

AUGUST 2, 2018

PRESS STATEMENT

**ICJ KENYA STATEMENT ON THE STATE OF THE JUDICIARY IN LIGHT OF
DRASTIC CUTS IN BUDGETARY ALLOCATIONS**

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is highly disconcerted by the undeviating and vicious attack on the Judiciary. We have been following closely, and with great interest, the ongoing budgetary processes and we are particularly perturbed by the reductions made on the Judiciary's budget in the financial year 2018/2019.

ICJ Kenya is deeply concerned about the reprisals against the Judiciary and particularly, the trend by Parliament which has traditionally used budget cuts as an instrument of punishing the judiciary for decisions made by the Courts. In 2015, Members of Parliament threatened to undertake budgetary cuts to the Judiciary after the Courts ruling that the Constitutional Development Fund was unconstitutional. In 2017, the Judiciary and a number of Independent Offices and Constitutional Commissions faced budget cuts as the government sought to raise money for the fresh presidential election and enhanced free day secondary education. In particular, the Judiciary lost about 11.1 per cent. In June 2018, Medical insurance cover for all Judges and its employees was suspended over insufficiency of funds in a move linked to national government threats to 'revisit' judiciary.

Recently, following the capping of the Judiciary's budget from Kshs. 31.2 billion to Kshs.17.3 billion through the National Government's Budgetary Policy Statement, and further to Ksh. 14.5 Billion by Parliament through the Appropriation Act, ICJ Kenya notes with great concern that the actions by the other two arms of government to strangle and curtail the operations of the judiciary through budgetary restrictions amounts to a grave violation of the Constitution and attack to the Kenyan democracy and the Rule of Law.

The crowning feature of any democracy is the supremacy of the Judiciary over all other branches of government and the independence of the Judiciary to exercise its sovereign power as envisaged in the Constitution. Further, Separation of Powers is a fundamental doctrine from which the principle of judicial independence is entrenched. The Constitutional provisions on judicial authority including Article 160 of the Constitution 2010 and independence expressly dictate that in the exercise of judicial authority, the judiciary shall not be subject to the control or direction of any person or authority'. This is because the principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies. Balancing these two principles is pertinent for the government of the day to maintain a healthy democracy. Both institutional independence and decisional independence and accountability is required.

ICJ Kenya recognizes that Parliament and the Executive exhibit Constitutional and legislative mandates to regulate and influence national budgets as envisaged in the Public Finance

Management Act and National Assembly Standing Orders which provide the National Treasury with the mandate to prepare annual Budget Policy Statement, the cabinet secretary to submit budget documents to the National Assembly and Parliament to oversee national finances. The Constitution only mandates the Legislature to approve the Budgetary estimates presented by the Judiciary. The act of the Treasury Secretary to plow into the estimates of the Judiciary before presentation to the Legislature have no Constitutional basis. While the legislature and the executive play a pivotal role in national budgetary controls, the two arms must acknowledge that financial security, alongside security of tenure and administrative independence, constitutes a pertinent element in judicial independence. ICJ Kenya therefore observes that the unsubstantiated, unfounded and malevolent reduction of the judiciary's budget in light of the delayed implementation of the Judiciary Fund constitute plans to deny the Judiciary financial security. This amounts to an attack to the independence of the Judiciary as secured under the Constitution of Kenya.

The Judiciary has in the recent years expanded its presence within the country to increase access to justice as commanded by the Constitution. Efforts to increase efficiency such as clearing case backlogs, digitization of court systems, performance contract etcetera, are responses towards actualizing constitutional commands and depictions of the ideal state of access to justice in Kenya. While these efforts have brought justice closer to Kenyans, significant gaps still plague the institution. Among these challenges includes the absorption of funds which the Judiciary has acknowledged and has worked to correct. However, the Judiciary faces challenges of releases of funds by the National Treasury upon request. Funding therefore remains the ultimate challenge that continuously threatens to cripple the institution.

It is clear that Kenyans must recognize the importance of financial autonomy in the operations of the Judiciary. Funds are a key enabler for achieving access to justice for the people. Without funds, the judiciary is unable to function properly. The judiciary bears the burden of ensuring access to justice to the people. It therefore requires a substantial amount from the national budget to fulfil all the Constitutional obligations.

The international practice of granting the judiciary at least 2.5% of the national budget buttresses the need to respect the independence of the judiciary and its financial autonomy. Notably, International law impresses upon the government to ensure respect of the independence of the Judiciary. Among them, the Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003 urges government to highly prioritize the provision of adequate funding for the judiciary in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once approved by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

Further, the Bangalore Principles of Judicial Conduct 2002 connotes that judicial officers shall exercise the judicial function independently on the basis of their assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

Denying the Judiciary financial security will lead to an increase of graft in the Judiciary, erosion of transparency and accountability, disrespect and non-adherence to the Rule of Law and ultimately the violation of human rights and democracy. In particular, the Judiciary Service Commission in their statement dated 23rd July 2018 notes that the drastic budgetary cuts will lead to stalling of its 41 Government-funded projects which are currently at various stages of completion; Suspension of Mobile Courts; Derailement of the case backlog clearance; derailment of ICT and modernization of court systems; and discontinuation of new constructions.

ICJ Kenya agrees with the Hon. Justice David K. Maraga and with the Judiciary Service Commission that the Judiciary exists not for its own sake but to serve the common person by ensuring the efficient administration of justice and facilitating smooth commercial interactions between business entities.

In view of the foregoing, ICJ Kenya notes that financial allocation must be done in a proportional manner. Funds already allocated to the Judiciary and remaining at the end of the financial years ought not to return to the treasury. This provides the judiciary with financial flexibility and security but does not remove or interfere with the role of treasury and National Assembly in determining the budget and allocation.

ICJ Kenya therefore urges Parliament and the executive to urgently enact and implement legislations, regulations, and rules underpinning the provision of the Judiciary fund. We as ICJ are ready to assist Parliament's Justice and Legal Affairs Committee to come up with the requisite structures to operationalize the Judiciary Fund as envisaged in the Constitution.

As would be expected, budget cuts will impact negatively on the core operations of the Judiciary and ultimately negatively affect the common citizen. All Kenyans must react to these cuts as a though they were directly affected. Indeed they are.

ICJ Kenya urges the public and all civil society stakeholders including Civil Society Organizations and the Media to join hands to ensure that we strengthen the institution and safeguarding gains we have managed to achieve since the promulgation of the Constitution in 2010.

Signed



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Chairman of the Council

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)