

AGENDA 4 AND THE QUEST FOR JUDICIAL REFORMS IN KENYAN

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DECLARATION.

I, Loise Ngonyo Maina, hereby declare that this dissertation is the result of an original research conducted by me and that it has not been submitted elsewhere, wholly or partially, for any other purposes. References to other materials have been duly acknowledged.

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Signature.

18TH MARCH 2011

Date.

20th March 2011

Date.

DEDICATION.

I dedicate this research to my parents, Mr. Samuel Maina Kariuki and Mrs. Susan Mwhiki Njoroge, my siblings Alex Ndegwa Maina and Kevin Charles Njoroge Maina and my Fiancée Christopher Ngene Muigai, whose prayers, love, extreme tolerance, understanding, guidance and support has brought me this far.

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The ultimate responsibility for any faults is entirely mine.

ACRONYMS

AG	Attorney General
CJ	Chief Justice
CPC	Criminal Procedure Code
ECK	Electoral Commission of Kenya
FRTF	Final Report on the Task Force
HC	High Court
HRC	United Nations Human Rights Committee
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
IEC	Independent Electoral Commission
ILAC	International Legal Assistance Consortium
JSB	Judicial Service Bill
JSC	Judicial Service Commission
JTI	Judicial Training Institute
KACC	Kenya Anti Corruption Commission
KEPSA	Kenya Private Sector Alliance

KMJA	Kenya Magistrates & Judges Association
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue & Reconciliation
KWJA	Kenya Women Judges Association
LSK	Law Society of Kenya
MoJNCCA	Ministry of Justice National Cohesion and Constitutional Affairs
MTEF	Medium Term Expenditure Framework
NGO	Non Governmental Organization
ODM	Orange Democratic Movement
PNU	Party of National Unity
TF	Task Force
UN	United Nations



CHAPTER ONE

1.0. INTRODUCTION

The judiciary consists of the courts and all officers of the courts, including the Chief Justice, the Attorney-General, judges and magistrates. It is one of the three arms of the Government. The Judicature sets out the structure of the court system in Kenya. The powers and duties of the courts and judiciary are further elaborated upon in the Judicature Act ¹ and the Magistrates' Courts Act². The Court system consists of the Court of Appeal, the High Court, magistrates' courts and Kadhis courts. The structure and organisation of the courts and judiciary is as follows:

Court of Appeal: The Court of Appeal has jurisdiction to hear appeals from the High Court in both civil and criminal cases.³ The judges of the Court of Appeal are the Chief Justice and not less than two, but not more than eleven, Judges of Appeal. There are currently ten Judges of Appeal.⁴ For the purpose of any final determination by the Court other than a summary dismissal of an appeal, the Court of Appeal is constituted by not less than three judges and the majority decision binds the Court.⁵ The Court of Appeal is situated in Nairobi but Judges of Appeal periodically travel on circuit to Mombasa, Kisumu, Nakuru, Nyeri and Eldoret. The decisions made by the Court of Appeal are binding on all other courts.

High Court: It has unlimited original jurisdiction in respect of both civil and criminal matters (offences of murder and treason only), and has jurisdiction to hear appeals from subordinate

¹ Chapter 7, Laws of Kenya

² Chapter 10, Laws of Kenya

³ The procedure in respect of applications for a certificate of fitness or leave to appeal in criminal matters and applications for leave to appeal in civil matters is addressed in rules 38 and 39 et seq. respectively of the Court of Appeal Rules issued under section 5 of the Appellate Jurisdiction Act (Chapter 9, Laws of Kenya).

⁴ Governance, Justice, Law & Order Sector (GJLOS) Reform Programme.

⁵ Appellate Jurisdiction Act (Chapter 9, Laws of Kenya), section 5.

courts on all matters. The High Court is also the final arbiter in matters concerning the interpretation of the Constitution, and is further empowered to hear and determine election petitions. The High Court in Nairobi has the following specialised divisions: Family Division, Criminal Division, Civil Division, Commercial Division and Constitutional and Judicial Review Division. There are **15 High Court** stations in the country. These are: Nairobi, Milimani, Kisumu, Kisii, Bungoma, Kakamega, Nakuru, Eldoret, Kitale, Embu, Nyeri, Mombasa, Malindi, Meru and Machakos with sub-registries in Kericho and Busia.

Magistrates Court: The Constitution provides that Parliament may establish subordinate courts and confer jurisdiction upon them. Established under the Magistrates' Courts Acts (Chapter 10, Laws of Kenya), the magistrates' courts have been created as the primary subordinate courts. They determine more than 90 per cent of legal disputes in the country, both criminal and civil matters. Jurisdiction is determined on a territorial and pecuniary basis. The judicial officers of the magistrates' courts are designated as, in order of seniority: Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate, Resident Magistrate and District Magistrate. There are **105 magistrates' courts** in the country.⁶

Kadhis Court: The jurisdiction of Kadhis courts extends to 'the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which

⁶ There are 105 magistrates' courts in the country stationed at the following district or divisional levels: City Court in Nairobi, Nairobi Law Courts, Milimani Commercial Courts Nairobi, Kibera, Makadara, Ukwala, Bondo, Siaya, Nyando, Nyamira, Keroka, Ogembo, Homa Bay, Migori, Oyugis, Rongo, Ndhiwa, Tamu, Kisii, Maseno, Kehancha, Winam, Mumias, Butere, Butali, Hamisi, Bungoma, Sirisia, Kimilili, Vihiga, Busia, Kakamega, Kabarnet, Sotik, Bomet, Kapsabet, Iten, Narok, Kajiado, Kapenguria, Maralal, Nakuru, Molo, Naivasha, Eldama-ravine, Kericho, Eldoret, Kitale, Nanyuki, Nyahururu, Lodwar, Kilgoris, Othaya, Karatina, Mukurweini, Kigumo, Kangema, Kandara, Gatundu, Limuru, Githunguri, Kikuyu, Wanguru, Kerugoya, Gichugu, Baricho, Nyeri, Muranga, Thika, Kiambu, Kwale, Hola, Wundanyi, Mombasa, Kilifi, Kaloleni, Malindi, Lamu, Voi, Taveta, Embu, Runyenjes, Siakago, Chuka, Nkubu, Maua, Tigania, Tawa, Kitui, Kilungu, Mwingi, Nunguni, Yatta, Makueni, Kangundo, Makindu, Meru, Machakos, Isiolo, Garissa, Marsabit, Wajir, Moyale and Mandera.

all the parties profess the Muslim religion. The judicial officers of the Kadhis courts are designated as Chief Kadhi, Deputy Chief Kadhi, Principal Kadhi, Senior Kadhi, Kadhi 1 and Kadhi 2. The power to appoint, discipline and remove Kadhis is vested in the Judicial Service Commission. There are 15 Kadhis courts nationwide.⁷ Appeal from the Kadhis court lies to the High Court, which sits with a Chief Kadhi or two other Kadhis as assessors.

In addition to these courts⁸, Kenya has specialised Children's Courts to deal with matters relating to children (including cases concerning parental responsibility, children's institutions, custody and maintenance, orders for protection of children, as well as criminal offences under the (Children's Act), anti-corruption courts to deal with matters relating to corruption and integrity, and traffic courts to deal with motoring offences. An appeal from the specialised courts lies to the High Court.

Also, tribunals are established under various laws made by Parliament to deal with specific disputes that arise in the course of the regulation and administration of certain matters. There are over 60 quasi-judicial tribunals in Kenya. The most active tribunals are the Industrial Court (established to settle labour disputes), the Land Disputes Tribunal (established to deal with disputes relating to land issues such as the division of land and boundaries of land), the Rent Restriction Tribunal (established to hear and resolve disputes between landlords and tenants of

⁷ There are 15 Kadhis Court stations in the country, namely: Mombasa, Garissa, Lamu, Marsabit, Bungoma, Kisumu, Isiolo, Eldoret, Wajir, Nairobi, Nyeri, Nakuru, Kwale, Hola and Malindi.

⁸ Court of Appeal, High Court, Magistrates Court and Kadhi Court.

residential houses) and the Business Premises Tribunal (established to hear and decide cases involving landlords and tenants of business premises).⁹

The duties of the judiciary are also further spelt out in the Judicature Act.¹⁰ It is charged with carrying out the following functions:-

- Administration of justice
- Formulation and implementation of judicial policies; and
- Compilation and dissemination of case law and other legal information for effective administration of justice.

Since 2002, the appointment of Judges has been preceded by some form of **vetting** and **consultation**, however, the vetting and consultations have not been institutionalized in any form by the JSC. The vetting process has also been fraught with systemic challenges or failures on the part of some agencies, hence undermining the integrity of the process. Due to these failures and lack of an open and merit-based process, it is likely that persons may be appointed as Judges when in fact they may not qualify on account of pending disciplinary cases, criminal investigations or any other reasons that otherwise disqualify them.

It has been noted that judicial administration as presently constituted is inadequate to bring about effective and efficient administration of courts.

⁹ Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya. February 2010: A Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute. Supported by the Law Society of Kenya: pg 28

¹⁰ Chapter 8 of the Laws of Kenya

The functions and the roles of the Registrar and the Chief Court Administrator are not clearly distinguished. Most of those charged with administration of courts have no relevant qualifications or training in public administration. While the Presiding Judge of the Court of Appeal, the Principal Judge of the High Court, Heads of the High Court Divisions and Resident Judges assist the Chief Justice in the administration of the courts, the Chief Justice remains inundated by mundane matters which can be dealt with by the Registrar, Presiding or Principal Judges. Finally, the rate of absorption of funds in the Judiciary, and particularly donor funds, has been wanting due to lack of capacity and the long and cumbersome procedures.¹¹

The Chief Justice (CJ) is the head of the Judiciary, and is the link between the Judiciary and the other arms of Government. Under the current Constitution, the Chief Justice exercises judicial functions as a Judge of the Court of Appeal (CA) and High Court (HC) and in the regulation of the practice and procedures of the courts of law, through among others, practice directions. The Chief Justice also assigns judicial work to Court of Appeal and H.C Judges.

The C.J may represent to the President that the question of removing a Judge of the C.A or H.C ought to be investigated. The Chief Justice also chairs the Judicial Service Commission, which, among other things, advises the President on persons to be appointed as Judges of the superior courts of record. The manner of exercising some of the administrative or managerial roles is sometimes discretionary and not subject to institutionalized consultations. There is no doubt that the exercise of these powers can pose a risk to independence of individual judicial officers as well as institutional independence of the Judiciary. Representations were made to the Task Force that given these roles and the hierarchical nature of the Judiciary, the powers of the Chief Justice

¹¹ Final Report of the Task Force on Judicial Reforms, July, 2010.

must be exercised judiciously and be subjected to safeguards. The functions of these offices should be clearly defined to avoid any potentialities of misuse of power or conflict.¹²

The advantages and disadvantages of establishing a new court management and administration model should be examined, given the complexities and implications involved. Representations were made that whatever model is chosen should cure the deficiencies in the current system by freeing administrative functions from Judges and magistrates and vesting the management and administration of courts of law in an autonomous entity such as a Judicial Services Unit, Administrative Unit, Agency or Department.¹³

The model should also ensure clear lines of responsibility and accountability for managerial, administrative and operational matters in the Judiciary. For example:-

- (i) There be a separation of judicial functions from court administration through the establishment of an autonomous court administration structure under legislation to oversee the administration and management of courts.

¹² The Task Force therefore recommends that:

- (i) The offices of the Chief Justice, President of the Supreme Court, Deputy Chief Justice, President of the Court of Appeal, Principal Judge of the High Court and Chief Registrar of the Judiciary be established as substantive offices in the judiciary.
- (ii) The Judicial Service Bill be enacted to provide for the functions of the offices of the Chief Justice, Deputy Chief Justice, President of the Court of Appeal, Principal Judge of the High Court and Chief Registrar of the Judiciary.
- (iii) Accountability lines and mechanisms between the Chief Justice, Deputy Chief Justice, President of the Court of Appeal, Principal Judge of the High Court and Chief Registrar of the Judiciary be established.
- (iv) The offices of Deputy Registrar and Personal Assistant to the Chief Justice be institutionalized to assist the Chief Justice in the exercise of the office's administrative and judicial functions.
- (v) The Chief Registrar be the chief administrator and accounting officer of the Judiciary.

¹³ The Final Report on the Task Force on Judicial Reforms, Republic of Kenya, July 2010, "As is the case in countries Like United Kingdom" page 63

- (ii) The offices of the Registrars of the Supreme Court, Court of Appeal, High Court, JSC and subordinate Courts be established by legislation.
- (iii) Clear job descriptions, reporting responsibilities and protocols be developed and issued to all judicial officers and staff to facilitate supervision, monitoring and evaluation in the judiciary.
- (iv) The Human Resources Department be strengthened to oversee human resource management and development in the Judiciary.
- (v) An Inspectorate Unit be established to independently monitor the operations of the courts on a continuous and regular basis.
- (vi) The Central Planning and Project Management Unit (CP & PMU) be strengthened to enhance its effectiveness in data collection, monitoring and evaluation in the Judiciary.
- (vii) Pending the appointment of professional court administrators, all officers engaged in court administration be trained in court administration and management.
- (viii) Resident Judges be required to supervise courts within the region in which the High Court is situated and present status reports to the Chief Justice and the Chief Registrar of the Judiciary.

In recognition of the importance of the separation of powers to the fair administration of justice, the United Nations Human Rights Committee¹⁴ has repeatedly recommended that states adopt legislation and measures to ensure that there is a clear distinction between the executive and

¹⁴ Communication No 263/1987, *M Gonzalez del Rio v Peru* (Views adopted on 28.10.1992), UN Doc CPR/C/46/D/263/1987 at para 5.2.

judicial branches of government, so that the former cannot interfere in matters for which the judiciary is responsible.¹⁵

Kenya is a State Party to several international human rights treaties, including the United Nations International Covenant on Civil and Political Rights (ICCPR).¹⁶ The ICCPR stipulates in Article 14(1) that ‘all persons shall be equal before the courts and tribunals’ and that ‘in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. The United Nations Human Rights Committee (HRC), the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal ‘is an absolute right that may suffer no exception’.¹⁷

1.1. BACK GROUND

There were earlier proposals for judicial reform between 1960- 1998. The seeds of the present-day judicial reform programme in Kenya were planted prior to, and in the years following, independence when numerous committees were appointed to study various aspects of the civil service which, until the early 1990s, included the judiciary. The most relevant committee reports issued during this period were the following:¹⁸

¹⁵ Concluding Observations of the Human Rights Committee on Romania, UN Doc CCPR/C/79/Add 111, para 10.

¹⁶ Date of accession: 1.5.1972.

¹⁷ Communication No 263/1987, *M Gonzalez del Rio v Peru* (Views adopted on 28.10.1992), UN Doc CPR/C/46/D/263/1987 at para 5.2.

¹⁸ Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya. February 2010: A Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute. Supported by the Law Society of Kenya: page 28-29

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

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

On 27 December 2007, Kenya held presidential, parliamentary and local government elections. Initial results in the presidential election indicated that Odinga was leading Kibaki by at least 200,000 votes.¹⁹ However, a delay in announcing the presidential contest raised doubts about the overall conduct of the election.²⁰ On 30 December 2007 the chairman of the Electoral commission of Kenya (ECK) declared incumbent Mwai Kibaki as the winner of the presidential election by a margin of 231,728 votes. This unanticipated reversal ignited suspicions of ballot-

¹⁹ Commonwealth Secretariat, Country Profile: Kenya. Available online at: www.thecommonwealth.org/YearbookInternal/139182/politics/.

²⁰ UK Foreign and Commonwealth Office, Country Profile: Kenya. Available online at: <http://www.fco.gov.uk/en/travel-and-living-abroad/traveladvice-by-country/country-profile/sub-saharan-africa/kenya?profile=politics&pg=7>.

rigging. Violence erupted in sections of Nairobi and opposition strongholds in Nyanza, Rift Valley, Western and Coast provinces as supporters of Odinga and supporters of Kibaki clashed with police and each other. Some of the violence assumed an ethnic dimension with the Kikuyu perceived as pro-Kibaki and the Luo as Odinga supporters.

In order to resolve the crisis, negotiation teams representing the PNU and ODM began talks under the auspices of former United Nations (UN) Secretary-General Kofi Annan and the Panel of Eminent African Personalities (Benjamin Mkapa of Tanzania and Graca Machel of Mozambique). The political settlement led by Kofi Annan also established a reform agenda designed to address the underlying causes of the post-election violence. The Kenya National Dialogue and Reconciliation (KNDR) framework identified four main agenda items for the purpose of addressing the causes of the crisis, reconciling communities, and preventing future conflicts in the country. Among the Agenda Items was Agenda Item IV that stipulated long term issues, including constitutional, legal and institutional reforms; land reforms; tackling youth unemployment, tackling poverty, inequity and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability.

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

National Dialogue and Reconciliation Agreement to undertake comprehensive reforms of the judiciary. The Kenya National Dialogue and Reconciliation process has prioritized a number of steps to reform the judiciary. They include the following:

- a) Constitutional review to anchor judicial reforms, including financial independence, transparent and merit-based appointment, discipline and removal of judges, strong commitment to human rights and reconstitution of the Judicial Service Commission;
- b) Enactment of the Judicial Service Commission Act, with provisions for peer review mechanisms and performance contracting; and
- c) Streamlining of the functioning of legal and judicial institutions through the adoption of a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes and activities in the justice sector.²¹

Principle 1 of the UN Basic Principles on the Independence of the Judiciary requires states to guarantee judicial independence “in the Constitution or the law of the country.”²² However, in Kenya the repealed Constitution fails to entrench judicial power exclusively in the judiciary, nor does it unambiguously guarantee its independence. That is why the Judicial Service Commission was formed to enhance the independence of the Judiciary. Under the previous existing legal regime, it derived its mandate from Articles 68 and 69 of Chapter 4 of the then Constitution of Kenya. In the current Constitution²³, it provides for the principles that the courts and tribunals shall be guided by.

²¹ Kenya National Dialogue and Reconciliation Monitoring Project – Agenda Item 4 Long-Standing Issues and Solutions - Draft Report on status of implementation January 2009.

²² UN Basic Principles on the Independence of the Judiciary, Principle 1. See also principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4(a).

²³ Article 159 (2)

The JSC is responsible for ensuring that the Judiciary has adequate and motivated staff for efficient service delivery. It is expected to handle all matters relating to human resource management and development.

The then Judicial Service Commission was made up of five (5) members as follows:-

1. The Chief Justice;
2. The Attorney General ;
3. Two judges, one from the High Court and another from the Court of Appeal;
4. Chairman of the Public Service Commission;

1.2. Statement of the Problem

Attainment of Independence and effective Judiciary for a vital democratic society, founded on the rule of law and respect for fundamental rights and freedom. By arbitrating on disputes in society and upholding the rule of law and limitation of governmental power, the judiciary contributes to social order. What is not clear however is that why has the Kenyan community lost so much faith in the judicial arm of the government. Yet from the onset it appears as the only institution that can provide enough mechanism best placed for settle of disputes.

1.3. Objective of the Study

- (a) To analyze reforms necessary to make the Judiciary responsive to change.
- (b) To establish ways and means of making the judiciary more responsive to individual freedom and human rights.

(d) To analyze the role of judiciary as a third arm of the government in Kenya.

(e) To establish ways of improving delivery of judicial services to all consumers.

1.4. Scope of the Study

This research will consider generally problems that the judiciary has been facing and its effect on administration of justice in the Republic of Kenya and the current efforts towards reforming the judiciary in line with the new constitutional dispensation.

Following the post-election crisis in 2007, judicial reform was identified as one of the areas of focus towards restoring the credibility, integrity and independence of public institutions in Kenya.

Under **Agenda Item IV** of the Kenya National Dialogue and Reconciliation, the two Grand Coalition Government partners agreed to undertake comprehensive reform of the Constitution and key governance institutions including the Judiciary, as part of the long-term solutions to the crisis.

1.5. Hypothesis

Issues bedeviling the judiciary have impacted negatively on the administration of Justice in the Republic of Kenya. The judiciary is a strong institution that can be aptly utilized to solve future post election violence.

CHAPTER TWO

LITERATURE REVIEW

2.1. Introduction

This study investigates on the extent to which the independent and effective Judiciary is vital for a democratic society founded on the rule of law and respect for fundamental rights and freedoms. The Judiciary is the third arm in the Government. It consists of the courts and all officers of the courts, including the Chief Justice, the Attorney-General, judges and magistrates. The primary role of the Judiciary is to independently and impartially administer justice and arbitrate legal disputes. The Judiciary also reinforces checks and balances between the other arms of government and by so doing, ensures constitutionalism. By arbitrating on disputes in society and upholding the rule of law and limitation of governmental power, the Judiciary contributes to social order that is a foundation for social and economic development.

The Report²⁴ identifies several challenges that the judiciary faces;

- I. Complex rules of procedure that undermine access to justice and expeditious disposal of cases;
- II. Backlog and delays in the disposal of cases thereby eroding public confidence in the Judiciary;
- III. Manual and mechanical systems of operations that affect efficiency in service delivery;
- IV. Inadequate financial and human resources that contribute to case backlog;
- V. Inability to absorb donor funds due to complex procurement and other financial procedures;

²⁴ The final Report on the Task Force on Judicial Reforms, Republic of Kenya, July 2010, at page 1

- (g) An offence involving dishonesty.

Corruption undermines institutional delivery of services to the people of Kenya. It undermines the rule of law and the administration of justice. On the onset, Corruption is a vice in the judiciary that must be addressed fairly and squarely with the rigors it merits.

2.2. Administration of Justice

The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government. The different organs of the state have exclusive and specific responsibilities and by virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere.²⁷

In different countries, we see different cases in the judiciary. According to a **panel of experts**²⁸ Turkey is ruled by judges, not the people. As such, it is nothing but a "**juristocracy**". According to **Professor Serap Yazici** " Since the foundation of the Republic, the ideological structure that dominates the governmental body and the ruling elite has assigned the judicial bureaucracy to protect the government's ideology instead of the law and constitution."

The Integrity and Anti-Corruption Committee, also referred to as 'the Ringera Committee', was

²⁷ The Human Rights Committee has referred to the principle of separation of powers when it noted that: 'lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy'(Concluding Observations of the Human Rights Committee on Slovakia, UN Doc CCPR/C/79.Add 79, para 3).

²⁸ Meeting held in Turkey on Thursday May 6th 2010.

appointed on 18 March 2003 and presented its report on **30th September 2003**. The report noted that judicial corruption was rampant. It cited credible evidence of corruption on the part of five out of nine **Court of Appeal judges** (56 per cent), eighteen out of thirty six **High Court judges** (50 per cent) and eighty two out of two hundred and fifty two **Magistrates** (32 per cent).²⁹ Prior to informing the accused of the allegations against them, however, a 'List of Shame' was published in the media, naming the judges and magistrates implicated in the report. The Acting Chief Justice then, **Mr. Hon. Justice Evans Gicheru**, publicly advised those named on the List to resign quietly within two weeks or be suspended without pay or privileges and face tribunals. **Fifteen judges** resigned but two Court of Appeal judges and **six High Court judges** decided to face tribunals. Most prominently, **Justice Waki**, a Judge of the Court of Appeal, challenged the allegations against him and secured his reinstatement in late 2004. Of the eighty two magistrates implicated, seventy two were 'retired' by the JSC in the public interest. The process of publicly naming individual judges and magistrates as corrupt without giving them prior notice of charges against them was widely criticized, as was the pressure placed on them to resign from office. These actions were seen to compromise judicial independence, including security of tenure, and undermine the right to due process.³⁰

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

²⁹ Report of the Integrity and Anti-Corruption Committee of the Judiciary, page 31

³⁰ ICJ Report, Kenya: Judicial Independence, Corruption and Reform, April 2005. See also The Hon Mary A Ang'awa (resident Judge of the High Court of Kenya), A View from Kenya, American Bar Association, Fall 2009, Vol 36, No 1.

recommend that Chief Justice Evans Gicheru be invited to submit his resignation.³¹ However, this action was feared to not only represent an infringement of the security of tenure of judicial office, which is an essential component of an independent judiciary, but it would also establish a dangerous precedent for the future. Moreover, it was considered that removal of an individual does not reform an institution.

However, Mr Justice Evans Gicheru retired on 27th February 2011 to paved the way for the appointment of a new Chief Justice. According to the JSC, foreign judges can now apply to become Kenya's Chief Justice.³²

The process of replacing Mr. Justice Evans Gicheru stalled after President Mwai Kibaki and Prime Minister Raila Odinga failed to agree on the president's nomination of Mr. Justice Alnashir Visram. The JSC, the committee on Implementation of the Constitution and Mr. Raila Odinga claimed that the nominations by the president were unconstitutional thus new nominations are to be made. Under the Constitution, a person applying for the job of Chief Justice should have 15 years' experience as a superior court judge³³. Alternatively, the candidate should have at least 15 years' experience as a distinguished academic, judicial officer or legal practitioner.

Justice Daniel Musinga's ruling³⁴ is a major step towards defending constitutionalism in Kenya where the respect for the supreme law has always been taken for granted by the Executive.

³¹ Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya. February 2010: A Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute. Supported by the Law Society of Kenya: page 37.

³² Daily Nation, Tuesday March 1, 2011 By Jillo Kadida

³³ Article 166 (3) of the New Constitution

³⁴ "President Kibaki's nominations a breach of the Constitution."

Looking at the history of Kenya, upholding all due respect for our very first president of Kenya and the struggle that was impacted in gaining independence from the colonial rule, soon after independence Mzee Jomo Kenyatta changed the constitution to give himself enormous powers. President Daniel Arap Moi simply perfected Kenyatta's dictatorship by making himself, constitutionally, the most powerful despot in this part of the world.

It might be too early to suggest that Justice Daniel Musinga's defence of the Constitution elevates the country into a new level of constitutionalism which will make Kenya even more respected as a country. It asserts the supremacy of law.

2.3. Judicial Service Commission

Judicial Service Commission (JSC) or Judicial Councils as they are called in some jurisdictions are central to the independence, integrity and efficiency of the judicial system. **Clause 2**³⁵ provides that "**Commission**" means Judicial Service Commission. Judicial Service Commissions or Councils generally oversee the functioning of the Judiciary and ensure judicial independence and accountability through their oversight roles in the governance of the Judiciary in general, and the appointment, discipline, and removal of judicial officers in particular. **Article 172 (1)**³⁶ provides that the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall-

- (a) Recommend to the president persons for appointment as judges;
- (b) Review and make recommendations on the conditions of service of-

³⁵ The Judicial Service Bill, 2010

³⁶ The new Constitution Of Kenya

- i. Judges and judicial officers, other than their remuneration; and
- ii. The staff of the judiciary;

The functions of the JSC have evolved to include not only broad governance or policy-making roles on the Judiciary, but also disciplinary control over judicial officers, performance management and evaluation, and court management in some jurisdictions.³⁷

2.3.1. Composition

The establishment and functions of the Commission and appointment of members shall be in accordance with the Constitution.³⁸ The membership of the JSC has been criticized for consisting only of persons appointed by the President and there is therefore the perception that the JSC is not sufficiently independent of the Executive. However, according to the new constitution, this is no longer the case because **Article 129 (2)** provides that executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

Members of the Commission, apart from the Chief Justice and the Attorney- General, shall hold office, provided that they remain qualified, for a term of five years and shall be eligible to be nominated for one further term of five years.

³⁷ Article 172 (1) (c)

³⁸ Clause 13(1) Of the Judicial Service Bill, 2010

The Constitution does not provide for the position of a secretary to the Commission. However, **section 3(1)**³⁹ provides for a secretary to the Commission. The Secretariat functions of the JSC are performed by the Registrar instead of a Secretariat as envisaged in the Service Commissions Act. Therefore, there is lack of a clear separation between the operational or administrative arm of the Judiciary headed by the Registrar and the policy making body for the Judiciary, namely the JSC.

However, membership of the Judicial Service Commission should consist of the following:⁴⁰

- (a) One Supreme Court Judge, other than the Chief Justice, elected by the judges of the Supreme Court, if a Supreme Court is established;
- (b) One Court of Appeal Judge, other than the Chief Justice, elected by the judges of the Court of Appeal;
- (c) a full-time chairperson who will be the judge of the highest court elected in accordance with either (a) or (b);
- (d) One High Court Judge, other than the Chief Justice, elected by the judges of the High Court;
- (e) One member from the subordinate courts elected by the Kenya Magistrates and Judges Association (KMJA);
- (f) One member elected by the Kenya Women Judges Association (KWJA);
- (g) Two advocates, one of each gender, of at least 15 years standing elected by the Law Society of Kenya (LSK);
- (h) One lay member elected by the Kenya Private Sector Alliance (KEPSA)

³⁹ of the Service Commissions Act (Cap 185 Laws of Kenya)

⁴⁰ Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya February 2010, pg 94

The functions of the Judicial Service Commission should be restructured, as provided for in

Article 211 of the harmonised draft Constitution of Kenya as follows:

- (a) to ensure and enhance the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice;
- (b) to recommend to the State President persons for appointment as judges;
- (c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their remuneration;
- (d) to advise the State President on the membership of a tribunal referred to in **Article 207(5) (a)** and **(b)**;⁴¹
- (e) to receive complaints against, investigate and remove from office or otherwise discipline, registrars, magistrates, other judicial officers and other staff of the judiciary, in such manner as may be specified by an act of parliament;
- (f) to prepare and implement programmes for the continuing education and training of judges, magistrates, other judicial officers and other staff of the judiciary;
- (g) to advise the national government on improving the efficiency of the administration of justice, and on access to justice, including legal aid;
- (h) to ensure competitiveness and transparent processes for the appointment of judicial officers and other staff of the judiciary;
- (i) to promote gender equality.

Also, the Judicial Service Commission should be provided with its own Secretariat and this Secretariat should be adequately funded from its own budget allocation, as provided for in the draft Judicial Service Commission Bill 2009.

⁴¹ Constitution of Kenya

2.3.2 Independence

The Commission shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) Suing and being sued;
- (b) Purchasing or otherwise acquiring, holding, charging and disposing of movable or immovable Property;
- (c) Borrowing and lending money;
- (d) Entering into contracts;
- (e) Doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully done or performed by a body corporate.⁴²

The JSC must exercise its functions, and shall not be subject to the direction or control of any person or authority. However, judicial independence has underlying implications, each of which is addressed in different parts of this Report:⁴³

⁴² Clause 13(2) of the Judicial Service Bill, 2010.

- ⁴³ i. That judicial officers must be persons of integrity and ability, with appropriate training and qualifications in law.
- ii. That the tenure of judicial officers should be secured in the constitution and/or any other law.
- iii. That adequate resources are provided for the Judiciary to operate effectively without any undue constraints which may hamper its independence.
- iv. That the Judiciary's budget should be separately presented for approval by the Legislature and managed autonomously. The Judiciary itself should undertake its planning and management of the Judiciary Fund.
- v. That the remuneration of judicial officers and other judicial staff and expenses of the Judiciary be secured by law and charged on the Consolidated Fund. Further, that the remuneration of Judges should not be reduced or altered to their disadvantage.
- vi. That judicial officers and staff should be paid competitive salaries determined on a regular basis by an independent body.

Independence of the Judiciary has arisen particularly with regard to the funding of its operations.

Article 173 (1)⁴⁴ provides that there is established a fund to be known as the judiciary Fund which shall be administered by the Chief Registrar of the Judiciary.

The Judiciary is funded from public resources through the Medium Term Expenditure Framework (MTEF) process in which public institutions are grouped into sectors. The Judiciary is grouped in the Governance, Justice, Law and Order Sector, together with the Office of the President, the Office of the Vice President and Ministry of Home Affairs, Parliament, Ministry of Justice National Cohesion and Constitutional Affairs (MoJNCCA), State Law Office, the Kenya Anti Corruption Commission (KACC), Ministry of State for Immigration and Registration of Persons and the Interim Independent Electoral Commission (IEC). Each institution in the sector is subjected to a resources “ceiling”.

The Funding shall be used for administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of the functions of the judiciary.

To the independence of the JSC and the Judiciary, the⁴⁵ following should be addressed:

-
- vii. That funds allocated to the Judiciary must be sufficient and sustainable. Funds allocated to the Judiciary through the budgetary process should be ‘ring-fenced’ so that the resources are not subject to reduction by Treasury.
 - viii. That judicial officers are not liable in any action or suit for any act or omission done or not done in the exercise of their judicial functions.
 - ix. That appointment of judicial officers must be merit based and transparent
 - x. That judicial appointments to all levels of the Judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and other historic factors of discrimination.
 - xi. That the Judicial Service Commission should not be under the direction or control of any body, person or authority.

⁴⁴ The new Constitution Of Kenya

- i. Legislation proposed in several parts of this Report be enacted so as to cumulatively guarantee the independence of the JSC and the Judiciary.
- ii. The remuneration and benefits payable to judicial officers and the administrative expenses of the Judiciary be charged on and issued out of the Consolidated Fund.
- iii. The Judiciary be allocated in the minimum 2.5% of the annual national budget to meet its recurrent and development expenditure.
- iv. Financial allocations to the Judiciary be provided on a sustained basis to facilitate the proposed judicial reforms in this Report.
- v. A Judiciary Fund be established and mechanisms for 'ring-fencing' its funds entrenched under the Judicial Service Bill.
- vi. Legislation be enacted to regulate the management of a Judiciary Fund and establish procedures that guarantee the financial independence of the Judiciary.

⁴⁵ Task Force Recommendations on Independence of the Judiciary

CHAPTER THREE

ANALYSIS

3.1. Access to Justice, Human Rights and Combating Corruption in the Judicial System.

This report does not purport to present an exhaustive analysis of the functioning of the judicial system of Kenya. The International Bar Association's Human Rights Institute (IBAHRI) and International Legal Assistance Consortium (ILAC) are mindful that both the deficiencies of the legal system and the legislative and administrative reforms that are needed in order to enable it to function in accordance with accepted international standards have been the subject of numerous previous reports, studies, workshops, colloquia and seminars.⁴⁶ Rather, the ambition of this research is to outline the major obstacles facing the judicial system and assess where international and regional expertise may be most constructively applied in order to provide assistance to the ongoing process of judicial system reform.

Poor terms and condition of service were perceived to cause corruption in the Judiciary. The Judiciary has an important role to play in the promotion, protection and enforcement of fundamental rights and freedoms. Initially, the courts were extremely rigid in their interpretation and enforcement of fundamental rights and freedoms and particularly so in 'political' cases, laying undue regard to procedural technicalities than substantive justice. This view was reinforced by the fact that past Chief Justices did not formulate rules of procedure for the High Court in relation to the enforcement of fundamental rights and freedoms.

⁴⁶ A Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute.

3.2. The existence of a culture of corruption in the society.

The salaries and allowances paid to magistrates and paralegal staff were inadequate to enable them to live according to their high status in society. Where Government housing is not provided, the house allowance paid to the officers is inadequate to enable them lease accommodation commensurate with their status. Concern is also expressed on the wanting of security that occasionally forces some magistrates to accept bribes. The Ringera report Committee⁴⁷ concurs with the view that the aforesaid poor terms and conditions of service were conducive to corruption and must be addressed as one of the strategies of fighting against judicial corruption.

There were also reports⁴⁸ that throughout Kenya, the practice in the judiciary was largely due to recruitment and deployment of paralegal staff in their home localities. It was noted that some joined service and retired without ever having been transferred from their 'home stations'. Some were recruited into magisterial service practicing advocates and posted to the very towns and areas where they had been practicing law. As such, corruption has taken root from overstay of all cadres of Judicial Officers in one station.

On the issue of delays in the hearing, and determination of cases, whether deliberate or otherwise, had an effect of inducing anxiety on the part of litigants and that such anxiety leads the judges and magistrates to be corrupt.

⁴⁷ Report of the Integrity and Anti Corruption Committee of the Judiciary of Kenya. (Vol. 1) (The Ringera report) September 2003. Page 14

⁴⁸ Ibid

Basically, all the problems associated with the judiciary narrow down to corruption. The corrupt individuals are not shunned and corruptly obtained wealth is not stigmatized. As a matter of fact, the corruptly acquired wealth is envied and idolized. Before all these scrutiny of the judiciary, it was realized that members of the public who desire to win cases by all means, fair and foul believe that justice could not be obtained without consideration.

This culture of corruption in Kenya has been fostered largely by a climate of impunity for corrupt individuals and poor governance in its broadest rendition to include poor leadership, weak rule of law and inappropriate institutional frameworks. Supervision of the court staff should seriously be upheld. Resident judges complain that in reality, they had no authority over the Deputy Registrars or other Magistrates under them.

3.3. Administration of Justice and Human Rights.

The objective of every justice system is to administer justice by protecting parties' legal rights and the rights of citizens. However, before the Judiciary was scrutinized, it was plagued with the cancer of unmeritocratic recruitment and promotions. Judges were appointed and/or promoted on the basis of political and/or ethnic considerations rather than competence and integrity.

The Task Force received representations that some aspects of the justice system undermine instead of advancing human rights and fundamental freedoms. In this regard, representations were made relating to overcrowding in prisons, in part due to the absence of bail and sentencing policies. Representations were also made that there are children held in adult prisons, contrary to

international human rights standards and the **Children's Act**⁴⁹ which requires separation of children in prisons facilities.

The Task Force⁵⁰ also received representations that an efficient, human rights-compliant, people-oriented, and accountable Police is indispensable to a functional and fair justice system.

Representations were made that unless the integrity of the functions of the police is guaranteed, the judicial process may not by itself provide access to justice. For instance, the Task Force was informed that arbitrary police arrests or 'swoops' or ill-treatment have an impact on judicial caseload and public trust in the justice system and should be addressed immediately as part of the ongoing police reforms. Finally, representations were made that the investigation and prosecution roles of the police should be separated.⁵¹

With the exception of cases where the offence is punishable by death, it is a constitutional right of every person arrested or detained to be released through bail or bond. As a general principle, the amount of bail is dependent upon the circumstances of the case. It should not be excessive as to result in denial of bail and pre-trial detention. However, in practice, subordinate courts have required disproportionately excessive bond terms, leading to applications in the High Court for review. This has led to circuitous court applications, in addition to overcrowding in prison facilities.⁵²

⁴⁹ (Act No. 8 of 2001),

⁵⁰ The Final Report on the Task Force on Judicial Reform, Republic of Kenya , July 2010

⁵¹ The Final Report on the Task Force on Judicial Reforms, Republic of Kenya, July 2010 , page 94

⁵² Recommendations by the Task Force, " (i) Bail guidelines be adopted to ensure that bail or bond terms are affordable, reasonable and consistent with the law.

(ii) A coordinated verification mechanism be instituted by the Judiciary, the Registrar of Motor Vehicles and Commissioner of Lands for documents used as security."

However, with the new Constitution of Kenya, cases have been tested on the rights of capital offence suspects to bond. In one case, the court, through **Justice Fred Ochieng'**, declined to grant bail to murder suspects on the reasoning that capital offences did not fall under the realm of bailable offences. Another case came up in Mombasa, *Republic Vs Kassim Shee Mbwana and Another*. In both cases, however, the question before the courts was whether **Article 49(2)**⁵³ of the new Constitution allows bail to murder, robbery with violence and treason suspects.

In the latter case, the Court agreed with John Khaminwa, for the accused, and granted bail. However, cynics say the terms were not "constitutionally reasonable".

Although there appears to be an apparent paradigm shift, it is not about to favour criminals. The term "compelling reasons" in the Constitution, do not take away discretion from judges. On the contrary, these "reasons" are resilient enough to create a reverse effect. So that even in bailable offences, it is not about a walk in the park. The court will consider the magnitude of the offence; whether the accused will consider jumping bail or will likely interfere with witnesses. Sometimes it will consider the circumstances leading to arrest. Rightly or wrongly, in **Republic Vs Margaret Gachara** case for instance, the court declined to grant the suspect bail owing to circumstances leading to her apprehension.

The law mandates judges to condemn capital offenders. Indeed hanging or legal killing by any standard, is an archaic and barbaric way of meeting justice. It is often seen as ungodly. There is a reenergised need to relook at our criminal justice. In any case, right to life under the new Constitution does not take away "guillotine justice"⁵⁴.

⁵³ New Constitution

⁵⁴ Published on 06/11/2010 By T K Bittok

Death penalty amounts to torture for the many victims who face death row for years on end waiting for an uncertain hangman. Moreover capital penalty is an alien concept that had no place in our customary justice system. Now that the Constitution allows wide borrowing, international instruments such as those on torture, human rights, humanitarian and refugees, should be the guiding norms towards attaining reforms in criminal justice system. As illustrated by the judgement in the recent court of appeal decision in **Godfrey Ngotho Mutiso Vs AG**⁵⁵ which outlawed imposition of mandatory sentences.

Although the repealed constitution had an imperfect Bill of Rights, its problem was not only to give too much power to the Head of State, but also to allow the President to violate both the first and second generation human rights with impunity. The present Constitution has commendable mechanism of correcting any attempt to violate it, long before the violations have any negative impact.

For instance, Articles 33 and 34 which protect the freedoms of expression and the media. These provisions enable Kenyans engage in a healthy debate on president Mwai Kibaki's nominations on the appointment of the Chief Justice long before Justice Musinga made his verdict. It is as a result of the healthy debate that Kenyans trusted that the High Court could not back any unconstitutional appointment by the Head of State.

⁵⁵ [2010] eKLR

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

4.1. Recommendations

The slow pace and sometimes non-implementation of reform initiatives in the Judiciary has been a matter of concern. Deep-seated patterns of corruption in the administration of justice remain a serious impediment to the rule of law in Kenya. However, only substantial and radical reforms in a coordinated and consistent manner will restore the efficiency, effectiveness and credibility of the Judiciary.

The adoption of Chapter 10,⁵⁶ will serve as an appropriate framework for an independent judiciary and the protection of human rights. The principles of judicial independence and accountability should be strictly observed in the discipline and removal of judges and magistrates. The process of disciplining and removing judges and magistrates should scrupulously comply with the principle of security of tenure and due process.

However, during this time of removal of judges and magistrates, an independent complaints procedure that can receive complaints on alleged misconduct and unethical behavior of judges and magistrates and other judicial staff should be established. The public should have access to such complaint procedure.

The procedures for complaints against judges and magistrates and relevant disciplinary procedures should be regulated by law. In the meantime the Judicial Service Commission should promulgate clear rules and procedures for receiving and handling substantiated complaints against magistrates and other judicial officers under their disciplinary control. The procedure

⁵⁶ New Constitution of Kenya

must ensure guarantees of a fair hearing and expeditious resolution of any complaints, with recourse to judicial appeal.⁵⁷

In the appointment and promotion procedures for both judges and magistrates need to be **improved** to allow **clear, transparent** and **objective** criteria to be applied and verified for all judicial positions, including the position of Chief Justice. Clear procedures in the nomination, selection and appointment of members of the judiciary should be established. All judicial vacancies, including those of the higher courts, should be advertised with clear deadlines for application. A consultative process must be set up where other stakeholders, such as the Law Society of Kenya and other organizations, may provide nominations according to previously set criteria. A "**vetting procedure**" is recommended through the publication of final nominations that would invite any substantiated submissions from the public and other interested parties.

Recently, there was an active campaign for the withdrawal of the judicial nominations made by the president for persons proposed to take up the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget. It was argued that **Article 129**⁵⁸ and **Article 131 (2)**⁵⁹ of the New Constitution were not upheld. During this period it was believed that **Article 10**⁶⁰ which sets out the national values and principles was disregarded whilst undertaking the nominations. **Article 27**⁶¹ which provides for equality and freedom from discrimination, however, the nomination process that was undertaken did not afford equal

⁵⁷ Judicial Independence, Corruption and Reform

⁵⁸ Executive authority shall be exercised in a manner compatible with the people of Kenya.

⁵⁹ Authority of the President which includes respecting, upholding and safeguarding the Constitution.

⁶⁰ The Proposed Constitution of Kenya, 6th May, 2010

⁶¹ Ibid

opportunity to both men and women.⁶² The nominations proposed favoured only men and discriminated against women. The House Speaker Kenneth Marende's ruling and that of Justice Musinga that declared the nominations unconstitutional, was found to be reasonable, fair and Just by the people of Kenya.

The law should expressly guarantee security of tenure for magistrates in Kenya. Magistrates should be treated as full judicial authorities and all other principles of judicial independence and accountability, including tenure; qualifications and appointments, discipline and removal and judicial ethics should apply to magistrates as they apply to judges.⁶³

Continuing judicial education should be developed on an institutional and long-term basis. It should be required for all members of the judiciary in the country. Appropriate training for judicial support staff should also be made available. Any continuing judicial programme should support opportunities for the judiciary to develop new fields of legal specialization.

4.2. Quality of Training

Training is vital to produce a new generation of competent justice officials, it will not do so unless it takes place in the broader context of judicial reform. Indeed, training in the absence of structural reforms could be counterproductive. While there is some cynicism about international programs, there is widespread acceptance that judges need better preparation and that training should be compulsory for all.

⁶² Naomi Wagereka, chair person, Fida- Kenya

⁶³ Kenya: Judicial Independence, Corruption and Reform

In Kenya, there is a Judicial Training Institute, however, there is need to be able to develop independently a proper curriculum for enhanced judicial training based on the real needs of judges. Most importantly, the rules should change to ensure that all new judges receive specialised training. The justice ministry needs to seek ways to come up with ways to support training in coming up with proper budget and stable funding. The IBAHRI and ILAC recommend that the capacity of the JTI to carry out its mandate could be substantially increased through the injection of additional financial resources. Additional funding would enable the JTI to meet its training expenses, purchase library materials and procure essential computer equipment. Further, the JTI could benefit from the advice of one or more regional and/or international experts on the education and training of the judiciary with respect to the technical assistance and capacity building needs of the institute. Assistance with curriculum development and the training of trainers could be particularly beneficial.

With regard to JSC, it's composition should be restructured in such a way as to ensure that it is fully independent from the executive and its membership is truly representative. An expanded membership of the Judicial Service Commission is expected to raise participation of several stake holders and to be inclusive. The functions of JSC have been expanded per the new constitution. Although this is noble idea, the independence of such institution will only be guaranteed if it is backed with financial independence.

To guarantee that these reforms and recommendations are sustained, it is important to ensure that they are owned internally within the Judiciary. In this regard, each judicial officer, from the highest to the lowest ranks, and every member of the Judiciary has a role and an input to make

towards the achievement of these reforms. They must be part of this process, because unless they see the need to reform, they may be obstacles to change. On its part, the JSC and the leadership of the Judiciary should ensure that there is adequate internal capacity to deal with the reforms.⁶⁴

4.3. Conclusion

There is an urgent need to reform the judiciary as an institution for the administration of justice. Under current arrangements, the constitution fails to entrench judicial power exclusively in the judiciary or unambiguously guarantee its independence.

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

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

⁶⁴ Final Report of the Task Force on Judicial Reforms, July, 2010, pg.121

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

Only substantial and radical reforms in a coordinated and consistent manner will restore the efficiency, effectiveness and credibility of the Judiciary. The Government should commit itself to sustaining this momentum, whereas the Judiciary should use this opportunity to see the Judiciary reform agenda succeed. The Task Force⁶⁵ on Judicial Reforms 2009 has formulated numerous constructive recommendations designed to strengthen and enhance the performance of the judicial branch in Kenya.

Musinga's defence of the Constitution elevates the country into a new level of constitutionalism which will make Kenya even more respected as a country that does not only believe in the rule of law, but also implements its supreme law without fear or favour. Having a good constitution is one thing; but obeying it religiously and establishing real constitutionalism in the country is another, much more admirable thing.

⁶⁵ Final Report of the Task Force on Judicial Reforms, July, 2010, pg.121

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