

The Kenyan Section of the International Commission of Jurists

Outline of Presentation and Recommendations to the TJRC

<u>Issue 1</u>: Capital punishment in Kenya is a critical access to justice issue.

- Kenya is increasingly isolated as a retentionist nation:
 - o In all, 13 African countries have abolished the death penalty. These include, in West Africa, Guinea Bissau, Ivory Coast, Senegal and Togo. In southern Africa Angola, Namibia and South Africa have abolished the penalty. The east and central African countries that have abolished the penalty are Rwanda, Burundi, Djibouti, Seychelles, and Mauritius. North Africa has the largest number of retentionist states as none of the countries in this region has abolished the death penalty.
 - If Rwanda, which faced genocide on a massive scale, can abolish the death penalty, no country should consider that it has faced crimes for which the death penalty is a necessary and inescapable response.
- Use of the death penalty is inconsistent with Kenya's ratification of international human rights instruments such as the UDHR, ICCPR, Convention against Torture and adoption and incorporation of the Rome Statute to mention but a few
 - For example, currently, Kenya faces a ridiculous paradox while those facing trial at the ICC for the most serious international crimes are not eligible for the death penalty, a poor Kenyan who steals some bread and does so while carrying a weapon could be sentenced to death; this is a manifestly unfair regime.
- Capital defendants are not provided with sufficient access to legal counsel, making their sentences a systematic violation of human rights
 - The recent Macharia case confirmed that capital defendants have a right to effective counsel under the new Constitution; however this fundamental principle is not being implemented. In the absence of a legal aid scheme in the country, capital defendants' right to counsel is regularly being breached.
- Judicial rulings on capital cases have been arbitrary and inconsistent, making application of the death penalty in Kenya a gross violation of human rights
 - For example, at a recent conference in Rwanda, a Kenyan judge, representing the Kenyan delegation, informed the conference that a Court of Appeal case had removed the mandatory requirement of the Death Penalty as a sentence for certain crimes.

- O However, just the previous day, a High Court Judge had gone against this Court of Appeal decision and had imposed a mandatory death sentence, observing that Courts were under a legal obligation to impose it, going so far as to challenge the President's decision to commute previous death sentences to life imprisonment, saying, "the President should sign death warrants passed by the Court, as failure to do so is to fail in his constitutional duty".
- Under international law, the death penalty is to be imposed only for the most serious crimes and can never be applied in an arbitrary manner. Unfortunately, that is exactly what is happening in Kenya given the confused state of Kenyan judicial decision-making.

Recommendation: The TJRC should recommend that the death penalty be abolished in Kenya.

- Abolition of the death is the only way to ensure that the penalty is not used for purposes of political repression. For instance, South Africa's judiciary outlawed the death penalty in the famous Makwanyane case, observing that this sentence had been a major tool of repression during apartheid, and that there was no justification for such a sentence in a free South Africa. Namibia, which had had a similarly abusive use of the death sentence, decided at independence not to retain the penalty in its law books.
- The danger of deploying the death penalty to achieve political repression is still present in independent African countries, except that because of the changed racial context, it appears less as a political tool. To make this point, the example of Kenya was provided: the longstanding moratorium against the death penalty was temporarily lifted in 1987, to allow the government to execute those convicted for involvement in the abortive attempt to overthrow the government in 1982. The moratorium then resumed and has held until now. The danger is that despite the current moratorium, until the practiced is abandoned in law, the penalty can be arbitrarily applied for political reasons. The pressure generated by political trials can easily lead to a lifting of the moratorium, even if temporarily.
- For all the reasons, discussed above, ICJ Kenya firmly believes that the death penalty should be abolished.

<u>Issue 2</u>: The relationship between the judiciary and the broader fight against corruption in Kenya has been a major problem.

- The judiciary has traditionally been one of the weakest links in that its jurisprudence on corruption has been significantly flawed, resulting in impunity.
- In the worst incidents, the Judiciary has been complicit and an active participant in corruption, for instance in 2005, when judges organized two lawyers to file a suit to oppose the constitutional review process, which at the time had threatened the vested interests of the judges. In essence, the judges judged in their own cause, in a suit that had been procured through deceit.
- "Gatekeeping" is a term that the legal community in Kenya uses to describe arrangements in which the Judiciary ensures that special interests are protected when the Judiciary is called upon

to adjudicate disputes. Gatekeeping is an old problem in the Kenyan judiciary. During the one-party era, which was characterized by attempts to challenge the establishment using the courts of law, the Judiciary organized itself to walk the tight rope of supporting the government of the day as best as it could, on the one hand, and maintaining a façade of impartiality, on the other.

- One of the ways in which gatekeeping was delivered at that time was through the control of
 case allocation in the courts. As part of this scheme, certain "safe" judges were assigned to any
 cases that sought to challenge the government of the day. As a result of this many cases were
 wrongfully decided, including one where the Bill of Rights under the Constitution was found to
 be unenforceable!
- I will highlight three major examples where the gatekeeping function has been exercised:
 - Saitoti Case George Saitoti, then the Vice President and Minister of Finance, was highly implicated by the commission of inquiry into the Goldenberg scandal. He decided to sue the Commission for implicating him. Despite the fact that the Commission was no longer in existence at the time, as it had expired, the judge hearing the case allowed the matter to be filed on the non-existent secretariat of the Commission. Then, in its judgment, the court held that not only were there factual errors in the Goldenberg Report, but it also suggested how the report should be reworded, and, in effect, absolved Saitoti of any liability. This in turn led to several proceedings by other implicated officials, seeking to be similarly absolved. In this case, the Court acted as a gatekeeper, by
 - hearing an appeal on the findings of the Goldenberg inquiry, a power it does not have
 - Allowing the matter to proceed without giving reasonable opportunity for participation by the authors of the report, which had been dissolved
 - The prosecution function of the government was not cloistered by the findings of the inquiry whether or not these were factually correct as the government was not obliged to rely on the contents of the report in mounting a prosecution.
 - Courts have a constitutional duty to review for legality, the decisions of the other arms of government. Illegality in relation to the Goldenberg affair could not have been cured by a mere resolution of Parliament
 - Eric Kotut Case Also stemming from the Goldenberg Scandal, Eric Kotut, and the Governor of the Central Bank was facing a criminal case, but the case has not proceeded on two grounds, that the Goldenberg report contained factual errors, and that there had been inordinate delay in bringing charges against him. There were several irregularities with this case:
 - Kotut sought and successfully managed to impugn the contents of a report whose authors were not in any serious way heard in Court. The High Court allowed Kotut's case to be brought against the Attorney General. The Attorney

General was tasked with defending a report he did not write, on behalf of an entity that no longer existed.

- Secondly, even if the report of the Commission contained factual errors, as the court found it did, it is difficult to accept its decision on the effect of those errors. According to the court, the errors invalidated a trial of Kotut by a court of law. Why would this be the case, if it is accepted that a court of law is under duty to evaluate all the evidence brought before it afresh and is not bound by the contents of the report? Why would the fact that the report had errors not be Kotut's defence to a charge against him in a criminal court? If a trial is brought that is based on erroneous information, an accused will have opportunity to point this out during the trial and will, if the court accepts his reasoning, be entitled to an acquittal. But, it is not clear how errors can invalidate a trial, and there was no legal basis for the court to alter the findings of the Commission of Inquiry on Kotut, even if they were in error.
- Thirdly, the court found that there had been delay in the commencement of proceedings against Kotut, in breach of the constitutional provisions which grant a right to a fair trial within reasonable time. But this is surely incorrect. The constitutional provisions for the right to a fair trial do not prohibit delay in bringing criminal charges against a person. What the provisions prohibit is delay in the hearing of a criminal case once the charges have been brought against a person. As it is possible for a crime to be detected for the first time long after it was committed, it would not be reasonable for the law to provide a time limit, by reference to when the alleged offence was committed, within which a person can be charged in court. The Court misapplied the Constitution, and misrepresented previous cases talking about this subject, to rule in Kotut's favour
- Finally, the Court, without an application on the matter or any cited evidence, found that the amount of publicity that the case against Kotut had received, both in Kenya and internationally, made it difficult to conduct a fair trial of the case. It will remain a mystery why the court decided that the wide publicity on the case was prejudicial to a fair trial.
- If these decisions continue to stand, they will form the basis for further, similar cases to fail.
- Nedmar Case this case is part of the Anglo Leasing scandal, where the government awarded contracts worth \$ 400 million and a further Euros 309 million to 18 shadowy companies. Nedmar was one of the companies involved in these contracts, which were bound by strict secrecy rules. The Kenya Anti-Corruption Commission attempted to investigate these transactions, but was blocked by the Court, which granted orders the Nedmar, ex parte, or without KACC being represented in court, on the basis that an investigation would prejudice the secrecy provisions of the contract. The Court made this determination despite the fact that a government official had filed a sworn

document waiving the secrecy provisions, and in the face of the claim that the contract may have been fraudulent.

- Kadhi Courts Case In this case, a judge sought to ban Kadhi courts. This judgment seems to attempt to outlaw one of the original articles of the Constitution, which the Courts cannot do. And, by including the Constitution of Kenya Review Commission as a party, the Court violated the rule that courts should not act in vain by entertaining litigation with an unenforceable outcome.
- The concern with cases like these, is that certain members of the Judiciary have in the past taken deliberate steps impede access to justice and as a result formed the constitutional basis for judicial vetting process.

Recommendation: The TJRC should declare its support for the ongoing judicial reform projects, and especially the vetting of judges and magistrates. The TJRC should include in its recommendations additional mechanisms to promote an independent, impartial, and corruption-free Judiciary.

<u>Issue 3</u>: Related to issue 2, there have been miscarriages of justice throughout the TJRC's mandated time period as a result of the failure of the judicial system to fairly and effectively carry out its fundamental function.

- This has impacted a wide array of cases including:
 - Wrongfully decided Criminal cases, including death penalty cases
 - Wrongfully decided civil suits that have resulted in manifest injustice
 - Wrongfully decided anti-corruption cases
 - Wrongfully decided land claims cases
- These wrongfully decided cases have two major repercussions:
 - First, the parties in a wrongfully decided case suffer direct injustice, whether through wrongful convictions, improper sentencing, damage awards in civil cases that are disproportionate to the harms suffered, and, especially with regards to land claims, ongoing and perpetual conflict over individual and group rights.
 - Second, in a common law system Judicial Decisions create new law, by virtue of the fact that they are precedent setting. Wrongfully decided, often contradictory decisions mean that a large portion of Kenyan Law is confusing, unclear, unpredictable and unenforceable.

Recommendation:

The TJRC should recommend that the judiciary establish a credible mechanism of case review to ensure that past injustices are remedied. Criminal cases that resulted in deprivation of liberty should be prioritized, especially where the death penalty or life imprisonment has been involved. In addition, an independent body should be formed to specifically review cases and decisions related to past instances of injustice where individuals were prosecuted and punished for political and/or non-legal reasons. Resources and organization should be recommended for on-going judicial training and sensitization on Common Law principles, rules and standards of Judicial Conduct.

<u>Issue 4</u>: Kenya's judicial system suffers from fundamental structural, process, and capacity issues that hamper access to justice and undermine confidence in the Judiciary.

- These problems include:
 - o process issues
 - delays
 - backlog
 - costs
 - personnel issues
 - case management
 - o judicial training
 - court infrastructure and technology
 - o corruption within the judiciary and judicial administration
 - o corruption within the procurement process that supports judicial functions

Recommendations:

The TJRC should publicly declare its support for ongoing judicial reform efforts and specifically recommend that the Judiciary Transformative Framework should be fast structured and priority areas such as those proposed to deal with case backlogs and an increase in judicial personnel should be urgently prioritized. In order to curb the rampant corruption in the Judiciary, the TJRC should recommend that the Vetting process should be extended to include judicial supports staff as they are the main drivers of corruption within the judicial system.

<u>Issue 5</u>: Provision of legal assistance to the poor is a major access to justice issue.

- There currently is no national legal aid program in Kenya. As such, low-income individuals are
 dependent on a network of over-stretched NGO and community-based programs that cannot
 service the demand. As a result, many who need justice are turned away and are unable to
 access the courts.
- ICJ K has worked consistently over the years to improve access to legal services through training and establishing paralegal networks and through working with the Ministry of Justice to develop legal aid legislation.
- However, the major challenges to any legal aid scheme are adequate funding and equitable allocation of resources.

Recommendation:

The TJRC should reiterate the government's responsibility to pass legislation establishing and fully funding a legal assistance regime for those who cannot afford legal services – it should highlight that the legal aid scheme must equitably provide services to particularly vulnerable groups and in traditionally marginalized areas.

<u>Issue 6</u>: The structure of the DPP's office is problematic in that it does not allow for transparent and accountable prosecutorial decision-making.

- In the first instance, the appointment process of the Director of Public Prosecution was heavily criticized for a lack of transparency and resulted in political polarization. The perceived failure in the interview process was attributed to a lack of an open and transparent selection and appointment process such that there is still to date a pending court case on this.
- Currently, the office of the Director of Public Prosecutions faces challenges in its internal structures and has huge operational weaknesses. The present staff was inherited from the State Law Office and the numbers of recommended and authorized posts are yet to be filled or the institution adequately funded. There are new areas of emerging crime that require sound technical competence and likely to be a challenge to the prosecution service.
- Appeals from the prosecution service take too long to finalize and there is limited undertaking of pre trials with witnesses
- There is a weak coordination between the Police Prosecutors and State Counsels

Recommendation:

The TJRC should recommend that all public office appointment processes that require a selection process should be conducted in an open, transparent and credible set criterion. Any appointment that fails to adhere to the established minimum standards should be nullified. It should recommend that the Office of the Director of Public Prosecutions should be adequately funded to enable it function optimally. Furthermore, the TJRC should recommend an increase in of personnel as well as strengthening of the Capacities of the staff at the Office of the Director of Public Prosecutions to enable it deal adequately deal with emerging crimes and recommended prosecutions that are likely to arise from the TJRC Process