. Indeed, there have been cases where the Attorney General has failed to prosecute where judicial inquiries have recommended prosecutions. The report of the Akiwumi Commission is a case in point. This report recommended the investigation and prosecution of listed police officers, provincial administrators and politicians who were allegedly involved in tribal clashes.<sup>370</sup> However, the recommendations were never implemented. Where private individuals undertake private prosecutions in cases where the Attorney General has chosen not to act, the Attorney General has often exercised his constitutional powers to terminate such cases. There is, therefore, a perception that the Attorney General does not often act in the public interest, and instead encourages impunity, especially by rich and powerful members of society.

White collar crimes, especially those involving high-level corruption by rich and powerful actors, also tend not to be punished. Kenya's record in this regard indicates that the perpetrators of such crimes invariably walk away scot-free. The only inconvenience they suffer is that they will be hauled before courts from time to time. The Goldenberg and Anglo Leasing scams are good illustrations of the rich and powerful's impunity.<sup>371</sup>

It has also been reported that police officers and judicial officers sometimes conspire 'to corrupt the wheels of justice'.<sup>372</sup> Gitobu Imanyara, an experienced legal practitioner, has given the following illustration of how this happens in practice.<sup>373</sup> A person makes a complaint that he has been assaulted by a 'well known businesswoman'. The police are at first reluctant to record the complaint in their 'Occurrence Book', but eventually do so and arrest the accused person upon discovering that the matter has been reported to their superiors. The accused is subsequently charged in a court of law and is bonded to appear for the hearing of the case at a later date. At the same time, the complainant is also bonded to appear in court, except that the date shown on his bond papers is different from the date in the court file. Inevitably, the complainant does not appear when the case comes up for hearing, and the accused is acquitted for lack of evidence.

The foregoing inefficiencies of the criminal justice system are reflected in current crime statistics, which indicate that the vast majority of reported crimes go unpunished. For example, it is reported that in the last two or so years, about 87% of murder suspects in Nairobi have been set free.<sup>374</sup> The Director of Public Prosecutions is reported to attribute this appallingly low rate of conviction to the fact that '[t]he judicial system is simply overwhelmed'.<sup>375</sup> Statistics confirm that the justice system in terms of judicial officers, police officers and prison officers is indeed overwhelmed. In terms of judicial officers, the Central Bureau of Statistics records that in 2008 the 287 magistrates were required to deal with 343 152 cases filed in 2008 and 768 908 cases

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<sup>370</sup> Republic of Kenya (1999: 285–291).

<sup>371</sup> See Wrong (2009).

<sup>372</sup> Imanyara (2004: 55).

<sup>373</sup> Ibid.

<sup>374</sup> See e.g. Wesangula *supra* note 21.

<sup>375</sup> Ibid.



pending.<sup>376</sup> Without adequate resources such as transport facilities and relevant technology, the 40 000 police officers are also overwhelmed dealing with the wide range of policing duties, hence compromising the quality of investigations. This, coupled with the challenge of police prosecutors<sup>377</sup> versus qualified defence lawyers, has contributed to low conviction rates.

There is, therefore, a palpable sense of criminal injustice among Kenyan citizens. Further, there is a perception that the government is not doing nearly enough to control the spiralling levels of criminal activities. This perception of criminal injustice has spawned a number of responses. In the slums, poor suburbs and rural areas, vigilante groups have become commonplace.<sup>378</sup> And in the wealthier neighbourhoods, there has been a proliferation of private security firms, which serve both residential and commercial districts.

## **B. The politics of policing**

### **Legal framework**

Policing in Kenya has mainly been the preserve of the Kenya Police Force (KPF), which was established by the Police Act (PA).<sup>379</sup> The KPF was headed by a Commissioner of Police who was appointed by the president.<sup>380</sup> Immediately below the Commissioner were a number of Deputy Commissioners of Police in charge of the Criminal Investigation Department (CID), the General Service Unit (GSU), training of personnel, administration, operations and logistics, and planning. The CID were responsible for crime detection and investigations, while the GSU dealt with 'situations affecting internal security' such as riots.<sup>381</sup> The KPF population currently stands at 40 000.<sup>382</sup>

The KPF has been organised as a nationally unified body whose centralised force is directed, coordinated and controlled from the top. At the same time, the KPF's administrative units have been divided into provinces, divisions, stations and police posts. Provincial police officers (PPOs) are responsible for the direction and control of the police at the provincial level, and are answerable to the Commissioner. Police divisions are headed by officers commanding police divisions (OCPDs), who are answerable to PPOs. Further, police stations are headed by officers commanding police stations (OCSs), who are answerable to OCPDs. Finally, police posts are headed by officers commanding police posts (OCPPs), who in turn are answerable to OCSs.

The location of police divisions, stations and posts do not necessarily follow the administrative division of the country or districts. Instead, they are opened in areas the Commissioner deems in need after considering all factors relating to the maintenance of law and order and crime control. In many cases, communities that have resources are also able to ensure the establishment of police outposts in their neighbourhoods. On the whole, however, there are no set objective criteria governing the location of police outposts.

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<sup>376</sup> Central Bureau of Standards (2009: 18–19); . See also ICJ-Kenya (2006: 32).

<sup>377</sup> Discussed in detail hereunder.

<sup>378</sup> Anderson, *supra* note 2 at 546.

<sup>379</sup> Police Act, chapter 84, Laws of Kenya.

<sup>380</sup> Constitution of Kenya 1963, section 108(1).

<sup>381</sup> Kenya Police Force (2003: appendix v).

<sup>382</sup> Interview with Charles Owino, Deputy Police Spokesperson, KPF.

The repealed constitution vested the power to appoint police officers above the rank of Assistant Inspector in the Public Service Commission (PSC).<sup>383</sup> But the PSC could delegate this power to one or more of its members or to the Commissioner.<sup>384</sup> Further, this constitution vested the power to appoint police officers below the rank of Assistant Inspector in the Commissioner.<sup>385</sup> Again, the Commissioner could delegate this power to any member of the KPF.<sup>386</sup> Police officers live in government housing, isolated from the public. It is felt that such isolation removes them ‘from the temptation of leniency or corruption and that it builds an *esprit de corps* that can help overcome the effects of former alliances’.<sup>387</sup>

It should be noted that the PA also provides for the establishment of the Kenya Police Reserve (KPR) which is to consist of volunteers, and whose duty it is to assist the KPF in the performance of its duties.<sup>388</sup>

The functions of the KPF as set out in the PA are ‘the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged’.<sup>389</sup> Further, the PA entrusts the KPF with the duty ‘to regulate and control traffic and to keep order on and prevent obstructions in public places, and to prevent unnecessary obstruction on the occasions of assemblies, meetings and processions on public roads and streets, or in the neighbourhood of places of worship during the time of worship’.<sup>390</sup> Finally, the PA mandates police officers to ‘take charge of unclaimed property’.<sup>391</sup>

In addition to the KPF, a number of constitutional institutions perform some policing functions, including the Administrative Police, the National Security Intelligence Service (NSIS) and the Armed Forces (which consist of the Kenya Army, the Kenya Navy and the Kenya Air Force).

The Administrative Police Force (APF) is established by the Administration Police Act (APA).<sup>392</sup> The APF is answerable to the president through the provincial administration.<sup>393</sup> The function of the APF is basically to bolster the coercive strength of the government.<sup>394</sup> It assists the Provincial Administration – which consists of provincial commissioners, district commissioners, district officers and chiefs – in the exercise of its duties. This function extends to preserving the public peace and preventing the commission of offences.<sup>395</sup> In this regard, administrative police officers also have powers to arrest suspects and use firearms. They therefore perform the same

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<sup>383</sup> Constitution of Kenya 1963, section 108(2)(a).

<sup>384</sup> *Ibid.*, section 108(2)(b)(i).

<sup>385</sup> *Ibid.*, section 108(2)(b).

<sup>386</sup> *Ibid.*, section 108(2)(b)(ii).

<sup>387</sup> Clinard & Abbott (1973: 222).

<sup>388</sup> Police Act, *supra* note 37, section 53.

<sup>389</sup> *Ibid.*, section 14(1).

<sup>390</sup> *Ibid.*, section 16(1).

<sup>391</sup> *Ibid.*, section 17(1).

<sup>392</sup> Administrative Police Act, chapter 85, Laws of Kenya.

<sup>393</sup> *Ibid.*, section 3(2). The provincial administration is an administrative unit established by the executive to enable it to establish political control over the populace and implement its policies throughout the country.

<sup>394</sup> Auerbach (2003: 13).

<sup>395</sup> Administrative Police Act, *supra* note 50, section 8.

policing functions as the KPF and in the same territory, which may cause some dysfunction.<sup>396</sup> Unfortunately, the legislative and institutional framework does not provide for the coordination of the activities of the KPF and the APF. In order to facilitate the coordination of their activities, and to enhance the accountability of policing, the Commission of Inquiry into Post-Election Violence<sup>397</sup> and other commentators<sup>398</sup> have recommended that the KPF and the APF should be merged.

The NSIS is established by the National Security Intelligence Service Act (NSIS-A)<sup>399</sup> and is headed by a director general appointed by the president.<sup>400</sup> The NSIS-A also establishes a National Security Intelligence Council (NSIC).<sup>401</sup> The main functions of the NSIS are to gather information on matters relating to national security and intelligence, advise the government of threats to national security and protect national security interests.<sup>402</sup>

Accordingly, the NSIS is also a policing institution, and its functions overlap with those of the KPF's Criminal Investigation Department, which gathers intelligence information relating to crime, information which implicates the country's national security. Unfortunately, the NSIS-A does not spell out how the activities of the NSIS and the CID are to be coordinated. Further, the Commissioner of Police is not even a member of the NSIC, whose main function is to advise the NSIS on matters relating to national security and intelligence policies.<sup>403</sup> Even more significantly, perhaps, the NSIS is not a democratic institution and it seems the regime maintenance rationale has precluded the need for public accountability in the collection and utilisation of information relating to national security and intelligence.<sup>404</sup>

Unlike the police who ordinarily provide security during peacetime, the armed forces not only protect the country against external aggression but also perform a policing role during war, civil strife and other emergencies that may occur from time to time. For instance, the armed forces were deployed in the aftermath of the violence spawned by the disputed results of the presidential election of December 2007. The power of the armed forces to intervene in such situations of disorder is derived from the Armed Forces Act, which entrusts them 'with the defence of the Republic and the support of the civil power in the maintenance of order, and with such other duties as may from time to time be assigned to them by the minister after consultation with the Defence Council'.<sup>405</sup> The members of the Defence Council are all appointees of the president, who, by virtue of the constitution, is the commander-in-chief of the armed forces.<sup>406</sup> It

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<sup>396</sup> Auerbach & Baudh (2003: 31).

<sup>397</sup> Republic of Kenya, *supra* note 5 at 436.

<sup>398</sup> Akech (2005).

<sup>399</sup> National Security Intelligence Service Act, No. 11 of 1998, Laws of Kenya.

<sup>400</sup> *Ibid.*, section 6(1).

<sup>401</sup> *Ibid.*, section 23(1). The NSIC is constituted by the Minister in charge of national security, the Minister for Finance, the Minister for Foreign Affairs, the Attorney General and the Head of the Public Service.

<sup>402</sup> *Ibid.*, section 5(1).

<sup>403</sup> *Ibid.*, section 23(3).

<sup>404</sup> See e.g. Murunga (2003).

<sup>405</sup> Armed Forces Act, chapter 199, Laws of Kenya, section 3(1).

<sup>406</sup> The Defence Council consists of the Minister for Defence, the Assistant Minister for Defence, the Chief of General Staff, the commander of each service of the armed forces and the Permanent Secretary of the Ministry of Defence. Armed Forces Act, section 5(1).

is worth noting that the power of the Defence Council to deploy the military in the maintenance of internal order is not regulated. In particular, the Defence Council is not required to consult or seek the approval of Parliament. Given that the armed forces are not subject to the ordinary courts of law, it is therefore exceedingly difficult for the public to hold the army to account for transgressions in the course of maintaining internal order. For instance, there are allegations that the armed forces used excessive force in dealing with the post-election riots in December 2007.<sup>407</sup> These allegations have been summarily dismissed by the armed forces.

It should be noted that the new constitution reorganises the policing agencies. It establishes a National Police Service, which consists of the Kenya Police Service and Administration Police Service (article 243). The National Police Service is headed by an Inspector General appointed by the president with the approval of Parliament. The Inspector General serves for a single term of four years, although the president may dismiss him or her – without any reference to Parliament – for ‘serious violation’ of the constitution, gross misconduct, physical or mental incapacity, incompetence, bankruptcy or any other just cause. However, these provisions fall short of establishing a single police agency, as the Commission of Inquiry into Post-Election Violence recommended. Nevertheless, it is arguable that the objective of integrating the two policing agencies can still be realised by enacting a law (as envisaged by article 243) that introduces uniformity in the practices of the two agencies and shields them from political manipulation. Such legislation would then need to be accompanied by uniform force standing orders, guidelines and operational arrangements, on the rationale that only such reforms would enable the Inspector General to exercise effective command over the National Police Service.

## **Policing strategy and performance**

Policing in Kenya has, however, been characterised by poor performance and abuse. First, the KPF is understaffed and the officers are not adequately equipped in terms of resources to effectively perform their duties. The current 1:850 ratio of police officers to citizens falls short of the UN recommended ratio of 1:450. Nevertheless, it must be acknowledged that the recruitment rate of police officers has increased to 2 000–3 000 officers recruited per year.<sup>408</sup> According to the Deputy Police Spokesperson, the force is also adversely affected by a high death rate of 600–700 per year.<sup>409</sup>

In order to enable the KPF to perform the above functions, the Criminal Procedure Code (CPC)<sup>410</sup> and the Police Act give police officers various powers. These include powers to arrest suspected criminals, conduct searches and investigations and use firearms. There are instances where officers of the KPF have abused these powers. For example, the constitution requires that any person who is arrested or is detained by the police should be informed of the reasons for the arrest or detention and brought before a court ‘as soon as is reasonably practicable.’<sup>411</sup> Further, the constitution provides that if this is not done, then such a person may be entitled

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<sup>407</sup> See e.g. United Nations Human Rights Council (2009: 18).

<sup>408</sup> Interview with Charles Owino, Deputy Police Spokesperson, Kenya Police.

<sup>409</sup> Ibid.

<sup>410</sup> Criminal Procedure Code, chapter 75, Laws of Kenya.

<sup>411</sup> Constitution of Kenya 1963, section 72.

to compensation for unlawful arrest or detention.<sup>412</sup> One of the practical implications of these constitutional provisions is that the police may legally arrest and detain anybody without just cause for a period of up to 24 hours. In fact, KPF officers frequently arrest and detain suspects they do not intend to charge with any particular offences, especially through a practice known as 'the Friday Collection'.<sup>413</sup> They make arrests on Friday evening, solicit bribes from those arrested and tell those who refuse that they cannot have access to a lawyer or magistrate until Monday.<sup>414</sup> In the past, police officers have been known to contravene section 72 of the constitution by detaining suspects for extended periods of time. Courts have, however, taken a stand against this behaviour and have dismissed cases involving defendants who had been detained for an unreasonable period of time before being charged. Acquitting a defendant who had been detained for eight months before being taken to court, Court of Appeal judges, Omollo and Deverrell, clearly reiterated that:

an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.<sup>415</sup>

The second major issue of concern has been the abuse of the power of the police to use firearms. Section 28 of the Police Act stipulates that police officers can, firstly, use firearms to prevent the escape of a convicted felon from lawful custody,<sup>416</sup> to prevent another person from rescuing or attempting to rescue another from lawful custody<sup>417</sup> and to secure the arrest of a person who is resisting the arrest.<sup>418</sup> The proviso to the said powers is that in the case of a felon escaping from lawful custody, the officer must have reasonable grounds that the escape can only be prevented by use of firearms and that the officer must warn the felon of his or her intention to use the firearm.<sup>419</sup> In the other instances, the officer must have reasonable grounds to believe that he or any other person was in danger of grievous bodily harm and that the arrest can only be secured or the rescue can only be prevented by use of firearms.<sup>420</sup>

In practice, police officers have been accused of using firearms indiscriminately. A case in point is 29-year-old Dr James Muiruri who was brutally shot five times at close range following a disagreement with a police officer. Not only was Dr Muiruri unarmed, but as admitted by a police spokesperson, it was unjustified to shoot him to death.<sup>421</sup> This is just one of the many cases of extra-judicial killings in Kenya which have been the subject of numerous reports and newspaper articles.<sup>422</sup> According to the UN special rapporteur on extrajudicial, arbitrary or summary

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<sup>412</sup> *Ibid.*, section 72(6).

<sup>413</sup> Auerbach & Baudh, *supra* note 54 at 35.

<sup>414</sup> *Ibid.*

<sup>415</sup> *Albanus Mwasia Mutua v. Republic* (2004) eKLR at 7.

<sup>416</sup> Police Act, section 28(a).

<sup>417</sup> *Ibid.*, section 28(b).

<sup>418</sup> *Ibid.*, section 28(c).

<sup>419</sup> *Ibid.*, section 28(i).

<sup>420</sup> *Ibid.*, section 28(ii).

<sup>421</sup> Wachira & Waithaka (2009).

<sup>422</sup> Commonwealth Human Rights Initiative & Kenya Human Rights Commission (2006: 21); Mathangani (2009).

executions, Prof. Phillip Alston, extrajudicial killings in Kenya appeared to be ‘widespread and some of the killings are opportunistic, reckless or personal’.<sup>423</sup> Similarly, Amnesty International has reported that in Kenya, allegations of ‘torture and unlawful killings by state security officials persisted’.<sup>424</sup> There is an urgent need for the government to end the culture of impunity that is displayed amongst officers of the KPF.

The KPF has also been accused of inefficient and selective policing. For instance, there is a perception that the police are incapable of tackling crime effectively. It is thus reported that the police frequently ignore particularised threats.<sup>425</sup> Accordingly, many victims of criminal activities do not even bother to report to the police, whom they perceive to be inefficient or corrupt.<sup>426</sup> Police officers also commit or participate in criminal activities.<sup>427</sup> Further, they are often heavy-handed, insensitive and use excessive force in their dealings with citizens. The KPF is also perceived to be corrupt, and Transparency International has consistently ranked it as the most corrupt national institution over the last five years.<sup>428</sup>

In addition, the police force has been politicised unduly throughout the history of the Kenyan Republic.<sup>429</sup> Thus, the KPF has often been deployed as an instrument for the political repression of the citizenry. Successive governments have also criminalised poverty, through statutes such as the Vagrancy Act<sup>430</sup> and specific provisions such as section 183 of the Penal Code,<sup>431</sup> which targets persons referred to as ‘rogues and vagabonds’. Furthermore, many informal activities ‘as well as the very existence of informal settlement itself are considered criminal and occasionally targeted by the government’.<sup>432</sup> The very concept of crime in Kenya has thus become problematic as the boundaries of *de jure* and *de facto* criminality are not only vague but keep shifting.<sup>433</sup>

Moreover, there is credible evidence that successive governments have used security agencies to achieve regime objectives. For example, the Akiwumi Commission, which inquired into the tribal clashes in Kenya in the 1990s, unequivocally concluded that the KPF and the provincial administration ‘connived’ in the perpetration of the clashes.<sup>434</sup> More recently, the Commission of Inquiry into Post-Election Violence established that ‘on a number of occasions the decision-making and behaviour of senior police officers was influenced by factors outside the formal operating arrangements, chain of command and in direct conflict with mandated duties’.<sup>435</sup> For example, it established that the Head of Public Service and Secretary to the Cabinet

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<sup>423</sup> See e.g. United Nations Human Rights Council, supra note 65 at 6.

<sup>424</sup> Amnesty International (2009: 195).

<sup>425</sup> See e.g. Daily Nation (2002); Mwangi (2009).

<sup>426</sup> Ruteere & Pommerolle (2003: 594); Ngugi et al, supra note 2 at 13; Anderson, supra note 2 at 544 (observing that ‘institutional and opportunistic corruption among police officers has long been recognised as a serious problem in Kenya’); *Standard* (2009).

<sup>427</sup> See e.g. Muiruri (2005: 5) (Reporting that ‘[d]uring the 2001–2004 period ... 312 police officers were arrested for being involved in violent crime.’); Ruteere & Pommerolle, supra note 84; Ngugi et al supra note 2 at 13; Republic of Kenya (2008B).

<sup>428</sup> Transparency International (2008).

<sup>429</sup> Ruteere & Pommerolle, supra note 84 at 591–592.

<sup>430</sup> Vagrancy Act, chapter 58, Laws of Kenya (now repealed).

<sup>431</sup> Penal Code, chapter 63, Laws of Kenya.

<sup>432</sup> Ruteere & Pommerolle, supra note 84 at 593.

<sup>433</sup> Ruteere & Pommerolle, supra note 84 at 593; Willis (2003).

<sup>434</sup> Republic of Kenya (1999: 284).

<sup>435</sup> Republic of Kenya (2008B).

ordered the Administration Police to train a large number of its officers before polling day so that they could act as agents for the Party of National Unity during elections polling.<sup>436</sup> Further, this Commission established that the NSIS acted as an agent of the government in the electoral process.<sup>437</sup>

This Commission also found the legislative framework for policing to be inadequate. According to the Commission, some of the main weaknesses of the Police Act and the Police Standing Orders are: unclear responsibilities and confused lines of accountability; constraints around the ability to place the right people in the right jobs; an inadequate system for managing staff performance and discipline issues; little guidance to work with partner agencies, domestically or internationally; and few supports to enable the use of modern policing tactics.<sup>438</sup>

## **Qualifications, training and remuneration of police officers**

The recruitment of police officers is governed by the Force Standing Orders.<sup>439</sup> While there are no fixed educational requirements for recruitment, the Force Standing Orders provide that ‘preference is given to candidates with Kenya Certificate of Secondary Education, who have completed Form IV or are in possession of Kenya Certificate of Primary Education and are otherwise intelligent’.<sup>440</sup> Further, candidates must pass aptitude tests, must be between the ages of 18 and 25 years, be medically fit, be of good vision, hearing and physique and have no previous criminal record.<sup>441</sup> In addition, ‘candidates who are otherwise outstandingly suitable for enlistment’ may be recruited even if their physique is of a ‘slightly lower standard’ than the norm.<sup>442</sup> The Kenya Police Force therefore has discretion in the recruitment of officers, which can be abused. An evaluation of the KPF’s recruitment practices thus observes that ‘the recruitment exercise has over the years been characterised by irregularities ranging from nepotism, tribalism, and political patronage to favouritism and corruption, with wide-ranging negative effects on service delivery’.<sup>443</sup>

Upon being recruited, police officers attend a nine month training programme in various institutions, in which they are instructed by selected police officers (‘uniformed instructors’) and civilians (‘non-uniformed instructors’).<sup>444</sup> The former are selected by the Commissioner of Police ‘ostensibly based on previous class performance and talent spotting by instructors who trained the officer during previous courses’.<sup>445</sup> The latter are selected by the Public Service Commission through advertisements in the media.<sup>446</sup> The training institutions established by the KPF include the Kenya Police College, the General Service Unit (GSU) Training School,

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<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.* at 367.

<sup>438</sup> *Ibid.* at 436.

<sup>439</sup> Kenya Police & Security Research & Information Centre (2004: 37).

<sup>440</sup> *Ibid.*

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid.* at 41.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

Provincial Police Training Centres, the Criminal Investigation Department Training School and the Force Driving School.

Research by the Security Research and Information Centre (SRIC) shows that ‘some of the officers deployed as instructors are not interested in the job and do not get relevant training to become instructors, while some field staff are transferred to training institutions against their will, which tends to affect their morale’.<sup>447</sup> Many uniformed officers thus regard deployment to the training institutions as a form of punishment.<sup>448</sup> In addition, the SRIC study found that ‘[c]urrent training facilities are insufficient, dilapidated and outdated.’<sup>449</sup> It is also worth noting that even though the KPF has acknowledged that the public complain of police brutality and disregard for human rights,<sup>450</sup> police training programmes do not fully incorporate modules on human rights.<sup>451</sup> In these circumstances, the KPF can hardly produce properly trained police officers.

At the same time, police officers are poorly paid; currently police constables earn a monthly salary of KES 11 000 (about US\$ 150).<sup>452</sup> Also, despite the occupational hazards they face while performing their duties, police officers do not have adequate medical and risk allowances.<sup>453</sup> According to the SRIC, ‘the existing levels of compensation for police in Kenya are not only well below those in the private sector but frequently below the living wage’.<sup>454</sup> This has motivated police officers to ‘engage in corruption and other opportunistic behaviour as survival strategy’.<sup>455</sup> In addition, the living conditions of police officers are ‘pathetic’ due to an acute shortage of houses, especially in Nairobi and other urban centres.<sup>456</sup> It must be acknowledged that the government has recently embarked on a project for housing units for police officers, but there is still a need for more houses. The morale of police officers is also low, given that promotions are not always based on merit.<sup>457</sup> In general, police officers are deployed ‘without strict adherence to laid-down procedures’, and the process is ‘influenced by factors such as favouritism, nepotism and corruption’.<sup>458</sup> As a result, skilled officers are ‘deployed to offices or stations where their skills are not utilised, while individuals lacking such skills are entrusted with duties they are not trained for’.<sup>459</sup> It should be noted that the National Task Force on Police Reforms has recommended that the conditions of service and the welfare of police officers should be improved. Among other things, the Task Force has asked the government to: improve the remuneration and allowances of police officers; take the interests of family members into account when transferring police officers; provide medical and life insurance cover; and improve the quality of their housing and accommodation. The government has already begun to implement these recommendations.

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<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid. at 42.

<sup>450</sup> Kenya Police Force (2004: 10).

<sup>451</sup> Kenya Police Force (2006: Appendix I).

<sup>452</sup> Interview with Charles Owino, Deputy Police Spokesperson, Kenya Police Force.

<sup>453</sup> Kenya Police & SRIC, *supra* note 97 at 76; interview with Charles Owino, Deputy Police Spokesperson, Kenya Police Force.

<sup>454</sup> Kenya Police Force & SRIC, *supra* note 97 at 73.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid. at 79–80.

<sup>457</sup> Ibid. at 53.

<sup>458</sup> Ibid. at 54.

<sup>459</sup> Ibid.



## Civilian oversight of the police

The Police Act empowers the Minister for Internal Security to make regulations governing discipline.<sup>460</sup> The Police Regulations enumerate various offences against discipline, such as unlawful use of violence, unreasonable use of firearms and negligent performance of duty. These regulations are reinforced by the Force Standing Orders, but which are not accessible to the public.<sup>461</sup> The effectiveness of these internal mechanisms is doubtful. First, public perceptions of the corruption and excesses of the KPF are very high.<sup>462</sup> In Nairobi, for instance, police officers have frequently killed individuals they erroneously mistook for car-jackers. Second, the KPF rarely punishes errant officers. For instance, on numerous occasions errant officers have simply been transferred to other stations instead of being punished.

Given the deficiencies of the internal regulatory mechanisms, there is a need for institutionalised mechanisms for holding the police accountable to the citizenry. Without such reforms, the KPF will not regain the trust of the public, which is, however, necessary for effective policing. In particular, policing needs to be democratised by sharing policing information with the citizenry, and by giving them voice and influence in the decision-making process.<sup>463</sup> Establishing civilian oversight bodies constitutes one way of democratising the policing decision-making process. In September 2008, a Public Oversight Board was constituted vide Gazette Notice 8144. As of the writing of this report, the Board was not yet in operation; its secretariat was yet to be set up.

While it acknowledged the need for police accountability, the establishment of this Board failed to address certain pertinent issues. First, it did not address the underlying issues. The KPF was established, and continues to be based, on a regime that does not demand police accountability. Police conduct continues to be dealt with in utmost secrecy and even governing provisions such as the Force Standing Orders are not accessible to the public. This betrays the underlying culture that is not founded on openness.

Secondly, there is a need for a legal framework to govern civilian oversight of policing. For example, there was no legal basis for the Internal Security Minister to establish the Oversight Board. The Police Act vests the power to direct, supervise and control the KPF in the Commissioner of Police, not the minister.<sup>464</sup>

## Police reform

A number of programmes have been initiated by the KPF and the government in the last five years to reform policing in Kenya. These programmes include the Police Strategic Plan 2004–2008, the Police Reforms Task Force, the Kenya Police Reforms Framework and the Government, Justice, Law and Order Sector (GJLOS) Reform Programme. In an effort to implement the recommendations of the Commission of Inquiry into Post-Election Violence, the government recently established yet another task force – the Police Reforms Task Force (also

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<sup>460</sup> Police Act, section 65(e).

<sup>461</sup> Police Act, section 5.

<sup>462</sup> See e.g. Kimilu (2003: 12).

<sup>463</sup> Luna (2000: 1163–1164).

<sup>464</sup> Kipkorir (2008); Police Act, Section 14A.

known as the Ransley Task Force after its chairman). Thus far, however, these reform initiatives have not transformed policing in any significant respect. Again, it remains to be seen whether the recommendations of the Ransley Task Force will be implemented. The Police Strategic Plan details various measures that the KPF proposes to take in order 'to be a world-class Police Service, with a people-friendly, responsive and professional workforce'.<sup>465</sup> Its objectives include developing a national policy on policing, improving coordination between public and private security services, eradicating corruption in the service and strengthening the institutional framework for policing. None of these objectives have been realised so far.

The Kenya Police Reforms Task Force was established by the government to examine and review the administrative and institutional structures of the KPF, the legal framework for policing, the standards and practices on recruitment, training and career development and terms and conditions of service. The Kenya Police Reforms Framework is a research survey that was carried out by the SRIC at the invitation of the Commissioner of Police.<sup>466</sup> It sought to provide a comprehensive guide for work of the Task Force. In its report, the Task Force notes that '[e]xisting weakness in accountability and responsibility in police services can be traced to the entrenched culture of impunity and patronage, whereby officers involved in misconduct, crime and violation of human rights, feel confident that they will not be disciplined or held accountable'.<sup>467</sup> The Task Force advocated the reform of recruitment policies and terms and conditions of service, the establishment of a civilian oversight board and the establishment of a service charter. Despite promises by the KPF to implement the report of the Task Force, 'there has been no sign of actual reform'.<sup>468</sup>

The GJLOS Reform Programme is a sector-wide joint initiative of the government and various development partners, whose objective is to strengthen the capacities of the institutions in the governance and legal sector. The police constitute one such institution, and the programme's objectives here include improving police responses to corruption, improving crime reporting procedures, increasing training in investigation techniques, and providing better equipment and technical assistance. A key achievement of the GJLOS Reform Programme is creating awareness of the different governance institutions such as the KPF and the standards expected of these institutions. The GJLOS Reform Programme has facilitated research initiatives and training programmes for officers. In 2007 for example the GJLOS Reform Programme commissioned PricewaterhouseCoopers to engage in a pilot training programme for change in police culture and attitude.<sup>469</sup> The pilot training programme not only facilitated training of officers but also provided a forum where issues were identified and recommendations made.

The KPF has also been working together with certain NGOs which provide training and resource materials on human rights. The African Network for the Prevention Against Child Abuse and Neglect (ANPCAN) for instance worked together with the police to publish guidelines

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<sup>465</sup> Kenya Police Force (2004: 6).

<sup>466</sup> Kenya Police & SRIC, *supra* note 97 at x.

<sup>467</sup> Kenya Police Reforms Task Force (2005: 64).

<sup>468</sup> Commonwealth Human Rights Initiative & Kenya Human Rights Commission, *supra* note 80 at 62.

<sup>469</sup> PricewaterhouseCoopers (2007).

on how to deal with children in contact and/or in conflict with the law.<sup>470</sup> The Federation of Women Lawyers (FIDA) together with the KPF have also published a training manual for police officers on gender and human rights.<sup>471</sup> Other organisations such as Save the Children have assisted in the setting up of child protection desks at police stations. The KPF have also involved FIDA in training officers on gender rights.<sup>472</sup> These joint efforts between the KPF and NGOs are unprecedented in Kenya and are playing a role in reforming the KPF.

Following the international mediation process that sought to assist Kenya to resolve the national crisis generated by the bungled presidential election of December 2007, a Commission of Inquiry on Post-Election Violence (CIPEV) was established in May 2008. Among other things, CIPEV was tasked with investigating the role of security agencies during the course of the post-election violence and recommending measures to be taken to prevent the occurrence of similar deeds in future. CIPEV recommended that policing reforms should be guided by the principles of fair representation of all ethnic groups in the policing entities, impartiality and cultural sensitivity, decentralisation informed by a 'single integrated command model based upon community policing', respect for human rights, legal and political accountability and integration of the Kenya Police Service and Administration Police.<sup>473</sup> Second, CIPEV recommended that the Police Act should be amended with a view to strengthening 'police governance, accountability and organisational arrangements in a way which is suitable for a contemporary age' and improving the effectiveness of the police.<sup>474</sup> Third, CIPEV recommended the enactment of 'a new and modern code of conduct' that can facilitate the establishment of trust for policing actors, which is an essential component without which the police cannot function effectively.<sup>475</sup> Such a code of conduct would seek to instil ethical standards in policing, including honesty, integrity, professionalism, fairness and impartiality, respect for people and confidentiality.<sup>476</sup>

Fourth, CIPEV recommended that the criminal investigations process should be strengthened since 'quality investigations are the cornerstone of the justice system as far as bringing perpetrators to justice is concerned'.<sup>477</sup> The question of independent investigations is particularly important. As CIPEV established, '[t]he Police Service has a fundamental problem with its investigative capability'.<sup>478</sup> Further, investigations by the Commission 'found that there was inability or reluctance to effectively investigate serious crimes and their perpetrators even when strong evidence existed'.<sup>479</sup> In addition, CIPEV reports that 'police appeared unwilling or incapable of investigating and arresting politically powerful individuals implicated in the post-election violence instead concentrating on the lower level perpetrators'.<sup>480</sup> The Commission also

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<sup>470</sup> ANPCAN (2006).

<sup>471</sup> FIDA (2008).

<sup>472</sup> Interview with Moses Otsieno, Officer at FIDA.

<sup>473</sup> Republic of Kenya (2008B) at 435-437.

<sup>474</sup> *Ibid.* at 438.

<sup>475</sup> *Ibid.* at 439.

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid.* at 440.

<sup>478</sup> *Ibid.* at 422.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

established that the Police service has weak systems and approaches to investigating incidents where police officers are involved.<sup>481</sup> There is therefore a compelling case for establishing an independent and autonomous Directorate of Criminal Investigations.

Other key recommendations of CIPEV include establishing a Police Service Commission and Civilian Oversight of Policing. It envisaged that the Police Service Commission would be responsible for holding an amalgamated police agency (that integrates the Kenya Police Service and Administration Police Service) to account.<sup>482</sup> With respect to civilian oversight of policing, it envisages the ‘establishment of a well researched, legally based, professional and independent Police Conduct Authority’.<sup>483</sup> Among other things, the Police Conduct Authority would be responsible for investigating the conduct of policing agencies and officers.<sup>484</sup> In this regard, CIPEV is right to dismiss the Police Oversight Board<sup>485</sup> created by the government in September as lacking ‘the key components or properly functioning arrangements necessary for the provision of quality civilian oversight of the police’.<sup>486</sup>

CIPEV had recommended that the process of realising these recommendations should be guided by a ‘specialised and independent Police Reform Group (PRG)’ consisting of both national and international policing experts.<sup>487</sup> Instead, the government established a National Task Force on Police Reform in May 2009 to ‘examine the existing policy, institutional, legislative, administrative, and operational structures, systems and strategies and recommend comprehensive reforms taking cognisance of the recommendations contained in Agenda 4, Krieger, Waki and other Police related reports so as to enhance police efficiency, effectiveness and institutionalise professionalism and accountability.’ In its report,<sup>488</sup> the Task Force made the following key recommendations:

- That an independent policing oversight authority composed of civilians should be established to enhance police accountability;
- That a code of ethics should be established to address conflicts of interest and corruption involving police officers; and
- That a statutory police reforms implementation commission should be established to coordinate, monitor and supervise the implementation of the recommendations of the Task Force.

After receiving the report of this Task Force, the government established the Police Reforms Implementation Committee, which is currently preparing bills on civilian oversight of policing, new legislation to govern policing and private security providers for consideration by Parliament.

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<sup>481</sup> Ibid.

<sup>482</sup> Ibid. at 438.

<sup>483</sup> Ibid. at 441.

<sup>484</sup> Ibid.

<sup>485</sup> See Kenya Gazette Notice 8144, 4 September 2008.

<sup>486</sup> Republic of Kenya (2008B) at 441; See also Kipkorir, *supra* note 122.

<sup>487</sup> Republic of Kenya (2008B) at 434, 483.

<sup>488</sup> Republic of Kenya (2009B).

### c. The Attorney General and prosecutions

In the repealed constitution, the power to decide if and when an individual could be prosecuted for a criminal offence was vested in the Attorney General (AG). Further, this constitution gave the AG the power to require the Commissioner of Police to investigate any matter. Section 26(3) of the repealed Constitution provided as follows:

- The Attorney General shall have power in any case in which he considers it desirable so to do -
- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
  - (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and
  - (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

These powers of the AG have been exercised in a manner that does not attract public confidence in the criminal justice system, even though the repealed constitution empowered the courts to regulate its exercise.<sup>489</sup> On the one hand, courts have deferred to the AG in the exercise of the power to prosecute, and have consistently held that they have no powers to direct the AG on how to exercise the power to prosecute or not to prosecute for any offence.<sup>490</sup> This power has often been abused, and results in individuals being prosecuted, only for charges to be dropped along the way. The lack of regulation of this power has resulted in the criminal justice system being used to persecute the citizenry. According to Godfrey M Musila, for example, Kenya's 'history is replete with examples of prosecutions conducted for reasons other than public interest, thus amounting to political witch-hunts and in some cases to settle personal scores'.<sup>491</sup> The case of *Veronica Njeri Kiarie v. Republic*<sup>492</sup> illustrates this. The applicant had been arrested and charged with robbery with violence. The case was later withdrawn after the hearing had been adjourned three times. The applicant was subsequently rearrested and charged again, this time with the offence of causing grievous bodily harm. The prosecution then sought to terminate the case. The applicant then sought the court's intervention, contending that she had faithfully attended court for three years and spent considerable resources on the case and that the Attorney General was abusing his powers by now seeking to terminate the case. The court agreed, holding that 'the Attorney General's discretionary power to enter *nolle prosequi* can only be exercised in good faith and for the public good' and that where that power is exercised in bad faith the court will intervene to ensure that it is not misused.<sup>493</sup>

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<sup>489</sup> Constitution of Kenya 1963, section 60(1), 123(8).

<sup>490</sup> See e.g. *Republic v. Shah* (1986) KLR; *John Otieno Oluoch v. Republic*, High Court Misc. Criminal Application No. 537 of 1992.

<sup>491</sup> Musila (2007: 31).

<sup>492</sup> *Veronica Njeri Kiarie v. Republic*, High Court of Kenya at Kakamega, Misc. Criminal Application No. 29 of 2005, (2005) eKLR.

<sup>493</sup> *Ibid.* at 3.

Conversely, while the courts have in many cases deferred to the AG in the exercise of the power to discontinue criminal proceedings initiated by private citizens, they are increasingly more assertive in regulating the exercise of this power.<sup>494</sup> This also arises out of a concern that this power has been abused, to the detriment of the legitimacy of the criminal justice system. At the same time, the privilege to initiate private prosecutions can also be abused, and the courts have established principles to regulate its exercise. These principles explain how the provisions of the Criminal Procedure Code which permit private prosecution are to be exercised.<sup>495</sup> The principles require an applicant who intends to conduct a private prosecution to first make a report to the AG or the police, so as to give these institutions a reasonable opportunity to commence criminal proceedings. The courts will only sanction a private prosecution where the AG or the police demonstrate an unreasonable reticence to act and there is a clear likelihood of a failure of justice unless the suspect is prosecuted.<sup>496</sup>

### **Selective prosecution of corruption cases**

The discretionary powers of the AG, coupled with the grant of prosecutorial powers to the Kenya Anti-Corruption Commission (KACC), has resulted in selective and arbitrary application of the criminal law. The KACC is established by the Anti-Corruption and Economic Crimes Act of 2003. Its primary mandate is to investigate matters that raise suspicion that conduct constituting corruption or economic crimes has taken place.<sup>497</sup> Where any such matter comes to the attention of the KACC, it is required to refer 'any offence that comes to its notice to any other appropriate person or body'.<sup>498</sup> The KACC therefore shares the responsibility of investigating crimes with the Kenya Police Force. It is important to note that it is up to the KACC to decide whether to investigate any matter. Because there are no objective standards regulating how this important decision should be made, the power to investigate is prone to abuse and can be subjective. Conversely, the constitution gives the Attorney General power to 'institute and undertake criminal proceedings against any person before any court (other than a court martial)'.<sup>499</sup> This power is apparently absolute and can be exercised by the Attorney General 'in any case in which he considers it desirable so to do'.<sup>500</sup> Similarly, the constitution does not establish any standards to regulate the exercise of this discretionary power.

Typically, once the KACC has determined that conduct constituting corruption or economic crime has occurred, it refers the matter to the Attorney General, who then makes a decision as to whether or not to prosecute the individuals or entities in question. This is the point at which politics invariably comes into play. In some cases, the Office of the Attorney General proffers charges against the accused; in other cases it does not. And it is often unclear what criteria the Office of the Attorney General uses to determine which cases merit prosecution and which cases do not.

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<sup>494</sup> See e.g. Waris (2005: 84–85).

<sup>495</sup> Criminal Procedure Code, sections 88–90.

<sup>496</sup> See *Kihara v Kimani* (1985) KLR 79; *Floriculture International Limited & Others* High Court Misc. Civil Application No. 114 of 1997; *Otieno Clifford Richard v Republic* (2006) eKLR.

<sup>497</sup> Kenya Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section 7(1).

<sup>498</sup> Kenya Anti-Corruption and Economic Crimes Act, No. 3 of 2003, section 7(3).

<sup>499</sup> Constitution of Kenya (1963), section 26(3)(a).

<sup>500</sup> *Ibid.*, section 26(3).

The effect of the combined discretionary powers of the KACC and the Attorney General is that investigations and prosecutions in cases of corruption and economic crimes are in many cases perceived by the public to be 'selective and discriminatory'.<sup>501</sup> In practice, it is quite apparent that only minor players are investigated and prosecuted by these government bodies, while the major players appear to be untouchable. Critics of the KACC thus maintain that it is yet to prosecute a single high-profile corruption case.

The Anglo Leasing scandal provides an example of such selective investigation and prosecution.<sup>502</sup> In this major corruption scandal, the Ministry of Home Affairs had initially sought to acquire tamper-proof passports, and invited five firms to tender for their production. A technical committee of the Ministry of Finance, Immigrations Department and the Government Technology Services then disqualified all the bids, and recommended that the project be expanded to include other security facets in the issuance of new visas, passports and computerisation of the immigration records, thereby blowing up the cost of the project beyond Treasury's means and necessitating external financing.

At this point Anglo Leasing and Finance Limited, a firm purportedly with registered offices in the United Kingdom, entered into the picture and submitted an unsolicited technical proposal for the supply and installation of an Immigration Security and Document Control System (ISDCS). Under the proposal, Anglo Leasing was to finance the project and supply the ISDCS through its subcontractor, Francois-Charles Obethur Fiduciare based in Paris. The Permanent Secretary in the Ministry of Home Affairs then wrote to the Ministry of Finance, informing it of the proposal and seeking to proceed with the procurement under security classification. A contract worth KES 2.7 billion was subsequently signed between Anglo Leasing and the government, although no due diligence test was conducted on the firm. The Ministry of Finance then paid the firm a commitment fee of KES 95 million. The government then cancelled the contract once the scandal was exposed. The government later sacked the permanent secretaries in the Ministries of Finance and Home Affairs. But the ministers, who gave final approval for the projects, initially declined to resign, although one of them later resigned. Then, the same firm was also awarded a contract worth KES 4 billion for constructing forensic laboratories for the police force, without competitive tendering.

The KACC investigated the matter and recommended that the Attorney General should prosecute certain public officers. However, the Attorney General declined to prosecute these public officers on the grounds that the KACC investigations were incomplete and had failed to disclose that any specific offences had been committed.<sup>503</sup> The Attorney General then referred the matter back to the KACC for further investigations. The KACC then retorted that it had 'offered watertight cases for prosecution'.<sup>504</sup> Some three years later, the KACC is apparently still conducting further investigations. As we can see, the outcome of these inter-agency power games is a perennial merry-go-round that results in no charges ever being brought against corrupt persons. Justice is thereby delayed, and inevitably denied. It is also quite possible that this

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<sup>501</sup> Imanyara (2004: 52).

<sup>502</sup> See e.g. A Harvest of Corruption Scandals, *Standard*, 5 February 2005.

<sup>503</sup> See e.g. Mugonyi & Barasa (2006).

<sup>504</sup> *Ibid.*

merry-go-round is the result of collusion between the agencies, whose motivation is to frustrate the legal process. Indeed, a government that is not keen on fighting corruption has an incentive to encourage such collusion.

The new constitution now seeks to enhance objectivity and accountability in investigations and prosecutions. In the new constitution, the task of exercising the state's powers of prosecution will now be exercised by the Director of Public Prosecutions (DPP) (article 157). The primary functions of the Attorney General will now be to give legal advice to the government and represent it in legal proceedings (article 156). Further, the new constitution provides that the DPP can only take over a criminal suit with the permission of the person or authority who instituted it. In addition, the DPP can only discontinue a prosecution with the permission of the court. In order to preclude the abuse of the power to prosecute, the new constitution requires that its exercise 'shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process'.

## **D. Non-state action against crime**

The deficiencies of the criminal justice system have led to the emergence of private modes of security provision. Among the poor, vigilante groups have emerged to fill the vacuum created by the state. Among the rich, there has been a proliferation of corporate security. A culture of 'mob justice', which involves the lynching of criminals by the public, has also developed.<sup>505</sup> The public take the law into their own hands in this manner because they are of the opinion that the police and the courts are unable to guarantee justice. It is a reaction to the fact that in numerous cases, criminals they have apprehended and handed over to the police are released for lack of evidence, or because the police interfered with the evidence so that it cannot be used in court, or powerful criminals bribed judicial and police officers.<sup>506</sup>

The emerging culture of mob justice is a demonstration that the citizenry may be losing faith in the authority of law. As Ewa Wojkowska has observed, '[i]f there are no viable means of resolving societal disputes, the alternatives are either violence or conflict avoidance – which in itself is likely to lead to violence later.'<sup>507</sup>

Vigilante groups are to be found mostly in Kenya's urban areas, although they increasingly have a presence in the rural areas. Examples include the Mungiki, Taliban, Jeshi la Mzee, Baghdad Boys, Kagio, Kaya Bombo Youth and the Sungu Sungu. Although these groups often engage in criminal activities, the citizenry perceive them to be an appropriate response to crime in many cases.<sup>508</sup> Some vigilante groups for instance operate to curtail the activities of other vigilante groups that may be considered a threat to security. For example, the Kagio vigilante group has been fighting the Mungiki in Kirinyaga.<sup>509</sup> There have been incidences where altercations between the Mungiki and other vigilante groups have led to mass killings. In April 2009, 26 people were killed in Mathira as a result of clashes between the Mungiki and local

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<sup>505</sup> See e.g. Gimode (2001: 313).

<sup>506</sup> Ibid.

<sup>507</sup> Wojkowska (2006: 6).

<sup>508</sup> See e.g. Anderson, *supra* note 2.

<sup>509</sup> (Nation: 2009).



vigilante groups.<sup>510</sup> In Kagumo, members of the Mungiki sect have been hacked to death at a spot named 'the Hague'. A case in point is 17-year-old Peter Kinyua who admitted to having been forced to take the Mungiki oath. The local vigilante group instructed him to attend a meeting to narrate how he joined the sect. Hoping to be spared, he attended the meeting in his father's presence only to be 'sentenced' and hacked to death.<sup>511</sup> In some cases, vigilante groups are even touted as a form of community policing, since they often consult with police officers in their areas of operation.<sup>512</sup> On the other hand, the police are often ruthless in dealing with vigilante groups, and have, for example, been accused of executing members of these groups without following the due process of the law. In June 2007, for example, the police are reported to have executed members of the Mungiki in the course of implementing a 'shoot to kill' policy of the government.<sup>513</sup>

This ambivalent relationship between the police and vigilante groups only serves to enhance citizen perceptions of insecurity, as the police are often accused of colluding with vigilante groups. Indeed, there is a perception that the government condones vigilante groups whenever it is politically expedient. This perception is encouraged by the fact that members of these groups often carry firearms, yet the police do not apprehend them.<sup>514</sup> It is also reported that some powerful political actors who are not in government also finance vigilante groups that they use to achieve their political objectives.<sup>515</sup> It therefore comes as no surprise that vigilante groups have been at the heart of the organised violence that has accompanied every general election since 1992.<sup>516</sup> The net effect of these complex relationships between vigilante groups, the police, government and powerful political actors is that government loses its monopoly of force, and anarchy becomes increasingly widespread. A major concern about vigilante groups is their resilience and potential to become uncontrollable. The Mungiki is an example of a group that has existed for over a decade and continues to be a threat to security. They are reported to have been involved in mass killings as early as 2002.<sup>517</sup> Interventions dealing with such vigilante groups are challenging owing to the unique dynamics presented by such associations. Vigilante groups can be quite dangerous and powerful yet able to disguise the extent of their membership. Aware of the imminent danger posed by such groups, the KPF has taken tough measures against the Mungiki. Thus, crime control considerations are placed in opposition with human rights considerations. Crime control considerations seem to take precedence and the KPF has been accused of killing members of the Mungiki sect without due process. Mutuma Ruteere notes that the public also seem to be torn between these considerations and some members of the public are in support of the police attempts to curtail the activities of the Mungiki. The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions highlight that conflict situations and public emergencies do not provide a

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<sup>510</sup> Police Commissioner (2009); Ochari (2009).

<sup>511</sup> (Standard: 2009); Nation (2009B).

<sup>512</sup> PricewaterhouseCoopers, *supra* note 127 at 13

<sup>513</sup> See e.g. Safer Access (2007: 9).

<sup>514</sup> Anderson, *supra* note 2 at 14.

<sup>515</sup> See e.g. International Crisis Group (2008).

<sup>516</sup> See e.g. Human Rights Watch (2002).

<sup>517</sup> Ruteere (2008: 17).

justification for such executions.<sup>518</sup> Thus, the threat to security posed by vigilante groups does not justify arbitrary killing of members. Nevertheless, the occurrences strongly suggest that vigilante groups must be dealt with right at the outset before they take root and become a menace.

Private policing arrangements in Kenya largely consist of the activities of the private security industry (PSI). There are also neighbourhood associations that provide security services. Typically, these associations pool resources to hire security guards. The activities of the PSI include guarding of property, protection of persons, transport of cash and other valuables, installation and management of electronic security devices such as alarms and investigation and risk management. Many private security firms are set up by police officers still in the employ of the KPF, while others are formed by retired policemen and army officers. There are about 2 000 private security firms in the country, which mostly operate in the urban areas. The PSI employs about a quarter of a million people and has an annual turnover of about KES 3.2 billion.<sup>519</sup>

Notable features of the PSI in Kenya include the following. First, private security guards are typically poorly-trained and therefore ill-equipped to perform their jobs.<sup>520</sup> Second, private security guards are not allowed to carry firearms and are not effective since they are invariably confronted by criminals who possess sophisticated weapons. Third, private security guards are poorly paid, earning about KES 5 000 per month.<sup>521</sup> They also work under very poor conditions. For instance, they work for long hours, averaging about 12 hours a day and invariably do not wear protective headgear.<sup>522</sup>

There is no legislative framework for the regulation of the activities of the PSI, which poses a threat to the liberties of citizens that is not any less significant than that posed by the public police. In addition, the PSI abuses the labour rights of workers.<sup>523</sup> Furthermore, there is a need to clarify their relationship with the public police, especially since a good number of them are established by KPF officers. It therefore becomes important to regulate the activities of the PSI to ensure their adherence to constitutional safeguards on individual liberties, respect of the labour rights of security workers and responsiveness to the consumers of their services. Along with legislation, an authority needs to be established to regulate the licensing of private security firms, to set standards of conduct and to monitor the activities of the stakeholders.

The Private Security Service Providers Bill that is now being developed by the Police Reforms Implementation Committee promises to fill this regulatory vacuum.

## E. Fair trial

The repealed constitution guarantees the right of an accused person to a fair trial. The term 'fair trial' is fairly loaded with numerous principles. Underlying this concept are the principles of affording an accused person a fair hearing within a reasonable time and by an independent and impartial court established by law; the presumption of innocence until proven guilty; the

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<sup>518</sup> ESCR 1989/65 of 24 May 1989, article 1.

<sup>519</sup> Okwach (2005).

<sup>520</sup> Ngugi et al, *supra* note 1 at 109.

<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.* at 110.

<sup>523</sup> See e.g. Okwach, *supra* note 180.

need of an accused to be informed, as soon as possible and in a language that they understand of the nature of offence with which they are charged; the right of the accused to defend himself either in person or by a legal representative of his choice; the entitlement to time and facilities to prepare a defence; the right to cross-examination of witnesses; the entitlement to an interpreter if need be and the non-applicability of laws retrospectively.<sup>524</sup>

These principles are part and parcel of the Kenyan criminal system. Moreover, the courts have jealously guarded these provisions by ensuring that accused persons are guaranteed a fair trial. The landmark case here is *Githunguri v. Republic*,<sup>525</sup> where the court held that it is an abuse of court process to charge a person with an offence after a decision has been made not to prosecute him, and this decision has been communicated to him and assurances given that he would not be prosecuted again. However, these principles have been constantly violated.

## Delays in bringing cases to trial

The courts have recently had to grapple with the consistent abuse of the right to be heard within a reasonable time. An arrested person must be taken to court within 14 days from the time of arrest where the offence is punishable by death and within 24 hours from the time of arrest in all other cases.<sup>526</sup>

In the recent past, the courts have unconditionally released many accused persons who have been detained by the police for periods longer than the constitution permits.<sup>527</sup> In doing so, the courts have reasoned that any 'unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge'.<sup>528</sup> Even though the courts may be technically correct in making such decisions, this approach may have a deleterious effect on public respect for the authority of law.

It is perhaps out of a concern that this technical approach may be subverting the course of justice that the Court of Appeal sought to clarify the law in *Dominic Mutie Mwalimu v. Republic*.<sup>529</sup> Here, the appellant contended that he should be released since he had been taken to court 17 days from the date of arrest, thereby breaching his constitutional right. The Court of Appeal declined to do so, reasoning that 'the mere fact that an accused person is brought before court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the constitution does not ipso facto prove a breach of the constitution'.<sup>530</sup> In the court's view, 'each case has to be considered on the basis of its peculiar facts and circumstances'.<sup>531</sup> This case is thus a clear example of how courts can interpret the law so as to salvage the criminal justice system from a reputation that it produces absurd results even in clear cases.

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<sup>524</sup> Constitution of Kenya (1963), section 77.

<sup>525</sup> *Githunguri v. Republic* (1986) KLR 1.

<sup>526</sup> Constitution of Kenya (1963), section 72(3)(b).

<sup>527</sup> *Albanus Mwasia Mutua v. Republic* (2006) eKLR; *Gerald Macharia Githuku v. Republic* (2007) eKLR; available at [www.kenyalaw.org](http://www.kenyalaw.org); *Paul Mwangi Murungu v. Republic*, Criminal Appeal No. 35 of 2006 (unreported).

<sup>528</sup> *Albanus Mwasia Mutua v. Republic* (2006) eKLR, available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>529</sup> *Dominic Mutie Mwalimu v. Republic* (2008) eKLR, available at [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>530</sup> *Ibid.* at 5–6.

<sup>531</sup> *Ibid.* at 6.

By adopting such a sensible approach, the courts are able to balance the constitutional rights of accused persons with the practical resource and bureaucratic constraints that the police and prosecutorial services may face in their efforts to enforce the criminal law. Indeed, the police argue that the constitution's 24-hour and 14-day deadlines are impractical and may hinder the attainment of justice.<sup>532</sup>

Long delays in bringing cases to trial also lead to the violation of the presumption of innocence. This presumption is only guaranteed in theory and more often than not, once arrested, suspects are treated as if they were already convicted. First, the long periods of time served in prison facilities while still on remand defy the ethos of presumption of innocence. In effect, being acquitted after having served a year in remand is tantamount to serving a sentence before being convicted. Some accused persons have been remanded for over three years. Secondly, whilst the Prisons Act distinguishes between remand inmates and convicted inmates in terms of the work they do while in the facility, the amenities provided for remand inmates are no better than those provided for convicts. In fact, it is argued that the living conditions for convicts are better than for remand inmates in certain respects. Due to the high numbers of remand prisoners, their blocks are in most cases gravely overcrowded. Also, based on the argument that their stay is temporary, remand prisoners are not provided with clothes.

## Right to legal representation

A large number of accused persons cannot afford legal services. As such the lack of a national legal aid scheme has undermined the right to a fair trial for many accused persons over many years. Identifying this need, non-governmental organisations (NGOs) such as the Legal Resources Foundation and CLEAR-Kenya have provided legal assistance to a number of accused persons. Part G of this chapter details the contribution of such NGOs who have provided paralegals in prisons. Without legal aid, many innocent people have found themselves convicted.<sup>533</sup> A National Legal Aid and Awareness Scheme was launched in 2008 which will hopefully assist economically challenged accused persons.

## F. Appropriate remedies and sentencing

Section 24 of the Penal Code enumerates the sentences that can be meted out by Kenyan courts. These are: the death penalty; imprisonment; detention under the Detention Camps Act; fine; forfeiture; payment of compensation; finding security to keep the peace and be of good behaviour; any other punishment provided by the Penal Code or any other act. Courts mostly commit criminals to imprisonment, which is therefore the most common form of sentence executed by courts in Kenya. Other sentences include the death penalty and various non-custodial sentences.

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<sup>532</sup> Kenya Police Force (2007: 17).

<sup>533</sup> Legal Resources Foundation (2007: 49).

## Sentencing

Sentencing is largely discretionary. Save for the offences which attract a mandatory death penalty, the Kenya Penal Code is couched in terms of the maximum penalties for the offences created. Exceptions to this include section 89, which criminalises the possession of firearms and section 308, which criminalises the possession of dangerous or offensive weapons in preparation for the commission of a felony. In both these cases minimum sentences of seven years imprisonment and maximum sentences of 15 years imprisonment are provided. Unlike the Penal Code, the recent Sexual Offences Act of 2006 provided minimum custodial sentences for sexual offenders. This departure from the Penal Code provisions sought to deal with the lenient sentences that were being meted to sexual offenders.

The criminal law statutes in Kenya do not adequately cover sentencing guidelines. Section 35 of the Penal Code, which addresses conditional discharges, merely hints at sentencing principles and directs the judicial officer to take into account the circumstances of the offence and the character of the offender. Hence, where only the maximum penalties are provided, the judicial officers have wide discretionary powers on the appropriate sentences. Jurisdictions such as the United Kingdom have sought to guide the judicial officers by setting out sentencing principles in statutes and policy documents. For example, the UK Criminal Justice Act of 2003 provides guidelines on the matters to be taken into account by the judicial officer at the sentencing stage. These include the objectives of the sentence,<sup>534</sup> the seriousness of the offence<sup>535</sup> and the circumstances of the offender.<sup>536</sup> The UK Magistrates' Courts Sentencing Guidelines, though not binding, offer judicial officers with comprehensive guidelines in determining the most appropriate sentence.<sup>537</sup> Firstly, this document sets out general sentencing principles and then provides detailed considerations in respect to specific offences.

In the absence of a statute or policy document addressing sentencing considerations, courts in Kenya are guided by case law. The Kenyan jurisprudence echoes accepted sentencing principles. In *Fatuma Hassan Salo v. Republic*<sup>538</sup> Justice Makhandia asserted:

Sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors.

Justice Makhandia's reference to 'sound legal principle' points at generally accepted sentencing principles. The *Nilsson v. Republic*<sup>539</sup> case discusses the considerations to be made when sentencing. In addition to the circumstances of the offence, the judicial officer is expected to take into account the personal circumstances of the offender. These include the age of the offender and whether the accused is a first-time offender or a repeat offender. In the case of juveniles it is

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<sup>534</sup> See United Kingdom Criminal Justice Act 2003, section 142.

<sup>535</sup> *Ibid.*, section 43.

<sup>536</sup> *Ibid.*, section 156(2).

<sup>537</sup> Sentencing Guidelines Council (2009).

<sup>538</sup> (2006) eKLR.

<sup>539</sup> (1970) 1 EA 599.

accepted that the paramount objective is the rehabilitation of the offender.<sup>540</sup> The judicial officer is also required to consider the mitigating circumstances such as the offender pleading guilty.

Therefore, although sentencing is largely discretionary, judicial officers are expected to base their decisions on these legal principles. For this reason, they are also expected to indicate the basis of their decision. In some appeal cases, judges have pointed out that this assists the appeal court in assessing whether the sentence was excessive.<sup>541</sup>

The issue of when fines should be imposed as opposed to prison sentences was discussed in the case of *Fatuma Hassan Salo v. Republic*.<sup>542</sup> The court noted that judicial officers are required to give an explanation for meting out prison sentences where there is an option for a fine.

Although the general sentencing principles are well developed in case law in Kenya, there is a need to develop comprehensive sentencing guidelines either in statutory or policy documents. This is particularly so in the Kenyan context where maximum sentences are set out for most offences without providing minimum sentences.

## Non-custodial sentences

The range of orders that can be made by a court on the conviction of offenders are laid out in the Penal Code of 1985. Section 24 lists a range of punishments available on conviction and part (i) of the said provision stipulates that a court may mete out 'any other punishment provided by the penal code or any other Act'. Within the mandate section 24(i) of the Penal Code of 1985, the Probation of Offenders Act of 1981 provides that where an offender has been convicted of an offence triable by a subordinate court, the court may make a probation order in place of a custodial sentence. In addition, section 3 of the Community Service Orders Act of 1998 entitles the court to commit an offender convicted of an offence punishable with imprisonment for a term not exceeding three years, to perform community service.

As illustrated in Figure 1, over the years courts have been reluctant to mete out non-custodial sentences. Recently, however, there has been an increase in the number of non-custodial sentences. Figure 1 maps out the growth of the probation population.

However, as noted, there is more potential for non-custodial sentences and there is a need to check the over-utilisation of imprisonment. Nevertheless, in practical terms, recourse to non-custodial sentences without adjustments of the Probation Services Department will undermine the potential of these sentences in the long run. The Probation Services Department faces the challenge of inadequate human resources. In 2006, the Department had 269 employees to deal with 14 000 offenders under probation, 19 000 under community service order and 800 in need of care. As of June 2009, there were 451 probation officers to supervise 35 000 offenders given probation orders. The increased workload poses a challenge to the probation officers to effectively execute their duties; the overwhelming workload may demand that they concentrate on the basic minimum of probation practices.

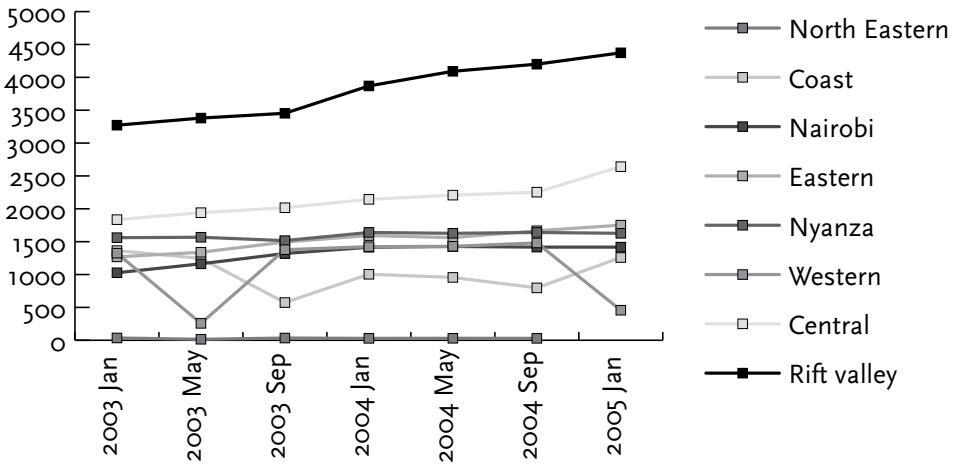
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<sup>540</sup> *Kaisa v. Republic* (1975) 1 EA 260.

<sup>541</sup> See *Fatuma Hassan Salo v. Republic* (2006) eKLR; *Leonida Asiko v. Republic* (2006) eKLR.

<sup>542</sup> (2006) eKLR.

Figure 1: Growth of probation in Kenya (2003–2005)



On the introduction of Community Service Orders in Kenya in 1999, the National Committee of the Community Services subsequently published practice guidelines for the stakeholders. In this document, community service is said to ‘represent a shift from more traditional methods of dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both the society and the victim’.<sup>543</sup> Moreover:

[t]he need to repair the harm done following the commission of an offence and the need for reparation to victims of crime remains an important goal of our criminal justice system. Such a restorative approach is in keeping with our traditional approach to crime and the sentence is likely to be very popular with the public if correctly implemented.<sup>544</sup>

Community service is thus considered to provide the offender with an opportunity to make reparations for his wrongdoing by engaging in work that benefits society. The practice guidelines make it clear that community service orders are particularly beneficial to first and youthful offenders.<sup>545</sup> These orders are restricted to offences punishable with imprisonment for a term not exceeding three years. In accordance with the restorative ethos, the court is required to involve the victim in the sentencing process. Hence, the court should take into account any suggestion made by the victim as to the institution in which the offender should be committed to serve the order.<sup>546</sup> The materialising of the objectives of community service orders is dependent on the community as volunteers in the scheme supervise the offenders. The heads of these volunteer institutions undertake the responsibility to supervise the offender and the Probation Services Department does the overall supervision of the institutions periodically.

<sup>543</sup> National Committee of the Community Services (1999: 3).

<sup>544</sup> *Ibid.* at 7.

<sup>545</sup> *Ibid.* at 3.

<sup>546</sup> *Ibid.* at 7.

In addition to the work done by the offenders, the volunteer supervisors are required to incorporate counselling of the offender, with the aim of rehabilitation. Towards this end, magistrates are required to convene supervisors' meetings to equip them with the necessary counselling skills. However, counselling is not done as a matter of course and is only given if it is deemed necessary. The practice guidelines make it clear that it is not mandatory for an institution to provide counselling but this is recommended where possible. If counselling is deemed necessary and the volunteer institution is not in a position to offer it, then the Probation Services Department should be asked to try to arrange counselling for the offender. This suggests that counselling is not mandatory and the test as to whether it is deemed necessary is subjective.

Whereas the community service orders are said to be in keeping with the 'traditional communities' approach to crime, from what has just been mentioned, conclusions to the contrary can be made. Being incorporated within the court process, the victim is passive all through the trial. The victim's role is limited to identifying the nature of the institution the offender should work in. The community service orders are only restorative to the extent that the offender engages in work that benefits the community the victim is part of. This is a far cry from the traditional model of justice in which parties with a stake in the matter are actively involved. Moreover, the traditional processes centralised 'restoration' in the true sense of the term. Through the whole process it was envisaged that the offender would be restored to a law-abiding member of the community. While it has been suggested that community service could have such effects, the actual practice suggests otherwise. It comes across as an emphasis on the work done, as opposed to the restoration of the offender to be law-abiding, hence, largely an alternative punishment to imprisonment. The practice guidelines, for example, indicate that 'the performance of community service cannot by itself serve to rehabilitate the offender. There is need for community service to be complimented with counselling.'<sup>547</sup>

In spite of this position, highlighting the inadequacy of community work in the absence of rehabilitative processes, in practice, emphasis is placed on the work done. As illustrated above, the provision of counselling services is fluid. On the other hand, supervisors are given detailed guidelines that relate to the offender's performance of the tasks. Far from being a reflection of traditional restorative practices, community service in Kenya can only be said to be restorative in terms of its symbolic reparation. In other words, the victim is a part of the larger community in which he or she lives and thus symbolically benefits from reparations to the community through public services.<sup>548</sup> Although the extent to which community service realises restorative objectives in practice is not well defined, its restorative potential cannot be overstated. However, similar to probation orders, the courts have over the years been reluctant to utilise community service orders in place of imprisonment. As noted, the prisons in Kenya reveal high numbers of inmates serving terms of three years and less hence there are many inmates eligible for probation and community service orders.

Courts have consequently been encouraged to utilise probation and community service orders mainly to ease congestion in prisons. The restorative objectives of these orders have

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<sup>547</sup> Practice Guidelines, *supra* note 209 at 13.

<sup>548</sup> McCold (2004: 159).



thus remained at the periphery within the structure of the criminal justice system. Even where there have been attempts to institutionalise restorative processes as in the case of community service, restorative objectives have remained secondary without proper supporting structures. In developing these non-custodial sentences, the objectives of rehabilitation, reintegration and restoration must not be lost in the quest to decongest prisons.

## Death penalty

Kenya has not abolished the death penalty. All capital offences are punishable by death under Kenyan law. These include murder,<sup>549</sup> robbery with violence,<sup>550</sup> attempted robbery with violence<sup>551</sup> and treason.<sup>552</sup> Although the death penalty exists *de jure*, it does not, however, exist *de facto*. The fact that the death penalty was last executed in 1987,<sup>553</sup> coupled with the fact that all death sentence victims since then have either been granted presidential pardon or are still behind bars, evidences the fact that the death penalty does not exist in practice. Perhaps this can be attributed to the prominence of human rights which upholds the right to life as a fundamental human right. Ironically, many Kenyans still oppose the abolition of the death penalty as illustrated by the deliberations of the National Constitutional Conference established by the Constitution of Kenya Review Commission Act of 2000. The conference delegates voted unanimously against a proposal to abolish the death penalty.

Meting out the death penalty raises pertinent human rights issues particularly in respect to robbery with violence or attempted robbery with violence. Firstly, apart from murder cases, the state does not provide legal representation for offenders charged with these offences. Without legal representation, injustices are likely to be occasioned on accused persons who may not fully appreciate the substantive and procedural law to be able to adequately defend themselves. A mandatory death sentence raises the stakes and justice would demand a level playing ground between the prosecutor and an accused person. But there is no such level playing ground in practice. A large number of accused persons cannot afford legal services and end up representing themselves.<sup>554</sup> Secondly, the Penal Code sets out robbery with violence in very broad terms. Sections 296(2) and 297(2) of the Penal Code provide that if the offender is in the presence of another person(s) or if the offender is in possession of an offensive weapon or instrument at the time of the robbery or attempted robbery, he or she attracts a mandatory death sentence. This broad definition brings many offenders within the ambit of robbery with violence or attempted robbery with violence, hence attracting the death penalty. This widening of the net coupled with the lack of mandatory legal aid raises pertinent human rights concerns that ought to be addressed.

It should be noted that the new constitution does not expressly outlaw the death penalty. Article 26(1) provides that every person has the right to life, while article 26(3) provides that a

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<sup>549</sup> Penal Code, sections 203 & 204.

<sup>550</sup> *Ibid.*, section 296(2).

<sup>551</sup> *Ibid.*, section 297(2).

<sup>552</sup> *Ibid.*, section 40(3).

<sup>553</sup> Kenya National Commission on Human Rights (2007: 3).

<sup>554</sup> Interview with Priscilla Kanyua, Programmes Officer, International Commission of Jurists – Kenya Chapter.

person shall not be deprived of life intentionally, except to the extent authorised by the constitution or other written law. The Penal Code constitutes one such law, although its provisions will need to be reconciled with article 25 of the constitution, which, among other things, provides that ‘freedom from torture and cruel, inhuman or degrading treatment or punishment’ is absolute. To the extent that the death penalty constitutes one such punishment, it would arguably be unconstitutional under the new constitution.

## G. Prisons

### Legislative framework and prison conditions

The Kenya Prisons Service is a department in the office of the vice president and Minister of Home Affairs. The prison service is established and governed by the Prisons Act<sup>555</sup> and the Borstal Institutions Act.<sup>556</sup> These statutes empower the Prisons Service to contain offenders in safe custody in order to rehabilitate, reform and facilitate administration of justice for community protection, stability and social reintegration. There are 89 penal institutions, two borstal institutions and one youth corrective training centre.<sup>557</sup> The administration, service and control of all prisons in Kenya is vested in the Commissioner of Prisons who is subject to the directions of the minister.<sup>558</sup> Imprisonment is the most common form of punishment in Kenya. By 2001 the then 87 prisons had an approximate population of between 35 000 and 40 000 per annum.<sup>559</sup> Forty per cent of these inmates were remandees. In mid 2009, the prisons in Kenya held 34 500 convicted offenders and 19 540 accused persons on remand.<sup>560</sup> The high number of inmates on remand has, to a large extent, been attributed to unwarranted delays in the trial process. According to officers interviewed at Lang’ata Women’s Prison, it is not uncommon to have trials running for more than two years. It is particularly unacceptable in the case of petty offences. For instance, Nancy Njeri<sup>561</sup> has been at Lang’ata Women’s Prison for two and a half years after being charged with housebreaking and stealing. She has attended 11 hearing sessions in court, which were always adjourned due to the complainant’s non-attendance. Moreover, the case was further delayed by the transfer of two magistrates who had been hearing the case to other stations. At her last hearing prior to the interview, the complainant attended court and sought to withdraw the case but the magistrate overruled the withdrawal in spite of the complainant’s previous conduct. These are not uncommon incidences and the length of the trials is in itself punitive. It is shocking that trials in certain cases have extended beyond four years. Table 13 below shows the remands population figures as of 31 March 2009.

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<sup>555</sup> Chapter 90, Laws of Kenya.

<sup>556</sup> Chapter 92, Laws of Kenya.

<sup>557</sup> Sourced from the Prisons Service website, [www.prisons.go.ke](http://www.prisons.go.ke).

<sup>558</sup> Prisons Act, section 5.

<sup>559</sup> Penal Reform International (2001: 14).

<sup>560</sup> Statistics obtained from the prisons headquarters.

<sup>561</sup> Pseudonym used.

Table 13: Remand population figures for the first quarter 2009

Provinces	0<6 Mts	6<12 Mts	1<2 Yrs	2<3 Yrs	3<4 Yrs	4<5 Yrs	5 Yrs and over	Total
Nairobi	2 585	602	267	33	50	71	12	3 620
Central	1 618	311	138	43	7	0	0	2 117
Eastern	993	373	487	253	123	33	19	2 281
Coast	1 650	183	125	59	42	28	32	2 119
Nyanza	1752	216	173	89	74	45	8	2 357
Western	1 387	66	96	94	70	39	50	1 802
North Eastern	85	2	3	0	0	0	0	90
Rift Valley	2 601	198	105	43	13	15	28	3 004
<b>Total</b>	<b>12 671</b>	<b>1 951</b>	<b>1 394</b>	<b>614</b>	<b>379</b>	<b>231</b>	<b>149</b>	<b>17 390</b>

The prison facilities in Kenya are gravely overstretched. For example, in mid-2006 the Nairobi Industrial Area Remand Home held 4 805 offenders when it only has a capacity of 1 000.<sup>562</sup> In mid 2009, the facility had a lower population of 3 115 offenders, but this still exceeded the ideal capacity of 1 000. Even prison facilities which are considered to be much better in terms of living conditions still exceed their capacity. Lang'ata Women's Prison, for example, held 353 convicted offenders with capacity for only 200 and 267 remand prisoners with a capacity for only 200.<sup>563</sup>

It is notable that the majority of convicted prisoners are petty offenders who could have been dealt with using alternative methods to imprisonment. Statistics as of 31 May 2009, for instance, reveal out of the 34 500 convicted offenders, 18 956 prisoners had been sentenced to less than three years imprisonment.<sup>564</sup> Using short sentences as an indicator of the nature of the offences and the circumstances of the offenders, these statistics suggest that a large number of the offenders should actually be considered for non-custodial sentences. To facilitate decongestion, it would, then be inevitable for the court to embrace non-custodial sentences like probation orders<sup>565</sup> and community service orders.<sup>566</sup>

This overcrowding, coupled with poor physical infrastructure, has highly compromised the human rights standards of both prisoners and prison warders. The prison is also a reservoir of diseases. This is made worse by the inability of prisoners to satisfy their conjugal rights hence necessitating unprotected man-to-man sexual intercourse with their fellow inmates. The situation is made worse by the lack of adequate medical care available to prisoners. There have also been allegations of inadequate security within the institutions to the extent that inmates have been making use of mobile phones to mastermind criminal activities carried out by other gang members at large.<sup>567</sup> The security in these prison facilities needs to be tightened and the government should consider investing in surveillance equipment towards this end.

<sup>562</sup> Statistics obtained from Nairobi Industrial Area Remand Home.

<sup>563</sup> Statistics obtained from Lang'ata Women's Prison.

<sup>564</sup> Statistics obtained from the prisons headquarters.

<sup>565</sup> Under the Probation of Offenders Act.

<sup>566</sup> Under the Community Service Orders Act.

<sup>567</sup> Prisoners Spread Terror from Jail, *Standard*, 17 June 2009.

Prison conditions continue to be harsh and life threatening, and the prisons, which have been described as death chambers,<sup>568</sup> are overcrowded and unhygienic. Prisoners sleep on dirty and damp cement floors. The communal cells are often poorly ventilated, badly lit and lack adequate washing facilities. Overflowing buckets in one corner of the cell usually serve as the only toilets. Acute water shortages in some prisons have exacerbated the unsanitary conditions. Infectious diseases such as diarrhoea, typhoid, tuberculosis and HIV/Aids spread easily, and are inadequately treated. Medical care for prisoners has not yet been adequately addressed. There are no separate facilities for minors in pre-trial detention. Civil society activists have witnessed young children, women and men sharing the same cells. In January 2006, a judiciary subcommittee report recommended that judges and magistrates visit prisons regularly to ensure that children were not confined with adult inmates.

Torture and ill treatment still remain an institutionalised practice in many prisons. The problem of excessive violence in prisons was highlighted in September 2000 when six death-row prisoners were killed at the maximum security King'ong'o Prison. The prisoners attempted to escape from prison, but their escape bid was foiled by the prison wardens who proceeded to torture and bludgeon them to death. The causes of death were first explained as suicide and falls from the high prison walls, but a post-mortem conducted revealed that the prisoners were tortured to death. Eight prison wardens were later charged in court with murder and found guilty. In November 2008 there was a similar incident at the Kamiti Maximum Security Prison where several inmates were injured and one died during a search for contraband items by the prison wardens.

## **Oversight of prison conditions**

In the last decade the prison department embarked on an open-door policy, which allowed access to the prison facilities. This enabled NGOs and individual researchers to highlight issues in prisons that needed to be addressed. Consequently, conditions for prisoners have generally improved but there is still need for further initiatives. One of the key benefits of the open-door policy is granting paralegals access to prisons to offer legal assistance to remand prisoners and convicted offenders who seek to appeal but cannot afford legal services. The contribution of these paralegals in checking injustices due to the lack of legal aid cannot be overstated. The Legal Resources Foundation (LRF), for example, has stationed trained paralegals in 21 prisons in different parts of the country. Apart from giving advice on individual cases, they hold legal clinics to educate the prisoners on criminal procedure and how to represent themselves in court. The LRF has also trained liaison prison officers to sensitise other officers on human rights standards and also to identify desperate cases which need attention.<sup>569</sup>

In addition, reforms which commenced in 2003 under the Governance Justice Law and Order Sector (GJLOS) Reform Programme have resulted in the establishment of health and HIV/Aids units in prisons, to improve the delivery of health services to inmates. Some facilities offer access to academic classes, enabling a number of prisoners to sit for national exams, or vocational training, such as carpentry or tailoring. Charitable associations organise occasional

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<sup>568</sup> Kenya Human Rights Commission (1996).

<sup>569</sup> Interview with Janet Munywoki, Officer in charge of the prisons programme, Legal Resources Foundation.

medical clinics for inmates. Prisoners now generally receive three meals per day, but portions still remain inadequate. Civil society organisations began visiting prisons in 2003, and these visits revealed harsh conditions as well as allegations by prisoners of inhumane treatment and torture. There are still institutional, financial and operational reforms needed as has been documented by a study on the prison reforms by the Kenya National Human Rights Commission.<sup>570</sup>

Another positive attribute concerns rehabilitation programmes. Various rehabilitation programmes are in place especially for prisoners serving long sentences. These include the prison industries and farms programmes. Prisoners are normally incorporated in industrial training and professional studies which are instrumental in assisting them become self-supporting upon their release. Such training programmes include carpentry, dressmaking, hand crafts, animal husbandry and computer programmes. The prison programmes also give opportunity to offenders to undergo formal education. For example, in Shimo la Tewa Borstal Institution, some juvenile male offenders attend Standard 7 and 8 classes and will then sit for the Kenya Certificate of Primary Education exam. In addition, the juveniles engaged in industry skills training obtain recognised qualifications. However, as a welfare officer at Lang'ata Women's Prison notes, offering skills on its own does not guarantee the rehabilitation of offenders. Thus, the prisons authorities facilitate counselling services and spiritual support. At the Lang'ata Women's Prison, for instance, the welfare office provides phone services which enable the prisoners to stay in touch with their families, hence making reintegration back to the community easier. Although the institutions are not in a position to adequately provide these services that are necessary for the rehabilitation of offenders, they have adopted an open policy which allows civil society and well wishers to contribute.

A key issue of concern has been the lack of aftercare services on the release of offenders, which is fundamental for the rehabilitation of offenders and to curb recidivism. Interviewed young offenders about to be released from Shimo la Tewa Borstal Institution expressed concern over the lack of resources to enable them to set up money-generating enterprises drawing from the skills they have learnt.<sup>571</sup> According to Okech, the Probation and Aftercare Services Department is in the process of coming up with an aftercare policy. Acknowledging that the title 'Probation and Aftercare Services Department' does not reflect the lack of an express legal mandate and structure for aftercare, he noted that the situation is far from ideal. However, in selected cases, probation officers are occasionally involved in trying to reintegrate offenders into the community. In some instances, some welfare officers take their own initiative in identifying organisations to offer support to released offenders. In Lang'ata Women's Prison, for example, they have set up a discharge board which provides a forum for organisations to assist offenders in resettling once released. Organisations such as NEST, Faraja and Father Grol Projects have been instrumental in this endeavour. In the absence of a government policy and resources allocated to aftercare, aftercare services are left to the personal initiatives of officers and organisations, and are hence not universal. It is therefore imperative to have a national policy and a well-structured framework to ensure uniform aftercare services.

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<sup>570</sup> Kenya National Commission on Human Rights (2004).

<sup>571</sup> Interviews with juvenile offenders at Shimo La Tewa Borstal Institution, July 2007.

Another issue worth exploring regards the policies relating to offenders sentenced to death. As noted, these offenders are not executed but are held in prison for life instead. Because the intention was to execute the offenders, the prisons regulations did not envisage holding capital offenders for extended periods of time. Capital offenders are not required to engage in the rehabilitation programmes or engage in any work apart from ensuring their cells are clean. As such, there is a potential danger of indiscipline as a result of idleness. In economic terms, failing to engage them in meaningful work means that the prison facilities use up resources to sustain them, yet the offenders do not contribute towards their sustenance in any way. To deal with idleness, the prison facilities have resorted to providing recreational activities such as sports and spiritual forums. There is a need, however, to review the prison regulations to reflect the reality. The underlying issue of retaining the death penalty yet not carrying out the executions must also be resolved.

It should also be noted that one of the key functions of the Kenya National Commission on Human Rights (KNCHR) is 'to visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon'.<sup>572</sup> In performing this function, the KNCHR has audited the status of prisons reform in Kenya and made recommendations on what should be done to enable the prisons in Kenya to fulfil their core obligations.<sup>573</sup> While the KNCHR has done a commendable job of publicising the conditions of prisons, an obvious limitation in its legislative mandate is that it can only make recommendations for reform.

## Governance of prisons

The effective running of institutions is dependent on the motivation of the personnel. Thus, prison officers must be motivated and satisfied for the implementation of the prisons reform initiative. Prisons officers are disheartened by what they claim to be sidelining of their welfare in the prisons reforms initiatives.<sup>574</sup> Key issues raised include inadequate and poor housing and low salaries.<sup>575</sup> These issues have caused hue and cry over the years but are yet to be fully addressed. For example, the failure to resolve these issues led to strike action by officers of the Kenya Prisons Service in April 2008. The strike was triggered by the failure of the government to give them a risk allowance, which other branches of the disciplined services were already enjoying.

Following the strike, the government set up a committee – the High Level Committee on the Prisons Crisis – to inquire into the conditions of the Prisons Department and make recommendations on how the department could be reformed. In its report, the High Level Committee notes that the Prisons Council, which was established by the Prisons Act to 'consider all questions affecting the welfare and efficiency of the Prisons' service',<sup>576</sup> has not been operating.<sup>577</sup> As a result, there was no avenue through which the grievances of the prisons

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<sup>572</sup> Kenya National Commission on Human Rights Act, section 16(1)(b).

<sup>573</sup> See Kenya National Commission on Human Rights, *supra* note 238.

<sup>574</sup> Kinyanjui (2008: 199).

<sup>575</sup> Interviews with Mutheu, Macharia and Njuguna, Prison Officers at Lang'ata Women's Prison, Nairobi Industrial Area Remand and Allocation Prison and Prison Headquarters. Pseudonyms used to protect the identity of the officers.

<sup>576</sup> Prisons Act, chapter 90, Laws of Kenya, section 20(1)(c).

<sup>577</sup> Republic of Kenya (2008B: 6).

officers could be addressed. The Committee also established that ‘governance systems have broken down’, and that ‘[t]here were complaints from officers, both junior and senior, of the lack of inspection by senior officers from both the provincial and headquarters levels.’<sup>578</sup> It is arguable that such poor governance has contributed to the deterioration in the conditions of prisons.

## H. Recommendations

As we have seen, a number of critical reform measures have already been initiated with the objective of enhancing the observation of the rule of law in the criminal justice system. Further, the new constitution provides firm anchorage for these reform measures. In addition to these measures, however, there is a need for:

- Civil society to participate in and monitor the implementation of the recommendations of reform bodies, including the making of the statutory laws needed to transform the criminal justice system;
- Government to carry out a comprehensive vetting of the staff of the Kenya Police Force and the Administration Police, as recommended by the National Task Force on Police Reforms;
- Government to streamline the sentencing process;
- Government to synchronise the activities and functions of key actors in the criminal justice system; and
- Government to recognise and give legal effect to customary or informal systems of criminal justice, to the extent that they are participatory, accountable, non-discriminatory and adhere to the new constitution and international human rights norms.

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<sup>578</sup> *Ibid.* at 8.

# 7

## Access to justice

Many Kenyans remain unaware of their basic rights. This lack of knowledge of rights remains a major hindrance to accessing justice, especially among poor, vulnerable and uneducated people. Court fees are very high for an ordinary citizen and hence most litigants shy away from going to court due to these costs. In addition, the courts are structured in a way that does not facilitate equal access to justice for all. Most of the courts are found in urban areas, as opposed to the rural areas where the majority of Kenyans reside. Thus, many people are compelled to travel long distances to access the courts. For many, legal services are also unaffordable. As a result, many Kenyans resolve their grievances and conflicts in alternative forums, including traditional or informal systems. However, the formal law does not recognise these non-state justice systems. Provision of legal aid is limited and does not cover all people who cannot afford legal services.

### A. Knowledge of rights

Access to justice is hinged on the knowledge of one's rights. By knowing which rights are protected, an individual can determine which route to follow in the pursuit of their protection or determination. A survey undertaken by the GJLOS Reform Programme indicated that most Kenyans were aware of their rights.<sup>579</sup> These basic rights were grouped into three, namely, civil and political rights, service rights and economic rights. The three categories appear to enjoy nearly equal balance.<sup>580</sup> The survey found that Kenyans, whatever their background, had little difficulty in identifying the rights that they considered important to them.

However, it is argued by some institutions that a lack of knowledge of rights remains a major hindrance to access to justice especially among poor, vulnerable and uneducated people.

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<sup>579</sup> Governance, Justice, Law and Order Sector Reform Programme (2006).

<sup>580</sup> *Ibid.*



Most people are unaware of some of the rights provided to them under the constitution and other legislature. This is especially apparent with the advent of the so-called third generation rights. There is a lack of sufficient educational programmes to keep the public constantly aware of their rights. The International Federation of Women Lawyers (FIDA Kenya) and others have undertaken to educate the general public on their rights through holding public forums, press conferences and rights forums. Public education continues and is perceived as important in continuously defending the rights and freedoms enjoyed by the citizens. Most notably, the constitution review process's entrenchment of civil education as part of the review has availed opportunities for providing legal education. There is, however, a need to streamline this process and regulate the providers to ensure that basic standards are met. It is widely acknowledged that while paralegals have played a vital role in educating Kenyans on their rights and therefore facilitating access to justice, there is no uniform curriculum or broadly accepted standards that are followed in the delivery of this education. The Paralegal Support Network developed a Handbook for Paralegals to bridge this gap.<sup>581</sup>

The new constitution provides for access to justice in the following words: "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."<sup>582</sup>

## **B. Physical access**

The court structure as it is does not afford equal access to justice for all. In chapter 4, we pointed out that most of the courts are found in major towns and at times far from rural areas. These courts are also found far from refugee camps, as most of these camps are not found close to provincial or district headquarters where most of the courts are. People have to travel far distances to access the courts. District magistrates' courts are only located in the district headquarters. Some districts are very large so not all people are able to access these courts. The 2010 Report of the Task Force on Judicial Reforms noted that in Northern Kenya courts are situated as far as 500km away from the users and that in such marginal areas, there is a dearth of legal service providers.<sup>583</sup> The Task Force proposed the establishment of court stations and mobile courts in marginalised areas and regions that have no geographical access to courts.<sup>584</sup>

For those who manage to access the courts, many still have problems locating courts and most of the time it is the court security staff that provide assistance to those unable to locate their courts. There are no professional mechanisms put in place within the various court stations to provide directions and simplify the process of locating courts for members of public.<sup>585</sup>

There is currently a shortage of court complexes in Kenya. According to research done by the Kenya AIDS NGO Consortium in 2004,<sup>586</sup> most of Kenya's districts only had one

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<sup>581</sup> Paralegal Support Network (2005).

<sup>582</sup> Constitution of Kenya, section 48.

<sup>583</sup> Republic of Kenya (2010: 86).

<sup>584</sup> *Ibid.* These included Munjila, Masalani, Bute, Laisamis, Marimanti, Kyuso, Wote, Engineer, Chaka, Lokitaung, Lokichar, Wamba, Kesses, Kapsowar, Kabiyeet, Chemolingot, Eldama Ravine, Rumuruti, Lokitaung, Lumakanda, Kapsokwony, Budalangi, Amagoro, Kosele and Mbita.

<sup>585</sup> ICJ-Kenya (2001).

<sup>586</sup> Kalla & Cohen (2007).

magistrate<sup>587</sup> in the entire district and the North Eastern Province did not have a visiting judge.

The court infrastructure does not accommodate persons with physical disabilities and women with children. Wheelchair ramps only serve the ground floor in most court structures with no elevators to the upper floors. The amenities provided do not cater for the special needs of the disabled. The 2010 Report of the Task Force on Judicial Reforms proposed that:

- Physical facilities of courts be made more accessible to persons with physical disabilities and other vulnerable groups;
- Courts administer substantive justice without undue regard to procedural technicalities;
- Rules of procedure of Kadhis courts be developed and enacted to standardise the procedures and practices of the courts; and
- Court rules and procedures be reviewed regularly to ensure that they are efficient and simple.<sup>588</sup>

### **c. Financial access**

Court fees in Kenya are very high for an ordinary citizen and hence most litigants shy away from going to court due to these costs. The costs are very high in a country like Kenya, where over 60% of the people live in poverty. Most Kenyans cannot afford lawyers as the legal fees are usually too high for the common person.<sup>589</sup> Legal fees are high compared to the median income and many Kenyans opt for extra-judicial settlements. The majority of people consider court fees to be prohibitive. A survey carried out to determine whether the court fees prevent people from accessing justice showed that a majority of those who had paid court fees found them to be prohibitive.<sup>590</sup>

The Court of Appeal is not expensive to access in terms of court fees and litigation costs, excluding lawyer fees, as compared to the High Court. The perception of people is that the cost in the Court of Appeal is very high and many do not therefore appeal their cases. This perception has therefore made the Court of Appeal inaccessible. This perception is based on excessive formality and adversarial proceeding. It is hoped that the revision of the Court of Appeal and the Civil Procedure Rules in December 2010 will push the overriding objective of courts to the fore and make them more accessible to litigants. After the report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (2003), there was a subsequent purge in the judiciary of judges alleged to be corrupt. Since then, instances of illegal payments and bribes has largely reduced. Public confidence in the judiciary has improved albeit marginally. However, the reports on the country's Bribery Index by Transparency International show that the judiciary remains very high on the list. Transparency International, for instance, ranks Kenya at 147/180 in its Global Corruption Perceptions Index.<sup>591</sup> In its special assessment of 2007, it reported that there are serious and ongoing problems, and that steps taken to dismiss and replace allegedly

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<sup>587</sup> Ibid. at 42.

<sup>588</sup> Republic of Kenya (2010: 87–88).

<sup>589</sup> To open a file with an advocate can cost about US\$ 60 and once filing fees and all professional fees are loaded up, a simple matter can cost up to US\$ 300 which most Kenyans cannot afford.

<sup>590</sup> ICJ-Kenya, *supra* note 7; see also Governance, Justice, Law and Order Sector Reform Programme, *supra* note 1.

<sup>591</sup> [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2008](http://www.transparency.org/policy_research/surveys_indices/cpi/2008).

corrupt judges did not meet best practice standards because of a lack of due process and erosion of judicial independence.<sup>592</sup> The Bertelsmann Transformation Index (BTI) which measures the status of political and economic transformation comprising a range of criteria including the rule of law, ranks Kenya at 61/123.<sup>593</sup>

The Advocates Act<sup>594</sup> through the Advocates Remuneration Order (2009) sets out the sums that an advocate may charge a client for services delivered. The Act prohibits advocates from charging amounts below those stipulated. This is in an effort to prevent undercutting. However, it is also prejudicial to the clients, who do not have much variety when it comes to picking the cheapest advocate. Thus, if they cannot afford the amounts set therein, they have to do without representation. Currently, the government provides minimum legal aid, which does not cover all people who cannot afford legal services. The state only provides legal aid for persons charged with murder in the High Court and conditional legal aid for a child offender having no other recourse to legal assistance.<sup>595</sup> The Civil Procedure Act also makes provision for pauper briefs where people who do not have sufficient means may apply to the court to be allowed to sue as paupers.<sup>596</sup> Such applications are dependent on the availability of lawyers to take up the brief.

Most free legal aid and associated clinics are consequently provided by non-governmental organisations<sup>597</sup> to disadvantaged groups of people especially children, women and the poor. For example, the Federation of Women Lawyers (FIDA Kenya) offers legal assistance to women who earn less than KES 5 000 per month and who have also undergone physical and emotional trauma. Some advocates do offer legal advice pro bono, but these instances are few and far between. Free legal advice from NGO participants is restricted by the fact that they do not have a countrywide presence. Some NGOs and the KNCHR offer free legal aid clinics but the assistance does not extend much further than providing legal opinions. FIDA, due to the overwhelming number of people needing legal aid, started, with the assistance of the World Bank, a programme for facilitating litigants in self-representation. They coach them and monitor their performance, constantly providing feedback.

There have been a great number of suggestions on how to improve access to justice through several reports on the judiciary. Among these include the establishment of small claims courts as one solution. Another suggestion is the creation of a government funded legal office to represent people who cannot afford legal fees. Another way is through the strengthening of arbitration systems as well as the recognition and incorporation of traditional and some non-state justice systems. In November 2007, the government appointed the National Legal Aid (and Awareness) Steering Committee to oversee, coordinate, monitor and provide policy direction to the National Legal Aid (and Awareness) Programme. The 2010 Report of the Task Force on Judicial Reforms proposes that a policy and legislative framework establishing a national legal aid system be adopted and implemented and that public interest litigation guidelines be adopted

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<sup>592</sup> Transparency International (2007).

<sup>593</sup> [http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-oA000FoA-D2A7CCFB/bst\\_engl/hs.xsl/307.htm](http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-oA000FoA-D2A7CCFB/bst_engl/hs.xsl/307.htm).

<sup>594</sup> Advocates Act, chapter 16, Laws of Kenya.

<sup>595</sup> Children's Act 2001, section 186(b).

<sup>596</sup> Civil Procedure Rules, order XXXII.

<sup>597</sup> Republic of Kenya (2010: 89).

and implemented to facilitate access to justice on issues of public interest.<sup>598</sup>

There are many paralegals in Kenya who provide an important source of legal assistance due to the absence of a sufficient cadre of lawyers. Kenya is home to several paralegal networks which have received some legal training and work for free in many communities. The paralegals in Kenya spread awareness of human rights and make referrals to appropriate services. In a few cases, paralegals serve as monitors for legal aid organisations, sending them information collected from the grassroots level and submitting monthly reports. However, there are not nearly enough paralegals in the country to take these important services to all those who need them.

Kalla and Cohen quote a review carried out for the United Kingdom Department for International Development (DFID) that approximately 1 000 paralegals had been trained in Kenya as of 2005.<sup>599</sup> They continue to point out that approximately 20 paralegal projects were operating nationwide, supported by various donors and NGOs of which 15 were located within a 250km radius of Nairobi. There are virtually no programmes in Kenya that provide salaries to paralegals beyond a small 'motivational token' or that support them after their training for costs such as transportation.<sup>600</sup> Data elicited from respondents in the Steadman Survey indicated that there are Kenyans who have limited access to justice. Indeed, an overwhelming majority (87%) said that there are Kenyans that have limited access to justice while only 17% responded to the contrary. This would imply that most Kenyans do not access justice in its broadest sense.

*Table 14: Distribution of respondents by whether there are Kenyans with limited access to justice*

<b>Are there Kenyans who have limited access justice?</b>	<b>No. of respondents</b>	<b>Percentage (%)</b>
Yes	1 665	83
No	342	17
<b>Total</b>	<b>2 007</b>	<b>100</b>

On factors that hinder peoples' access to justice in Kenya, poverty ranked first with a 59% score followed by poor knowledge and awareness among the population. Gender inequality and inequity was cited as a factor by 7% of the respondents while corruption and other factors scored 5% and 4% respectively. However, every other factor cited, when scrutinised critically, tied in well with poverty.

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<sup>598</sup> Ibid.

<sup>599</sup> Kalla & Cohen, *supra* note 8 at 29.

<sup>600</sup> Ibid.

Table 15: Distribution of respondents by factors that hinder access to justice

Suggestions on what limits Kenyans' access to justice	No. of respondents	Percentage (%)
Poverty	987	59
Gender	110	7
Religion	32	2
Lack of knowledge of their rights	707	42
Corruption	82	5
Others (incl. poor governance, tribalism, nepotism, illiteracy, discrimination, cumbersome process, courts are far, fear, culture, etc.)	57	4
<b>Total</b>	<b>1 975</b>	<b>100</b>

## Efforts to reduce cost of access to justice

Kenya does not have small claims courts in place. All legal disputes, regardless of their magnitude, are determined through the same court system. This has led to a backlog of cases in courts and has also prevented determination of cases whose subject matter value is less compared to the court expenses. The establishment of small claims courts is necessary to enable the majority of the Kenyan population access to justice. Presently, even the magistrates' courts, the lowest in the judicial hierarchy, are not accessible to the greater part of the population. Lodging claims in these courts is still too expensive and complicated for rural Kenyan people.

Efforts have been made to establish small claims courts. As pointed out above the 2010 Report of the Task Force on Judicial Reforms proposes the establishment of a small claims court.<sup>601</sup> The Small Claims Court Bill 2010 incorporates the provisions of a similar bill published in 2007 by the Law Reform Commission but which was not debated by Parliament.

The new constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted<sup>602</sup> subject to their conforming with the Bill of Rights, and their not being repugnant to justice and morality or resulting in outcomes that are repugnant to justice or morality. They must also be consistent with the constitution and other written laws.<sup>603</sup> Additionally, section 67 requires the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.

## Provision of legal aid

There are many non-governmental organisations that offer legal aid as well as assist marginalised groups of people in gaining access to justice such as women and children. These organisations have played a great role in enabling people to know their rights and take legal action against those who have violated their rights.

<sup>601</sup> Republic of Kenya (2010: 192).

<sup>602</sup> Constitution of Kenya 2010, section 159(2)(c).

<sup>603</sup> *Ibid.*, section 159(3).

## *FIDA*

The Federation of Women Lawyers Kenya (FIDA Kenya)<sup>604</sup> is a non-profit, non-partisan and non-governmental membership organisation, committed to the creation of a society that is free of all forms of discrimination against women through the provision of legal aid, women's rights monitoring, advocacy, education and referral.

FIDA Kenya has assisted women in gaining access to justice through various initiatives such as training women to enable them to access justice through self-representation in court. They take up and pursue the following types of cases: succession and inheritance; family law cases including separation, divorce, custody of children, maintenance and division of matrimonial property; employment cases where there is discrimination on the basis of sex; land cases where there is discrimination on the basis of sex; cases involving gender-based violence such as rape, defilement, incest and assault; as well as public interest cases. They have established a pro bono lawyers scheme country-wide and are engaged in legal awareness activities and the resolution of disputes without resorting to the formal justice system.

## *OSCAR Foundation*

The Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK) was set up in 1998 and formally registered in 2002 as a non-governmental organisation. It was formed on the realisation that law, policy and judicial action that upheld the human rights framework had a central role to play in effectively dealing with the spread of the HIV epidemic. OFFLACK has been dealing with HIV/Aids and the law since 2001, when it published its training manual called HIV/Aids and Legal Implications in Kenya.

This Foundation continues to do much of their litigation on HIV in an ad hoc manner, as and when the need arises. In the 1990s, when Kenya saw the need to deal with HIV/Aids urgently and effectively, OFFLACK felt that a planned legal intervention was necessary to support People Living With HIV and Aids (PLWHA). It also felt the need to sensitise decision-makers, and those affected, on the law and its link with the public health crisis that HIV/Aids created.

The Foundation has a network of 150 pro bono lawyers working in their commercial offices country-wide and heading OFFLACK and the Local Project Advisory Group (LPAG). OFFLACK's mobile full-time legal aid clinic has three main spheres of activity: providing free legal services to persons living with or affected by HIV/Aids and the poor as provided in the Civil Procedure Act; advocacy; and policy research on human rights and the law in order to make justice accessible to the poor and those in custody.

## *CRADLE*<sup>605</sup>

The CRADLE (The Children's Foundation) is a non-profit and non-governmental organisation committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. This organisation was founded primarily by a group of Christian lawyers to respond to the need for the provision of juvenile justice, following a research and baseline survey in 1997 on the provision of justice to children in Kenya. The

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<sup>604</sup> <http://www.fidakenya.org>.

<sup>605</sup> <http://www.thecradle.or.ke>.

research showed the absence of institutional mechanisms to respond to this issue. CRADLE was born to respond to this need. It exists to protect and promote the rights of the child, especially girls.

This organisation has been involved in various activities to enhance children's access to justice. Some of these activities include: initiation of a pro bono legal aid scheme; undertaking of policy and legislative advocacy on the Children's Act, the Criminal Law Amendment Bill and the constitution; impact cases on children born out of wedlock; their participation as observers and delegates in the constitutional review process, including printing of 'absent voices' and having an information tent at the Bomas conference; and mainstreaming child rights into government programmes.

### *The International Commission of Jurists (ICJ) in Kenya* <sup>606</sup>

ICJ-Kenya has been in formal existence since 1974 when it was registered as an autonomous society of jurists. Its legal history predates Kenya's independence. It was started in 1959 as a small colonial extension of justice, the British Section of the ICJ. ICJ-Kenya is an autonomous, non-partisan, non-profit, non-governmental organisation. ICJ-Kenya enjoys observer status with the African Commission for Human and Peoples' Rights and is the only African national section of the ICJ. Today, over 300 members comprise the organisation, which is dedicated to the legal protection of human rights in Kenya and the African region in terms of the general mandate for national sections defined by article 4 of the ICJ Statute. ICJ-Kenya is governed under a constitution through an elected council of seven members that serves for two year fixed terms.

Members, through a permanent secretariat, fulfil the human rights work of this organisation, where a professional team of full-time lawyers is in charge of programme activities under the oversight functions of the elected council.

The organisation's objectives include:

- Enhancing the use of legal expertise through programmes or projects in order to effectively demand and monitor legal reform;
- Devising programmes that build capacity of key governance institutions through training and legal services in order to improve access to justice;
- Ensuring analytical legal and constitutional information is available for the media and other users; and
- Strengthening linkages between ICJ-Kenya and the ICJ family, and other identified national, regional and international stakeholders and partners.

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<sup>606</sup> [www.icj-kenya.org](http://www.icj-kenya.org).

### *Kituo Cha Sheria (legal advice centre)*<sup>607</sup>

Kituo Cha Sheria is a national membership human rights non-governmental organisation. It was founded in 1973 as Kituo Cha Mashauri by advocates committed to helping disadvantaged and poor people who could not afford the cost of legal services. It was the first legal aid centre established in Kenya. In 1989, the name was changed to Kituo Cha Sheria and a secretariat was established with full-time staff. Kituo Cha Sheria is largely donor-dependent. The organisation gets support from donors as well as lawyers who volunteer their services. The services are provided to the indigent through various mechanisms, which include the provision of advice, legal representation, litigation and community mobilisation and organisation.

This organisation has offices in Nairobi and Mombasa. It has also established a network of volunteer advocates in major towns to cover the whole country as well as embarked on programmes aimed at empowering individuals and communities for self-governance and the protection of their rights and obligations.

Kituo Cha Sheria's thematic focus is on legal aid, land and housing rights and labour rights. The organisation is also attending increasingly to refugee clients, not as a refugee agency but on an individual, case-by-case basis. With such cases, it dialogues and liaises with the main refugee agency – the UNHCR – to seek the implementation of appropriate measures in the best interests of refugees.

## **D. Right to appear: Jurisdictional restrictions**

### **Public interest litigation**

The laws of Kenya allow people to appear in person without any legal representation. Chapter 77(2)(d) of the constitution states that: 'Every person who is charged with a criminal offence– [shall be] permitted to defend himself before the court in person or by a legal representative of his own choice'. In civil cases people can also either represent themselves or seek a legal representative.

Public interest litigation is not very widespread in Kenya. The issue of *locus standi* has been used by courts in Kenya to defeat a number of initiatives aimed at securing the public interest through the application of a very rigid and doctrinal form of *locus standi*. A litigant previously had to demonstrate to the court that he or she had a personal stake that was distinct from injuries to the public at large. This has been well-illustrated in environmental cases. For instance, Kenyan courts were unable to establish a clear jurisprudence on matters of *locus standi* before the promulgation of the EMCA in 1999. In the public interest case of *Wangari Maathai v. Kenya Times Media Trust* (an environmental case brought before the court as a public interest matter), lack of *locus standi* was used to bar the action.<sup>608</sup> The plaintiff was a resident of Nairobi and the coordinator of the Greenbelt Movement, a non-governmental organisation working in environmental conservation. She filed suit on her own behalf seeking a temporary injunction to restrain the defendant from constructing a proposed complex in a recreational park in Nairobi. The court upheld the defendant's objection that the plaintiff lacked standing to bring the suit, because the plaintiff would not be affected more than any other resident of Nairobi. The court pointed out:

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<sup>607</sup> <http://www.kituoachasheria.or.ke>.

<sup>608</sup> High Court of Kenya, Civ. Case No. 5403 (1989).



... it is not alleged that the Defendant Company is in breach of any rights, public or private in relation to the plaintiff nor has the company caused damage to her nor does she anticipate any damage or injury.<sup>609</sup>

The Environment Management and Coordination Act of 1999 has resolved this issue by conferring *locus standi* on individuals to enforce environmental rights. It provides that '[e]very person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.'<sup>610</sup>

This position has also found anchorage in the new constitution at section 70 where it is provided that:

If a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

The civil procedure rules allow for representative suits, but these are limited to those parties who have the same interest in one suit. The nature of public interest litigation is such that it is hard to be specific about the class of persons on whose behalf the action is brought and this has hampered the use of this rule to facilitate litigation. The rule allows for 'relator' actions to be brought in cases of public nuisance, but this is restricted by the requirement that authority must be given by the Attorney General. This is very bureaucratic and thus prone to delays. The Office of the Attorney General is also a political office as well as an executive one and has proved in the past to be singularly incapable of taking action on sensitive issues that involve a conflict of interest. The repealed constitution did not provide a basis for public-interest litigation. This can be seen through the failure to offer constitutional protection to such rights as the guarantee to a healthy and wholesome environment. These issues have been addressed by the new constitution. Another barrier to public interest litigation is cost. The costs of litigation are very prohibitive and there is always a danger of having to pay damages to the other party in the event of losing a case.

It is within this context that the Public Law Institute (PLI) was created by the National Council of Churches of Kenya and the Law Society of Kenya in 1981. Its scope also extended to consumer and environmental protection as well as legal representation and services to the poor and disadvantaged. Together with the Kenya Consumer Organisation, the PLI successfully sued the Kenya Power and Lighting Company for the reversal and refund of power supply tariff increases.<sup>611</sup> On the environmental front, the PLI was the lawyer in the *Wangari Maathai v. Kenya Times Media Trust* case, and even though unsuccessful, exerted pressure on the government and the backers of the project that led to its abandonment.<sup>612</sup> There is a need for more public-spirited lawyers to assist members of the public to access justice.

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<sup>609</sup> Ibid. at 24.

<sup>610</sup> Environment Management and Coordination Act, section 3(1).

<sup>611</sup> <http://www1.umn.edu/humanrts/africa/kenya.htm>, accessed on 16 July 2010.

<sup>612</sup> High Court of Kenya, Civ. Case No. 5403 (1989).

## Jurisdiction of courts

The earlier discussion on the jurisdiction of different courts illustrates that there are some cases that can only be brought to particular courts.<sup>613</sup> This depends on the pecuniary and physical jurisdiction of a court with regards to the subject matter. People are restricted to certain courts depending on the value of the subject matter. The Chief Justice can direct where some matters may be heard. For instance, a directive was issued in 2007 that judicial review matters could only be heard in Nairobi.<sup>614</sup> This affects access to justice in the sense that the costs incurred in the issue of bringing the matter to the jurisdiction of the courts are enormous. Consider the case of judicial review of a matter that was heard in Kisumu. The travel and accommodation expenses to and from Nairobi until the matter is finished can be astronomical. Such is the case where a matter of high pecuniary interest arises in the countryside, and then the parties and their witnesses have to bear the high travel costs to the nearest High Court. There was a huge outcry from the Bar<sup>615</sup> and the directive was withdrawn.

### *Peter Nganga Muiruri v. Credit Bank Ltd & 2 others* [2008] eKLR

Court of Appeal at Nairobi, (RSC Omolo, SEO Bosire & JW Onyango-Otieno JJA)

February 8, 2008

The parties to this appeal had been in the Court of Appeal on two previous appeals. The first appeal, in which the first respondent in this appeal was the appellant, arose from a dispute about a mortgage debt and it concerned the interpretation of certain terms contained in a consent agreement recorded by the parties. That appeal was dismissed by a differently constituted bench of the Court of Appeal.

The second appeal was filed by the appellant in the present appeal against the respondent bank and its advocate (the first and second respondents to this appeal). The dispute concerned certain monies deposited into a joint bank account and a professional undertaking which the High Court had declined to enforce. A differently constituted bench of the Court of Appeal allowed the appeal and ordered the bank's advocate to deposit the monies in a bank account held jointly with the appellant's advocate.

Subsequently, the appellant moved to the High Court for an order to have the money held in the account released to him. After this application was dismissed by the High Court, the appellant filed an originating summons for several orders, including a declaration of whether his fundamental rights had been violated by a failure of the Court of Appeal to conclusively

<sup>613</sup> See Criminal Procedure Act, chapter 75, Laws of Kenya; Civil Procedure Act, chapter 21, Laws of Kenya.

<sup>614</sup> Kenya Gazette (Issue No. 218) Notice on February 19, 2007.

<sup>615</sup> See e.g. Standard (2007).

determine the second appeal referred to hereinabove. The appellant felt that the Court of Appeal had failed to determine with finality the issues of the amount of the deposit and ownership of the money.

The originating summons was listed before the Chief Justice for him to decide on its direction. However, the Chief Justice dismissed it in so far as it related to being a constitutional matter when he allowed a preliminary objection raised by the respondents on the grounds that the matters raised by the applicant were not issues that merited going to the constitutional court.

Following that ruling, the applicant took out a motion on notice in the suit seeking a declaration of whether his fundamental rights had been violated by the decision of the Chief Justice 'denying the applicant access to the Constitutional Court and denying him a hearing' and whether the decision and all its consequential orders and processes were null and void. On this basis, the applicant asked for orders of prohibition to stop the execution of the Chief Justice's orders, *mandamus* directed at him to constitute a court to enforce the applicant's rights and an order of stay of the process of taxation and execution of costs against him.

The application came before J Nyamu. In his ruling, he found that the matter was *res judicata* as the issue raised before him had been canvassed and ruled upon before the Chief Justice sitting in his capacity as a judge of the High Court. While acknowledging that the High Court had jurisdiction under section 84 of the Constitution to hear a challenge directed at an order or ruling made by a judge, he observed that the jurisdiction did not necessarily extend to considering or reviewing the merits of the judge's ruling but to whether the process or procedure adopted in obtaining the ruling was proper. However, the judge noted that in certain circumstances that jurisdiction might be wider.

J Nyamu declined jurisdiction to grant the orders the applicant had sought in his application thus provoking his third appeal in which the appellant raised four main issues:

1. That the originating summons had been improperly referred to the Chief Justice on the basis of an administrative practice which had no sanction in law;
2. That the High Court erred in holding that the Chief Justice had jurisdiction to entertain the originating summons when he (the Chief Justice) was not a member of the Constitutional Court;
3. That the High Court had failed to appreciate that the originating summons was mentioned before the Chief Justice who had improperly proceeded to make final orders upon it and shut out the appellant from the Constitutional Court; and
4. That the High Court had erred in holding that because the appellant did not raise an objection to the reference of his originating summons to the Chief Justice, he had acquiesced to the procedure.

Held:

1. There is no provision in the Constitution which establishes what the High Court has referred to as the Constitutional Court. In Kenya there is a division of the High Court at Nairobi referred to as 'Constitutional and Judicial Review' Division. It is not an independent court but merely a division of the High Court.

2. Section 67 of the Constitution which gives the power to the High Court to deal with questions of interpretation of sections of the Constitution and section 84 which related to the protection of fundamental rights, did not talk about a constitutional court. Instead, the sections talked about the High Court.
3. The creation of the Constitutional and Judicial Review Division of the High Court was an administrative act with the sole object of managing the cause list. The Chief Justice has no jurisdiction to create a constitutional court with supervisory jurisdiction over all courts as opposed to creating a division of the High Court.
4. Any single judge of the High Court has the jurisdiction and power to handle a constitutional question. The establishment of a constitutional division did not create a court superior to a single judge of the High Court sitting alone.
5. Courts must exercise the jurisdiction and powers vested in them. The High Court has no jurisdiction whatsoever to review the decisions of the Court of Appeal. A decision which emanates from a court regarding itself as a constitutional court with powers of review over decisions of judges of concurrent or superior jurisdiction is at best a nullity.
6. Having held that he lacked the jurisdiction to hear it, it was not open to the learned judge to at the same time consider whether he had the jurisdiction generally to entertain a constitutional challenge of a decision emanating from the Court of Appeal. The issue was extraneous to the matter before him.
7. No part of a decision of any court can be severable on appeal so as to distinguish between the merits of a decision and procedural violations and be dealt with separately, except where by reason of rule 74 of the Court of Appeal Rules, the party appealing has singled out the part of the decision he is aggrieved of, upon which he seeks a decision. Procedural aspects in the administration of justice are an integral part of those decisions and are not severable.
8. The appellant, by filing the originating summons which was referred to the Chief Justice, and also the motion before J Nyamu was challenging the doctrine of finality – that there has to be an end to the litigation. There was neither constitutional nor statutory authority to support his approach. Therefore, neither the Chief Justice nor J Nyamu had the jurisdiction to entertain the appellant’s application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no constitutional or statutory right of appeal or review was available.

Appeal dismissed with costs to the respondent.

Dicta per RSC Omolo, SEO Bosire & JW Onyango-Otieno JJ.A:

‘Appeals from the High Court lie to this Court. If this Court’s decisions will be subject to a review by the so called “Constitutional Court”, an appeal from that court will lie to this Court for a second time, and if any of the parties feels any of his fundamental rights has been violated by this Court he will have recourse to the “Constitutional Court” whose decision thereon will be appealable to this Court. There will be no end to litigation.’

**SOURCE:**

[http://www.kenyalaw.org/Articles/show\\_latest.php?cat=20](http://www.kenyalaw.org/Articles/show_latest.php?cat=20) .

## E. Reasonable delay

Civil cases in Kenya take different durations of time to be complete depending on the parties to the dispute. There are various stages that are supposed to be followed before a party decides to institute a suit. If the parties agree on the period within which they can solve the dispute, none of the parties will decide to go to court. If a party decides to go to court, they file a complaint which is served on the other party. Delays in civil trials are caused mainly by adjournments by any party either by mutual consent or if one of the parties is not in a position to continue with the case at a given time. Delays are also caused by the large number of cases which have not been adjudicated, transfer of magistrates or judges or even the misplacement of files. Some cases take more than a year before they can commence.

A party who has been aggrieved by a decision of a subordinate court is allowed to appeal to the High Court. The Civil Procedure Act lays down the rules and the procedure that is supposed to be followed when instituting an appeal. Once the appellant has filed an appeal he is supposed to serve it on the other party. Concerning the time that the appellant is allowed before he can appeal, section 79G of the Civil Procedure Act (chapter 21 of the Laws of Kenya) states that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

According to research carried out in 2004 by the Kenya AIDS NGO Consortium, the average civil matter takes between two and six years.<sup>616</sup> The Ethics and Governance Sub-Committee<sup>617</sup> found that there were delays in the finalisation of matters brought before the courts attributable to the failure of witnesses to attend court and unnecessary adjournments.<sup>618</sup> Delays occasion great injustice to people whose legal rights remain unadjudicated because of the adjournments of cases. The delays also serve as impediments to access to justice with most people unwilling to undertake the enormous expense of instituting a claim. They thus seek alternative remedies such as mediation by traditional elders despite their potential for bias.

## F. Mechanisms to assert rights outside the court system

Outside the court system, Kenya has a quasi-judicial system of asserting rights. This takes the form of administrative tribunals established subject to the provisions of the enabling legislation. They are established to ensure that certain types of civil disputes are given specialised judicial attention, either due to their complexity, urgency, large number of cases or other unique attribute.<sup>619</sup> Tribunals operate with fewer adherences to rules of procedure and are perceived

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<sup>616</sup> Kalla & Cohen, *supra* note 8 at 29.

<sup>617</sup> See Republic of Kenya (2005B).

<sup>618</sup> *Ibid.*

<sup>619</sup> ICJ-Kenya (2003: 41).

to be less expensive.<sup>620</sup> Administrative tribunals established in Kenya include the Industrial Court,<sup>621</sup> Rent Restriction Tribunal,<sup>622</sup> Public Procurement and Disposal Review Board,<sup>623</sup> Water Appeals Board,<sup>624</sup> the Seeds and Plant Varieties Tribunal,<sup>625</sup> the Capital Markets Tribunal,<sup>626</sup> the Sugar Tribunal,<sup>627</sup> the Cooperatives Tribunal,<sup>628</sup> the Business Premises Rent Tribunals<sup>629</sup> and the National Environment Tribunal.<sup>630</sup> We discuss a few tribunals in this section to illustrate their mandate and operations.

## Kenya Industrial Court

The Kenya Industrial Court is established under the provisions of the Trade Disputes Act.<sup>631</sup> The court's main objective is to deal with disputes between employers and employees such as the dismissal of employees or non-payment of dues to employees. It is presided over by a judge who is appointed by the president for a term not less than five years. He is assisted by four other members who are appointed by the Minister for Labour for a period of not less than three years. The judge should have the same qualifications as those of a puisne judge, namely an advocate of the High Court of not less than seven years' standing. The judge and the four members can be reappointed to the court after the expiry of their terms.

The Minister for Labour appoints the four members to the court in consultation with the Central Organisation of Trade Unions, the Minister for Finance and the Federation of Kenya Employers. One of the four members is appointed by the minister to be the deputy to the judge. The judge of the court has the power to appoint two assessors from the panel of assessors appointed by the minister; one to represent the employer and the other the employee. The decision of the Industrial Court is final and hence a dissatisfied party cannot appeal to any other court. The Trade Disputes Act stipulates that any trade dispute should be reported to the Minister for Labour by an employer or employee, trade union or employers' organisation. The minister can notify the parties to the dispute about his decision or he can refer them to the Industrial Court. A decision by the minister can be appealed at the Industrial Court whose decision is final. Collective agreements, such as any agreement between a trade union and the employer (or the employers' federation) are registered at the Industrial Court.<sup>632</sup>

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<sup>620</sup> Government of Kenya (2010).

<sup>621</sup> Trade Disputes Act, chapter 234, Laws of Kenya.

<sup>622</sup> Rent Restriction Tribunal, chapter 296, Laws of Kenya.

<sup>623</sup> Public Procurement and Disposal Act of 2005, Laws of Kenya.

<sup>624</sup> Water Act, Act No. 2 of 2002, Laws of Kenya; Water Appeal Board Rules, Legal Notice No. 144.

<sup>625</sup> Seeds and Plant Varieties Act, chapter 326, Laws of Kenya.

<sup>626</sup> Capital Markets Act, chapter 485A, Laws of Kenya.

<sup>627</sup> Sugar Act, 2001, Laws of Kenya.

<sup>628</sup> Cooperatives Societies' Act, Act No. 12 of 1997, Laws of Kenya (as amended in 2004).

<sup>629</sup> Business Premises Rent Tribunals Act, chapter 301, Laws of Kenya.

<sup>630</sup> Environment Management and Coordination Act, Act No. 8 of 2000, Laws of Kenya.

<sup>631</sup> Trade Disputes Act, *supra* note 45.

<sup>632</sup> ICJ-Kenya (2003: 2).

## Rent Restriction Tribunals

These tribunals are established under the Rent Restriction Act.<sup>633</sup> There are various rent tribunals in the major cities of Nairobi, Mombasa and Kisumu. Each of these tribunals has a distinct administrative jurisdiction.<sup>634</sup> A rent tribunal is established by the Minister for Housing in an area where the minister may think necessary. The tribunal consists of a chairman, deputy chairman and a panel of members determined by the minister. The chairman is appointed by the minister. A person eligible for appointment as the chairman or deputy chairman must have been an advocate or legal practitioner in Kenya for not less than five years. Any member serves at the tribunal at the discretion of the minister. The tribunal is usually presided over by the chairman or his deputy and two members selected by the permanent secretary in charge of housing from among a list of people approved by the minister.<sup>635</sup>

The main purposes of this tribunal include:

- Determining the reasonable rents for residential houses and imposing some restrictions on increasing such rents;
- Investigating complaints made by either tenants or landlords relating to the tenancy of the dwelling houses; and
- Assessing the standard rent of any dwelling house to which the Act applies, either on its own motion or on the application of any interested person.<sup>636</sup>

Decisions in this tribunal are reached through a majority of votes by the members present. If there is a tie, the chairman has a casting vote. The chairman, due to his legal knowledge, is entitled to give a ruling on any point of law that arises.

## Public Procurement Administrative Review Board

This tribunal is established by the Public Procurement and Disposal Act of 2005 to undertake administrative review of procurement proceedings. This Act gives standing to 'any person who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity'. In a nutshell, the tribunal is a forum for the administrative review of public procurement decisions, and forms a critical part of the government's efforts to ensure transparency and accountability in the public procurement process. The board handles about one hundred cases annually and is contributing immensely to the restoration of credibility to the public procurement system. For example, the board has stopped a considerable number of corrupt and irregular proceedings. As a result, both local and foreign firms actively participate in its proceedings and have given it good reviews.

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<sup>633</sup> Rent Restriction Act, chapter 296, Laws of Kenya.

<sup>634</sup> See ICJ-Kenya (2003: 3).

<sup>635</sup> Ibid.

<sup>636</sup> Ibid.

## Business Premises Rent Tribunals

These tribunals are established under the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act.<sup>637</sup> This Act regulates controlled tenancies. It defines ‘controlled tenancy’ as a tenancy of a shop, hotel or catering establishment, which is in a written form and is for a period not exceeding five years. The Business Premises Rent Tribunals are established to set out reasonable tenancy standards and to ensure that the landlords do not charge excessive rents for business premises.<sup>638</sup> These tribunals have the following powers among others:

- To determine whether or not any tenancy is a controlled tenancy;
- To determine or vary the rent payable in respect of any controlled tenancy;
- To fix the amount of any service charges if required as per agreements in respect of controlled tenancy;
- To make orders for the recovery of possession and for the payment of arrears of rent;
- To permit the levy of distress for rent; and
- To award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of good will, and improvements carried out by the tenant with the landlord’s consent.

## Kenya National Commission on Human Rights Complaints Hearing Panel

The Kenya National Commission on Human Rights has also set up a redress programme. Under this programme is established a complaints hearing panel, an alternative dispute resolution mechanism and a forum for public enquiries. The Complaints Hearing Panel is a quasi-judicial process for resolving human rights complaints. It is less rigid than a court of law and is not bound by the strict rules of civil and/or procedure or the stringent requirements of the Evidence Act. It hears matters where human rights have been violated and provides adequate redress. The decisions of the Complaints Hearing Panel are enforceable in the High Court of Kenya where appeals from the panel are addressed.

## National Environment Tribunal

The National Environment Tribunal (NET) is established under section 125 of the Environment Management and Coordination Act (EMCA) 1999. It consists of the following five members: the chairman appointed by the Judicial Service Commission; two lawyers, one nominated by the law society of Kenya and the other appointed by the minister for Environment and Natural Resources and Wildlife; and two persons with competence in environmental conservation appointed by the minister. The Tribunal is an independent body charged with the following functions:

- To review administrative decisions and actions of the National Environmental Authority (NEMA) in matters of issue, cancellation, denial of licence, amount of money to be paid under the EMCA; and
- To give legal opinion to the National Environment Management Authority (NEMA) in any matter of a complex nature referred to it.

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<sup>637</sup> Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, chapter 301, Laws of Kenya.

<sup>638</sup> *Ibid.*



On receiving an appeal or referral, NET is supposed to:

- Inquire into the matter and make decisions or give directions without reference to any other party;
- Confirm, set aside or vary the order or decisions in question;
- Exercise any of the power which could have been exercised by NEMA in the proceedings in connection with the appeal or make other orders, including any order for costs, as it may deem just; and
- Order the status quo to be maintained pending determination of the appeal.

The mission of NET is to provide accessibility to justice that is relatively inexpensive, while its vision is to provide compliance with the law with the aim of achieving sustainable environmental management. NET may exercise the following powers:

- Compel attendance of any party or person;
- Order for discovery or production of documents;
- Order for investigation of any contravention of the EMCA as it deems necessary or expedient;
- Take evidence on oath or may for that purpose administer oath;
- Make an award, give directions, make orders or decisions of matters heard before it;
- Confirm, set aside or vary an order or decision in question and make other orders including orders of cost as it may deem just or on its own motion; and
- Summon and hear any person as a witness.

Any person aggrieved by a decision or order of this tribunal may, within thirty days of such decision or order, appeal to the High Court. Upon the appeal, the High Court may:

- Confirm or set aside or vary the decision or order in question;
- Remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
- Exercise any of the powers which may have been exercised by the Tribunal; and
- Make such order as it deems just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

The decision of the High Court is final. The Tribunal makes its decisions independently in accordance with the law and free from any political interference. It operates from an arm's length from departments which are likely to interfere with its impartiality.

## **Public Complaints Committee**

Another mechanism for asserting rights outside the court process is the Public Complaints Committee established under article 31 of the Environmental Management and Coordination Act. It was constituted in August 2001 but it started serious operations in January 2003. The chairman is appointed by the minister in charge of the environment. He must be a person duly qualified to be appointed as a judge of the High Court of Kenya. Other members of the committee include: a representative of the Attorney General; a representative of the Law

Society of Kenya; a representative of non-governmental organisations appointed by the NGO Council who acts as the secretary to the committee; a representative of the business community appointed by the minister; and two members appointed by the minister for their active role in environmental management. The functions of the committee include:

- To investigate any allegations or complaints against any person regarding the environment in Kenya;
- To investigate any allegations or complaints against the National Environmental Management Authority (NEMA) regarding the environment in Kenya; and
- To investigate on its own motion any suspected case of environmental degradation in Kenya.

## **G. Traditional and other non-state justice systems**

Traditional law is recognised and listed as one of the sources of law. Chapter 8 of the Judicature Act lists customary law as one of the sources of laws and directs that customary law should be applicable where the parties are subject to customary law. However, its application is limited to the application of civil customary laws and not criminal laws, which are governed by the Penal Code. Customary law is not codified. Expert witnesses, literature and past court decisions are the basis for determining the existence and application of customary law.

Many Kenyans pursue their grievances and conflicts through alternative justice systems. They include traditional systems, peace or reconciliation forums, Islamic courts and interventions of the local chiefs. The latter are part of the provincial administration and they are mandated to maintain law and order in their communities. They employ statutory as well as customary or informal conflict resolution methods to resolve conflicts. Kenyan law does not formally recognise the role played by non-state justice systems. In most of the rural parts of Kenya, justice is sought through the use of non-state justice systems such as a council of elders or extended family members and religious institutions. Cases which are most commonly brought to these institutions include matters to do with land disputes, livestock disputes, marital and domestic matters as well as domestic violence. Some crimes such as assault and sexual violence are also referred to the elders for resolution. The legal system acknowledges only Kadhi courts as the only religious courts in Kenya. Other examples of non-state justice systems include:

- Initiatives such as the ‘peace elders initiative’ in Laikipia district, which are working to make dispute resolution processes more inclusive, by bringing in youth and women as ‘elders’,<sup>639</sup> and
- Chiefs and assistant chiefs who are appointed by government as local administrators. They take on a significant role in settling disputes in areas where access to police and courts is restricted. They preside over, and record proceedings of, cases in which elders chosen by the disputing parties make the final decision. Chiefs and their assistants also hold positions of authority in their clans, sometimes on the basis of popular elections.

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<sup>639</sup> Nyamu-Musembi (2003).

Several government-led activities and reform programmes either aim to support conflict resolution at the local level or focus on providing improved access to justice by improving the formal system. The Provincial Administration is currently training chiefs in conflict resolution. The National Steering Committee on Peace-Building and Conflict Management, coordinated from within the Office of the President, is in the process of developing a policy framework with the aim to coordinate and harmonise peace-building and conflict-management interventions.

These non-state and traditional judicial systems apply some of the principles and guidelines on the right to a fair trial and legal assistance such as:

- Accord fair trial;
- Accord equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances except for Kadhī's courts which are exclusive to Muslims;
- Respect the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhuman or degrading punishment or treatment;
- Respect the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;
- Respect the equality of women and men in all proceedings;
- Respect the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment;
- Allow for the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;
- Allow for the assistance of and representation by a representative of the party's choosing in all proceedings before the traditional court;
- Allow appeal to a higher traditional court, administrative authority or a judicial tribunal; and
- Conduct all hearings before traditional courts in public and render its decisions in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children.

There are certain forums that breach these guidelines. Such as:

- Some norms and traditions discriminate against women and children;
- Some forums do not allow a representative of the party's choosing in all proceedings before the traditional court;
- Some rules do not allow appeal to a higher traditional court, administrative authority or a judicial tribunal; and
- There are no procedures for complaints against and discipline of members of traditional courts that are prescribed by law.

Mediation and arbitration by traditional elders is preferred because of the relatively lower cost and unavailability of formal court structures.

Generally, there is no effort to formalise these courts from the central government. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process. It is, however, noteworthy that the new constitution requires the National Land Commission ‘to encourage the application of traditional dispute resolution mechanisms in land conflicts’.<sup>640</sup> It also addresses these bodies at Section 159 (2)(c) and (3) as noted above. The 2010 Report of the Task Force on Judicial Reforms also recognises alternative dispute resolution as ‘a way of reducing backlog of cases in court and ensuring speedy and affordable access to justice’.<sup>641</sup> It specifically proposes the need to:<sup>642</sup>

- Enact enabling legislation for mediation and other alternative dispute resolution mechanisms (mediation-arbitration, negotiation, conciliation and adjudication);
- Encourage out of court settlement of claims in family and commercial disputes by the Bar and Bench;
- Train judicial officers in alternative dispute resolution mechanisms through the Judicial Training Institute and other training institutions locally and abroad; and
- Establish a complaints mechanism and appropriate codes of conduct for arbitrators, mediators and other alternative dispute resolution bodies.

## H. Recommendations

Access to justice is quintessential to the realisation of the rule of law ideal and should be promoted vigorously. In this regard, we propose that:

- The ratio of lawyers to the population should be improved in the country and efforts made to avail legal and judicial services in all parts of Kenya.
- The government and civil society should establish mechanisms for educating citizens on their rights and make them aware of the different ways in which they can access justice.
- The government, in collaboration with other stakeholders offering legal aid services, should establish a national legal aid scheme to enable more Kenyans to access justice.
- The government, in collaboration with other stakeholders such as the Law Society of Kenya, should provide a framework and incentives for engaging in public interest litigation.
- The government should encourage and institutionalise alternative dispute resolution to ease the backlog in courts and ensure expedient resolution of justice and ensure that traditional justice systems adhere to the constitutional norms of equality and non-discrimination.
- The government should establish more venues such as courts for formal dispute resolution to ensure that citizens do not have to travel long distances or incur huge costs to access these venues.
- The government should make it easier for people with disabilities and other marginalised users with special needs to access the venues of formal dispute resolution.

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<sup>640</sup> Constitution of Kenya (2010), section 67(f).

<sup>641</sup> Government of Kenya (2010: 54).

<sup>642</sup> *Ibid.* at 55.

- The government should train judicial officers in dispute resolution to ensure that they do not go against cardinal rules of access to justice such as fairness and non-discrimination in dispensing justice.
- The government should implement the provisions of the new constitution on alternative forms of dispute resolution and the recommendations of the 2010 Report Task Force on Judicial Reforms.

# 8

## The role of development partners

While development assistance has contributed to efforts to realise the rule of law in Kenya, much foreign aid has only been given to further the interests of donor countries or agencies. Donors continue to set much of the agenda and the conditions for cooperation, even in the context of sector-wide approaches (SWAs). The experiences of the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme illustrate the need for a national law on the administration of aid, establishing clear institutional and accountability frameworks, and also structuring the participation of all stakeholders. Such a law should also mandate the government to keep an inventory of all development assistance agreements and facilitate public access thereto. Further, such a law should facilitate the integration of aid with national development strategies. It is therefore encouraging that there is now a greater awareness of the need to establish a legal framework for the administration of aid in the justice, law and order sector.

### **A. An overview of development assistance to the justice sector**

At present, 17<sup>643</sup> development partners have, jointly with government and non-state actors, developed the Kenya Joint Assistance Strategy (KJAS), and are using the KJAS as a basis for implementing the government's development strategy, including the 2030 Vision and also linking it to the achievement of the Millennium Development Goals (MDGs). Budget support will be made available by the development partners if the government makes adequate progress in transparency and accountability. This strategy lays emphasis on partnership between the government, development partners and non-state actors. The KJAS is centred on three principles consistent with the Paris Declaration on Aid Effectiveness, namely:

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<sup>643</sup> Canada, Denmark, the European Commission (EC), Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, the United Kingdom, the United States of America, the African Development Bank, the United Nations and the World Bank Group.

- Support of country-owned and government-led strategies to improve social well-being and achieve the MDGs;
- More effective collaboration between development partners and the government; and
- A focus on results and outcomes.

In the justice sector, donors' support has mainly been channelled through the GJLOS Reform Programme, a basket-funded sector-wide programme that has been supporting reforms in 34 government ministries, departments and agencies (MDAs) including the judiciary, the police and the Deputy Public Prosecutor. Implementation of the programme commenced in 2004 under a Short-Term Priorities Programme (STPP), which was a one-year work plan of activities, mainly aimed at building the capacity of the participating MDAs in terms of the procurement of necessary equipment and materials and the training of personnel.

The STPP implementation ended in September 2005 and the MDAs then developed a Medium-Term Strategy (MTS) for the period 2005–2009. The MTS focused on reform in the sector in order to make the government more responsive to the needs of the people, and prioritised reform measures in each of the sub-sectors addressed by the programme, namely governance, human rights, justice, law and order as well as in capacity building. Each MDA's activities in this respect were aimed at contributing to the achievement of one or more of the following key result areas of the programme:

- Responsive and enforceable policy, law and regulation;
- More effective GJLOS institutions;
- Reduced corruption-related impunity;
- Improved access to justice especially for the poor, marginalised and vulnerable;
- More informed and participative citizenry and non-state actors; and
- Effective management and coordination of the GJLOS Reform Programme.

Currently, the World Bank and the UK's Department for International Development (DFID) are also providing support to the Financial and Legal Sector Assistance Programme (FLSTAP) with the objective of creating a sound financial system and stronger legal framework and judicial capacity that will ensure broad access to financial and related legal services. This objective is being achieved through provision of technical expertise and building capacity to implement the government's financial Sector Reform Programme and supporting implementation of the relevant key results areas of the GJLOS Reform Programme. In addition, the World Bank is funding a project on reform of the judiciary. Other donors who provide support to the justice sector include the Canadian International Development Agency (access to justice), the Danish Agency for International Development (access to justice), the Swedish International Development Agency (SIDA) (access to justice), the United States Agency for International Development (good governance) and the United Nations Development Programme (legal empowerment).

Donors also support non-state actors engaging with the justice sector through various mechanisms, principally the Civil Society Democratic Governance Facility (the 'DG facility'), the National Civic Education Programme (NCEP II), the Gender and Governance Programme (GGP III) and the Civil Society Strengthening Programme.

It should be noted that information about these development assistance programmes can be accessed from the websites of the institutions concerned. The GJLOS Reform Programme has provided the most information to interested parties, which can readily be accessed from its website.<sup>644</sup> The information is available in the form of reports, research and case studies, strategies, plans and budgets and workshop reports.

## **B. Transparency and accountability in development assistance**

Since the SWAp approach is the mode of aid delivery now preferred by donors, it is useful to examine whether it enhances transparency and accountability in the provision of development assistance. Here, we examine the GJLOS Reform Programme in greater detail. It should be noted that the GJLOS constitutes Kenya's first SWAp and is considered by many in government and donor circles as a test case. The expectation is that it should be replicated in other sectoral reform programmes.<sup>645</sup>

We should also note at the outset that while SWAp promise to enhance the effectiveness of aid, a major drawback is that they invariably seek to bypass national public accounting and procurement systems on the grounds that the latter are ineffective and corrupt. On the one hand, there is much evidence, for example, that these systems in many cases merely facilitate the use of public procurement as a resource for political patronage and for the unjust enrichment of corrupt public officials. On the other hand, if the development of local public procurement capacity is instrumental for the effectiveness of aid, then the case for the maintenance of parallel procurement regimes ceases to be persuasive. This is especially the case where, as in Kenya, considerable efforts have been made to reform the national procurement system. The maintenance of parallel procurement systems is not only inefficient, but also provides avenues for corruption since the lines of accountability are attenuated. At the very least, there is therefore a case for the harmonisation of these parallel systems.

In response to concerns that SWAps are bypassing national frameworks for accountability, development partners often argue that they are primarily accountable to their taxpayers and that it is up to the recipient governments to worry about accountability to the local electorate. Again, this argument is not entirely persuasive since this accountability relationship implicates the effectiveness of aid. Because there are no frameworks through which the local electorate can hold such governments to account, aid funds have invariably not been used for their intended purposes. Accordingly, there is a strong case for reformed national frameworks to ensure the accountability of SWAps to the citizens of developing countries since the local electorate cannot demand accountability directly from the development partners.

## **The nature of the GJLOS Reform Programme<sup>646</sup>**

The principal objective of the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme is to strengthen the capacities of the institutions in the governance and legal sector

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<sup>644</sup> See [www.gjlos.go.ke](http://www.gjlos.go.ke).

<sup>645</sup> See Everatt et al (2004: 12).

<sup>646</sup> The following account of the GJLOS Reform Programme is largely drawn from Akech (2005).



for 'efficient, accountable and transparent administration of justice'.<sup>647</sup> The Programme is quite broad, and brings together some thirty departments of the government drawn from the Ministry of Justice and Constitutional Affairs (MoJCA), Office of the President (Provincial Administration and National Security), the Ministry of Home Affairs, the Attorney General and the judiciary.<sup>648</sup> These departments of government work with an array of donor organisations and non-state actors drawn from the private sector and civil society.

The Programme emerged in the environment of optimism that followed the inauguration of the NARC administration. The new government developed a comprehensive policy framework, the Economic Recovery Strategy for Wealth and Employment Creation (ERS),<sup>649</sup> in which it identified governance as one of the foundations for economic growth. Through the ERS, the NARC government sought to institute reforms in public administration, national security and law and order. Among the new institutions it created to foster the required governance reforms were the MoJCA and the Department of Governance and Ethics in the Office of the President.<sup>650</sup> The enthusiasm of the Kenyan people was shared by the development partners, who quickly moved in to support the reform agenda of the new government. It is in this environment that the MoJCA and development partners conceived the GJLOS Reform Programme in November 2003. At inception, the participation of non-state actors in the Programme was quite limited and unstructured.<sup>651</sup> In addition, a major drawback of the GJLOS Reform Programme is that it concentrates on supply factors at the expense of demand factors. For example, it does not address how citizens can access justice.

The Programme was developed out of a realisation that the institutions in the governance and legal sector need to address their inadequacies on a sector-wide basis if they are to be effective. In the administration of criminal justice, for instance, it was noted that the judiciary cannot function efficiently and effectively without the cooperation of the prosecution service, the police and the prisons department.<sup>652</sup> The development partners introduced the idea of sector-wide funding in order to support the government's integrated approach to reforms.<sup>653</sup>

It should be noted that following its launch, the GJLOS Reform Programme was divided into two phases, a Short-Term Priorities Programme (STPP) and a Medium-Term Strategy (MTS).<sup>654</sup> The STPP, which closed in December 2005, targeted 'quick wins' while building an appetite for reform.<sup>655</sup> The MTS, which was launched in July 2005, targeted deeper and more substantive reforms, and was expected to terminate in June 2009, with the expectation that a follow-up sector strategy would be developed thereafter.<sup>656</sup>

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<sup>647</sup> Governance, Justice, Law and Order Sector Reform Programme, Short Term Priorities Programme (STTP) Fiscal Year 2003/04 (2003: 11) (hereinafter STTP).

<sup>648</sup> Everatt et al, *supra* note 3 at 6.

<sup>649</sup> Republic of Kenya (2003).

<sup>650</sup> Everatt, et al, *supra* note 3 at 5.

<sup>651</sup> *Ibid.* at 13–14.

<sup>652</sup> STTP, *supra* note 5 at 11.

<sup>653</sup> Everatt et al, *supra* note 3 at 17.

<sup>654</sup> Republic of Kenya (2007: 2).

<sup>655</sup> *Ibid.*

<sup>656</sup> *Ibid.*

The principal document governing the Programme is a memorandum of understanding (MoU) between the government and the development partners. The MoU sets out the funding arrangements for the Programme. It provides that most of the development partners will provide funding through a basket fund, the GJLOS Basket Fund, while others will do so on a bilateral basis.<sup>657</sup> While bilateral funding agreements take precedence over the MoU, the development partners undertake to ‘strive to establish funding agreements that are compatible with the provisions of [the] MoU’ for the sake of harmonisation.<sup>658</sup> Further, the MoU sets out the terms and procedures for the joint management, funding, monitoring and evaluation of the Programme. Thus, it provides for the appointment of a financial management agent (FMA) to manage both the basket and non-basket funds, through a holding account in a commercial bank.<sup>659</sup> It also gives the government overall responsibility and accountability for the implementation of the Programme.<sup>660</sup>

A number of institutions have been established to assist the MoJCA to run the Programme, namely the Inter-Agency Steering Committee (IASC), the Technical Coordination Committee (TCC) and its management committee, the Donors’ Coordination Forum, the Thematic Groups and the Programme Coordination Office (PCO). These institutions work together with the thirty or so government departments charged with the task of implementing the Programme.

The IASC provides policy oversight and strategic leadership to the Programme, and is made up by senior government officers, namely the vice president, ministers in the MoJCA and Office of the President, the Attorney General, the Chief Justice and the Permanent Secretary Governance and Ethics. The IASC was created to ensure that there is sufficient political goodwill behind the programme.<sup>661</sup> However, it is not a recognised structure of the Cabinet, which therefore means that it does not derive its mandate from formal structures of the executive.<sup>662</sup> The IASC has not met regularly, a failure which has been attributed to the absence of a policy and legislative framework.<sup>663</sup> Generally, the IASC ‘is not seen as taking a keen interest in the [G]LOS programme, nor is it seen to act as a champion of the reform agenda or provide policy leadership’.<sup>664</sup> It has thus been suggested that the functions of the IASC should be transferred to a formally constituted sub-committee of the Cabinet.<sup>665</sup>

The task of the TCC is to provide guidance on Programme implementation, coordinate implementation and ensure that implementation is in line with government policies. Its members are a justice of the Court of Appeal as chair, permanent secretaries, heads of

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<sup>657</sup> Governance, Justice, Law and Order Sector Reform Programme, Memorandum of Understanding, section 5 (2003). Eight development partners provide their funding through the Basket Fund. These are the governments and/or development agencies of Canada, Denmark, Finland, Germany, the Netherlands, Norway, the United Kingdom and Sweden. They have appointed the Swedish International Development Agency (SIDA) as the lead donor.

<sup>658</sup> *Ibid.*

<sup>659</sup> *Ibid.* at sections D3, K1.

<sup>660</sup> *Ibid.* at section E1.

<sup>661</sup> Everatt et al, *supra* note 3 at 57.

<sup>662</sup> Everatt & Kanyinga (2007: 46).

<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

departments participating in the Programme and representatives of donors, private sector and civil society organisations. Because of its large size, it has a management committee to provide coordination and decision-making oversight. The management committee comprises permanent secretaries and heads of institutions given the task of leading the thematic groups. The TCC meets regularly, although ‘the heads of department do not always appear to have the time or information necessary to engage effectively around conceptual issues that need discussion and decision-making at this level’.<sup>666</sup> It should also be noted that MoJCA now wants to establish an inter-ministerial committee (IMC) to replace the management committee.<sup>667</sup>

Given the deficiencies of the IASC, the TCC and the management committee, a programme coordination office (PCO) was created in the MoJCA to assume responsibility for the day-to-day management of the Programme.<sup>668</sup> Further, the PCO implements the strategic decisions of the TCC. Plans are now underway for the PCO to hand over its functions to a department of the MoJCA.<sup>669</sup>

There are also thematic groups (TGs) created around seven ‘Key Result Areas’ to address ‘output-specific issues’.<sup>670</sup> The TGs are convened by members of the TCC and are required to provide a forum for the discussion of issues and assist implementing government departments in developing work plans and implementation of activities. Members of the TGs are drawn from the implementing institutions, the PCO, the FMA, donors, the private sector and civil society. The TGs provide an opportunity for departments and stakeholders to hold each other accountable on what progress is being made by each on the reform agenda.<sup>671</sup> However, some of them do not meet regularly and do not have good records of their activities.<sup>672</sup> Further, the TGs lack the capacity and clout to enforce accountability.<sup>673</sup> For example, there are no sanctions for failure to attend meetings or failure to implement work plans.<sup>674</sup>

In addition, the donors have established a donors’ coordination committee to provide opportunities for feedback on the implementation of the Programme and consultations with the government. This committee meets every month. Tensions have been observed within the donors’ committee, with non-basket fund donors being accused of cherry picking, that is, selecting high-profile programme areas they regard as their own ‘turf’ while leaving the basket fund to pay for the low-profile work.<sup>675</sup>

The Programme’s institutional framework is rather unwieldy. A group of consultants hired to review the Programme (review team) thus unsurprisingly found that ‘[t]he absence of

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<sup>666</sup> *Ibid.*

<sup>667</sup> *Ibid.* at 48.

<sup>668</sup> In some respects, the PCO was established as a response to complaints about the FMA. But while the PCO now performs some of the functions previously performed by the FMA, there is no clear demarcation of their roles.

<sup>669</sup> Everatt & Kanyinga, *supra* note 20 at 49.

<sup>670</sup> These Key Result Areas are: ethics, integrity and anti-corruption; democracy, human rights and rule of law; justice, law and order; public safety and security; constitutional development; legal services; and leadership and management development.

<sup>671</sup> Everatt & Kanyinga, *supra* note 20 at 47.

<sup>672</sup> *Ibid.* at 46–47.

<sup>673</sup> *Ibid.* at 47.

<sup>674</sup> *Ibid.*

<sup>675</sup> Everatt et al, *supra* note 3 at 25.

a clear programme management structure detailing linkages between organisations and their functions is causing confusion.<sup>676</sup> In addition, the GJLOS Reform Programme does not have clear arbitration mechanisms.<sup>677</sup> Such mechanisms are required, in light of differences between MDAs in some thematic groups, which have resulted in walkouts.

## **Assessing the effectiveness and accountability of the GJLOS Reform Programme**

The GJLOS Reform Programme has succeeded in some respects. For example, it has opened up the justice sector ‘to greater scrutiny, promoted harmonisation and created space for constructive engagement by non-state actors’.<sup>678</sup> Further, it has enhanced the planning skills of the participating government ministries and departments, and improved coordination within the sector.<sup>679</sup>

Nevertheless, Kenyans should be concerned about the democratic character of the GJLOS Reform Programme. First, vast financial resources have been allocated to the Programme. The implementation of the Programme is expected to cost about US\$ 15 million, 75% of which will be sourced from the development partners.<sup>680</sup> Secondly, and as we have noted, the Programme constitutes Kenya’s first SWAp and is considered by many in government and donor circles as a test case. The expectation is that it should be replicated in other sectoral reform programmes.<sup>681</sup> Given that the development partners fund virtually the government’s entire development expenditure budget, the governance of the GJLOS Reform Programme considerably implicates the future administration of development assistance in Kenya, especially if donors achieve consensus on basket funding.<sup>682</sup>

Thus far, a number of concerns have been raised about the effectiveness and democratic character of the GJLOS Reform Programme. As a SWAp, the effectiveness of the Programme should be assessed by the extent to which it ensures government ownership and leadership, and strengthens the government’s capacities and efficiency. The Programme has not done particularly well on both accounts, although performance is improving slowly. While the MoJCA has ‘increasingly exerted its authority’, there are concerns that ‘donors have too much influence and only pay lip service to the notion of government leadership’ and are ‘too involved in the detail of GJLOS’.<sup>683</sup> The evidence for such influence includes the frequent meetings between donors, the PCO and the FMA.<sup>684</sup> Thus donors, and not domestic constituencies, remain the main point of accountability.<sup>685</sup> Concerns have also been expressed that the development partners have undue influence over the PCO, which is arguably the Programme’s executive organ.<sup>686</sup>

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<sup>676</sup> *Ibid.* at 59.

<sup>677</sup> Everatt & Kanyinga, *supra* note 20 at 50.

<sup>678</sup> *Ibid.* at 7.

<sup>679</sup> *Ibid.*

<sup>680</sup> STTP, *supra* note 5 at 36; Republic of Kenya (2004: 6).

<sup>681</sup> Everatt et al, *supra* note 3 at 12.

<sup>682</sup> Development expenditures account for about 30% of the government’s annual budget.

<sup>683</sup> Everatt et al, *supra* note 3 at 17.

<sup>684</sup> *Ibid.* at 26.

<sup>685</sup> *Ibid.* at 28.

<sup>686</sup> *Ibid.* at 18.

Further, the Programme has not been sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems have been noted because of the poor linkage between the Programme and the Ministry of Finance, where the GJLOS Reform Programme is ‘not well known or understood’.<sup>687</sup> Indeed, at the inception of the Programme, officers of the Ministry of Finance acknowledged that they were yet to develop financial management approaches appropriate for SWAs.<sup>688</sup> Since then, some progress has been made towards mainstreaming the Programme into the government’s financial management processes, which suggests that the ‘GJLOS is slowly being accepted rather than resisted as was the case in its early days’.<sup>689</sup>

Perhaps the most important unfulfilled expectation relates to the Programme’s efforts to strengthen the government’s financial management and procurement capacities.<sup>690</sup> Because the development partners were convinced that the government’s financial management and procurement systems are cumbersome and corrupt, they insisted on the appointment of the FMA.<sup>691</sup> In effect, therefore, they created financial management and procurement structures that bypassed the national systems. With respect to financial management, whilst the FMA is contracted to improve the government’s capacities, it appears that neither indicators nor a timetable for doing so were provided.<sup>692</sup> The review team thus ‘found no evidence of the FMA proactively identifying financial management capacity gaps and filling them’.<sup>693</sup> A subsequent review conducted some two years later reported that the participating government ministries and departments were concerned about ‘poor communication, procurement delays and – perhaps most importantly – no real demonstrable evidence of financial capacity building’.<sup>694</sup>

Furthermore, bypassing the government’s financial management system is likely to weaken the government’s financial management capacity since disbursements take place outside of the governmental financial system.<sup>695</sup> A vicious cycle – in which the government’s financial management system is bypassed and weakened thereby justifying the continued demand for an FMA – is thus formed.<sup>696</sup> It is, however, encouraging that a consensus seems to be emerging among the development partners towards moving to an arrangement under which the Programme’s finances are managed by the Ministry of Finance through a special account.<sup>697</sup>

The participation of non-state actors, namely private sector and civil society organisations (CSOs), has also been problematic. Their participation is not only unstructured, but there are also concerns that the Programme may be crowding out CSOs. A review of the Programme has thus noted that ‘[i]nvolvement and participation of the civil society and the private sector

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<sup>687</sup> Ibid. at 20–21.

<sup>688</sup> Ibid. at 21.

<sup>689</sup> Everatt & Kanyinga, *supra* note 20 at 57.

<sup>690</sup> The procurement activities of the FMA are discussed in part IV(B) *infra*.

<sup>691</sup> Everatt et al, *supra* note 3 at 28. KPMG, an accounting firm, was appointed as the FMA.

<sup>692</sup> Ibid. at 29.

<sup>693</sup> Ibid. at 50.

<sup>694</sup> Everatt & Kanyinga, *supra* note 20 at 10.

<sup>695</sup> Ibid.

<sup>696</sup> Ibid.

<sup>697</sup> Ibid. at 29. The Review Team also recommended that ‘the FMA in consultation with MoJCA and the Ministry of Finance develop a detailed and focused capacity building strategy, with timeframes, targets and measurable indicators’. Ibid. at 50.

in GJLOS has been ad hoc and disjointed and GJLOS lacks a clear strategy for meaningful participation by NSAs.<sup>698</sup>

At the time of conceptualising the Programme, the government invited a select group of non-state actors to participate.<sup>699</sup> While the participation of private sector organisations has not been controversial, the absence of effective representation from small- and medium-term enterprises (SMEs) is notable.<sup>700</sup> Thus, the focal point for private sector organisations is the Kenya Private Sector Alliance (KEPSA), whose members are drawn from the high end of the sector.

The government only invited participation from a number of CSOs it thought were implementing projects similar to those proposed under the GJLOS Reform Programme and others who 'had shown an interest in working with government'.<sup>701</sup> Because this select group of CSOs was thereby guaranteed access to the Programme's resources, the government was perceived by many as using the Programme to dispense political patronage.<sup>702</sup> This was especially because many of these CSOs 'had personal relationships with the new leadership in MoJCA and sector departments, many of whom came from civil society'.<sup>703</sup> In some cases also, CSO actors have been hired as consultants for the Programme, but were apparently not sourced transparently.<sup>704</sup> Further, a number of CSO actors felt that only the select group of CSOs had access to information on the Programme.<sup>705</sup> Accordingly, the participation of CSOs 'has not been sufficiently structured and has not ensured active or representative participation'.<sup>706</sup> It has thus been noted that the CSOs involved in the Programme 'consist predominantly of Nairobi-based organisations'.<sup>707</sup> Further, the Programme has left out many other categories of non-profit, non-state actors, such as faith-based organisations (FBOs) and research organisations.<sup>708</sup>

A further problem is that the role CSOs are supposed to play in the Programme is not clear: are they partners, service providers or programme monitors? The CSOs participating in the Programme span this participation spectrum. Especially for the CSOs that seek to provide services, the modalities for accessing GJLOS funds need clarification. Indeed, a scenario in which the GJLOS funds CSOs directly is undesirable since it gives the MoJCA the resources with which to compromise the independence of CSOs and effectively crowd them out of the governance and legal sector.<sup>709</sup> An attempt to resolve some of these constraints was later made, by establishing a non-state actors support facility. However, this facility 'ultimately fell victim to the serious coordination difficulties faced by civil society itself as well as what might be described as a sense of resignation or even exasperation on the part of MoJCA, PCO and donors towards CSOs'.<sup>710</sup>

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<sup>698</sup> Ornemark et al (2006: 14).

<sup>699</sup> Everatt et al, *supra* note 3 at 30.

<sup>700</sup> Ornemark et al, *supra* note 56 at 19.

<sup>701</sup> Everatt et al, *supra* note 3 at 30.

<sup>702</sup> *Ibid.* at 31 (observing that 'some CSOs are rumoured to have received substantial funds to participate in GJLOS ... while others have been told by the FMA that no funds are available for civil society participation').

<sup>703</sup> *Ibid.*

<sup>704</sup> Interview with Harun Ndubi, Executive Director, Kituo Cha Sheria, February 28, 2005.

<sup>705</sup> Interview with Millie Odhiambo, Executive Director, Child Rights Advisory and Legal Centre (CRADLE), February 28, 2005.

<sup>706</sup> Ornemark et al, *supra* note 56 at 14.

<sup>707</sup> *Ibid.*

<sup>708</sup> *Ibid.*

<sup>709</sup> Interview with Harun Ndubi, *supra* note 62.

<sup>710</sup> Evaratt & Kanyinga, *supra* note 20 at 11.

### c. The procurement regime of the GJLOS Reform Programme

The procurement regime of the GJLOS Reform Programme also raises serious questions of effectiveness, accountability and participation. According to the MoU, procurement arrangements under the Programme are supposed to comply with the government's procurement regulations, but prior to the enactment of procurement legislation, the Programme 'will adopt procurement procedures of the FMA'.<sup>711</sup> Further, the MoU authorises the FMA to appoint a procurement agent to help it with this work. Thus, despite the elaborate and fairly democratic procurement system established by the procurement regulations, it was thought best to create a parallel procurement regime. Unfortunately, however, the parallel regime only seems to have served to lengthen the procurement process.<sup>712</sup> As a result, the 'GJLOS has been characterised by low funds absorption,' which 'has been mainly attributed to delays in procurement, low capacity within MDAs, and the complexity of procurement procedures.'<sup>713</sup>

In order to enable it to carry out the task of procurement, the FMA (KPMG) developed a set of guidelines in consultation with the donors and the government. Although these guidelines seek to embrace the principles of sound public procurement, they raise several issues.

In the first place, the guidelines for all intents and purposes establish KPMG, a private firm, as a procuring entity. Thus, it is the responsibility of KPMG to develop procurement plans after it has been furnished with approved work plans and to tender for goods and services.<sup>714</sup> According to the guidelines, KPMG prepares and compiles the tender documents, although the implementing agencies are responsible for providing technical specifications.<sup>715</sup> Further, the FMA determines whether bids are responsive and coordinates the evaluation of responsive bids by establishing an evaluation panel.<sup>716</sup>

Quite apart from the fact that this arrangement concentrates responsibility for the procurement needs of some thirty government departments in one institution, it is also quite troublesome from a public law viewpoint. Since it is managing public resources, the FMA is for all intents and purposes exercising a 'public function'. Thus far, however, the FMA is only accountable to the basket fund donors through their leader (SIDA), with which it has entered into a contract. In addition, since it has not been constituted as a 'procuring entity' under the procurement regulations, the exercise of its procurement powers under the Programme are removed from the purview of national accountability mechanisms. But since the exercise of these powers affect 'vital interests' of the citizenry, it should accord with principles of good administration, such as participation, accountability and fairness.<sup>717</sup>

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<sup>711</sup> GJLOS Memorandum of Understanding, section G.

<sup>712</sup> Everatt et al, *supra* note 3 at 49. Reporting respondents as stating that 86% of the procurements by the FMA were not done on time. However, the FMA argues that it has improved the lead times and that its absorption rates of donor funds of about 50% are much better than the government's 20–25%. Interview with Chris Ngovi, Fund Manager, KPMG, 21 February 2005.

<sup>713</sup> Everatt & Kanyinga, *supra* note 20 at 11.

<sup>714</sup> The GJLOS Procurement Guidelines 2004, section 2.1 (hereinafter FMA Procurement Guidelines).

<sup>715</sup> *Ibid.*, section 4.5.1.

<sup>716</sup> *Ibid.*, section 4.7.2. The members of the evaluation panel are the FMA Project Director, two FMA Procurement Advisors, FMA Fund Manager, FMA Capacity Building Advisor, FMA Financial Accountant, three government representatives and a donor representative.

<sup>717</sup> See Aman (2001).

In particular, the need for KPMG to do so arises because a number of concerns have been raised that it is exercising its powers arbitrarily. Thus, there are allegations that being a predominantly accounting firm, KPMG does not have the requisite public procurement management capacity.<sup>718</sup> Further, concerns have been expressed that in some instances it has acted beyond its mandate by interfering with activities in work plans and suggesting ways of implementing them.<sup>719</sup> Thus, where a child rights CSO selected a venue for a workshop, KPMG insisted that it should be held at a different venue.<sup>720</sup>

Secondly, the guidelines do not provide for a bidder protest mechanism. The guidelines merely provide that ‘applicants who feel they have been evaluated unfavourably, or were disadvantaged in evaluation either by error or due to an irregularity, may register a written complaint with the FMA within five working days from the date of notification of award’.<sup>721</sup> The FMA is required to immediately inform SIDA of the complaint and respond to the complainant ‘within a reasonable time’.

Further, the guidelines provide for the automatic disqualification of bidders where they attempt to influence the outcome of the selection process. There are no provisions for bidders to contest such disqualification. In addition, the guidelines provide for the suspension of ‘suppliers’ from the FMA’s supplier lists.<sup>722</sup> In this case, however, the FMA is required to give suppliers a hearing. Those aggrieved with the FMA’s decision may appeal to SIDA.

In either case, there is no convincing reason why the decisions of the FMA should not be subjected to scrutiny by the PPCRAB, which has developed good jurisprudence on public procurements. Indeed, the procurement guidelines of development agencies such as SIDA typically provide that dissatisfied bidders ‘may have recourse to procedures established under the cooperation partner’s national legislation’.<sup>723</sup> In the case of the government’s GJLOS, however, it is not clear whether the envisaged procedures are those established by the procurement regulations or the FMA procurement guidelines.

From the foregoing account of the GJLOS Reform Programme, it is quite evident that it raises serious issues of democratic accountability. Given that the Programme is considered a test case, there is a need for a national legislative framework for the administration of development assistance that not only streamlines the institutional framework but also establishes clear mechanisms for participation by, and accountability to, local constituencies. In this regard, it is encouraging that article 211 of the proposed constitution would require Parliament to enact a law to regulate the terms on which the government may borrow money, including obtaining the approval of Parliament.

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<sup>718</sup> See e.g. Everatt et al, *supra* note 3 at 50 (observing that ‘[r]espondents also noted that the FMA had not “hit the ground running”, but had built their capacity as GJLOS unfolded’).

<sup>719</sup> *Ibid.*

<sup>720</sup> Interview with Millie Odhiambo, *supra* note 63.

<sup>721</sup> FMA Procurement Guidelines, section 4.12.

<sup>722</sup> *Ibid.*, annex C.

<sup>723</sup> SIDA Procurement Guidelines 2004, section 3.19.



## D. Human rights and development assistance

The protection of human rights has not been an explicit agenda item in development assistance to the justice sector. Nevertheless, it is likely to be a by-product of the various donor programmes. For example, if the GJLOS achieves its stated objective of an 'efficient, accountable and transparent administration of justice', then the protection of human rights would in all likelihood be advanced.

At the same time, it should be appreciated that the need for a more explicit rights-based approach to development assistance is increasingly being recognised. In this regard, the MoJCA has been developing a policy framework paper, which seeks to make the promotion and protection of human rights an explicit objective of the justice sector.<sup>724</sup> The paper calls for the adoption of a human rights based approach to development and the assessment of the developmental and human rights impact of its programmes and initiatives.<sup>725</sup> It also lays emphasis on the need to ensure access to justice for all.<sup>726</sup>

This new approach should also be seen in the context of international developments. For example, more attention is now being paid to access to justice. Thus, the United Nations Development Programme's policy of 'Access to Justice for All' gives priority to people's ability to use justice services – regardless of their gender, ethnicity, religion, political views, age, class, disability or other sources of distinction.<sup>727</sup> The World Bank has also adopted access to justice as one of three strategic objectives, in addition to legal and judicial reform.<sup>728</sup> In particular, the World Bank now explicitly recognises that member states have human rights obligations and that they can be assisted in fulfilling them. Thus, the World Bank has given grants to a number of African countries to support gender-responsive legal reform processes.

## E. Recommendations

- There is a need to ensure that the three branches of government and their agencies are directly accountable to the people of Kenya for all aid funds.
- A law should be enacted to govern the administration of all forms of aid. Such a law should, in particular, establish clear institutional and accountability frameworks.
- The private firms appointed as the financial management agents of sector-wide aid programmes should be subjected to the requirements of the Public Procurement and Disposal Act.

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<sup>724</sup> Republic of Kenya (2007: 24).

<sup>725</sup> Ibid.

<sup>726</sup> Ibid at 25.

<sup>727</sup> United Nations Development Programme (2002).

<sup>728</sup> World Bank (2003).

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