

COMMUNIQUE ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN KENYA: EVALUATING THE TENSION BETWEEN THE JUDICIARY AND EXECUTIVE

HELD ON TUESDAY, 16 JUNE 2020

1. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) held its eleventh webinar in a series of justice and rule of law webinars on 16 June 2020. The webinar focused on judicial independence and accountability as constitutional imperatives and the impact of the tension between the Judiciary and the Executive, which undermines the promotion and protection of human rights, democracy and the rule of law;
2. ICJ Kenya sincerely appreciated the participation of its distinguished panellists and participants that were drawn from diverse fields of expertise from all sectors, including government, civil society, the legal fraternity, the private sector and the general public;
3. ICJ Kenya is deeply concerned about the ongoing tension between the Judiciary and Executive following the public exchange between the Chief Justice Hon. Justice David Maraga and the Attorney General of the Republic of Kenya Mr Paul Kihara Kariuki on the issue of pending judicial appointments and disregard of court orders by the Executive;
4. We are alarmed by the ostensible campaign by individuals in the Executive and Legislature that is intended to undermine the mandate of the Judiciary and other related organs as envisaged in the Constitution of Kenya 2010;
5. We are further concerned about the increasing trend in the disregard of court orders by the Executive, with senior government officials topping the list of people ignoring court orders at will and without any fear of reprimand;
6. We note that the Constitution of Kenya 2010 recognises the principle of separation of powers which requires all the three arms of the government to work independently and inter-dependently. The independence and accountability of the Judiciary is therefore imperative and a prerequisite to effective and equal access to justice to all;
7. We acknowledge that judicial independence ensures the protection of the citizens from abuse of power and excesses of the Legislature and Executive as well as promotes accountability in governance;
8. We recognise that as a protector and promoter of human rights, democracy and the rule of law, the Judiciary remains at the heart of competing interests between the Legislature and the Executive;



In the discussion, the panellists and participants acknowledged that:

- a. Ten years after the promulgation of the Constitution of Kenya 2010, there are numerous provisions intended to safeguard judicial independence that are yet to be implemented such as the provisions on the Judiciary Fund;
- b. There is a need for more focus on the implementation of existing laws, including on the Constitution itself rather than the constant agitation for amendment. We are yet to implement what we already have in place;
- c. The three arms of government although independent are mutually dependent, and therefore the government cannot function unless all the arms; Legislative, Judiciary and Executive, are able to function properly;
- d. Alongside the principles of separation of powers is a system of checks and balances that requires consultation and cooperation between the three arms of government;
- e. The obligation on the heads of the three arms of government to consult and cooperate is founded in law by virtue of their capacity as State officers and in the exercise of public authority;
- f. The Kenyan Judiciary is not sufficiently funded and to date receives less than 1% of the government budget against the recommended international global best practice of 2.5% of the national budget;
- g. There is need to ensure a balance in sharing of resources between the three arms of government and denial of resources should not be used to frustrate the Judiciary to the detriment of 'Wanjiku's' right to access justice;
- h. All public institutions are expected to uphold the principles of transparency and accountability in their operations and use of public resources;
- i. Chapter Six of the Constitution provides for the standards of leadership and integrity and all State and public officers must abide by these standards in the exercise of their mandate; the failure to obey court orders is a breach of Chapter Six;
- j. The law also provides for the procedures for disciplinary action against judicial officers whose integrity is in question;
- k. The appointment of judges has repeatedly been a cause of push and pull between the three arms of government since 2011, and therefore this is not an isolated incident, with the Executive and Parliament wanting to influence the appointments. There is therefore need for all the institutions involved to understand their respective roles and to play their part, as well as respect the independence of the others;
- l. The Judiciary and the Judicial Service Commission (JSC) also have a role to play in ensuring public confidence in their independence in delivering their mandate;
- m. The rule of law demands that court orders be obeyed.



In view of the foregoing, ICJ Kenya calls upon:

A. The Executive;

- i. His Excellency the President to swear in the judges recommended for appointment by the Judicial Service Commission in compliance with existing court orders;
- ii. The Office of the President must engage the Office of the Chief Justice in a constructive dialogue and resolve the existing tension between the Judiciary and the Executive;
- iii. His Excellency the President should take the lead in ensuring the smooth running of the three arms of government by fostering cooperation and consultations;
- iv. The Executive must provide all relevant information to the Judicial Service Commission, regarding any allegations pertaining to the integrity of the nominated judges in order to trigger the commencement of necessary disciplinary action as prescribed in law;
- v. The Executive should facilitate the establishment of the Judiciary Fund in line with the provisions of the Constitution and the Judiciary Fund Act.
- vi. The Executive should obey court orders issued against it.

B. The Judiciary:

- i. The Office of the Chief Justice should engage with the President with a view to fostering cooperation and consultation and resolving the subsisting impasse with the Executive;
- ii. The Judiciary should uphold the highest standard of professionalism, consistently uphold the rule of law, ensuring that complaints of judicial misconduct are dealt with firmly and swiftly in order to build trust amongst members of the public;
- iii. The Judiciary should ensure that justice is done and is seen to be done by reducing delays in hearing and determination of cases and clearing backlog;
- iv. The Judiciary should be prudent, transparent and accountable in the use of public resources;
- v. The Judiciary should ensure that the competence of judicial officers is paramount.

C. To the Attorney General:

- i. The Attorney General should uphold the Constitution and the rule of law in the performance of his duties in line with his constitutional obligation to promote and protect the rule of law, and defend the public interest;



- ii. The Attorney General should ensure compliance with all court orders issued against the Executive as the principal legal adviser to the government;
- iii. The Attorney General should observe neutrality and fidelity to the law in the exercise of public power;
- iv. The Attorney General should ensure the implementation of the Constitution and other legislation critical to the independence of the Judiciary, such as the establishment of the Judiciary Fund.

D. To the Judicial Service Commission:

- i. The JSC should ensure complete transparency and accountability in the execution of its mandate;
- ii. The JSC should fully disclose, at the earliest opportunity, information that may result in a perceived or actual external influence;
- iii. The JSC should expedite the hearing and finalisation of complaints against judicial officers in order to promote public confidence in the Commission;
- iv. The JSC should ensure that when evidence is provided to them on the alleged integrity issues pertaining to judicial officers, a tribunal is set up to conduct investigations in accordance with the law.

E. To the Constitutional Commissions:

- i. To proactively carry out their mandate as oversight bodies over the government as stipulated by the Constitution.

F. To Civil Society Actors:

- i. Civil Society should continue to seek accountability from the three arms of government, respect for the rule of law and the principles of separation of powers through the various tools available to them including public interest litigation, advocacy efforts, engagement with relevant government institutions and empowerment of 'Wanjiku' to understand her role in holding government accountable;
- ii. Civil Society should continue defending the independence of the Judiciary and promote mechanisms that enhance accountability of the Judiciary in Kenya and in the region;
- iii. Civil Society should strengthen judicial institutions and the legal fraternity in upholding constitutionalism.



G. To Legal Practitioners:

- i. Legal practitioners should submit information on court orders issued against the Executive that have not been obeyed to the Law Society of Kenya, to enable the LSK to hold public officers who have failed in their obligations to uphold the rule of law and administration of justice accountable;
- ii. Legal practitioners should be at the forefront of protecting the independence of the Judiciary bearing in mind their oath upon admission to the Bar, to uphold the rule of law and the administration of justice;
- iii. Legal practitioners should be at the forefront of sensitising the public on accountability by the government and all State officers.

H. To the General Public:

- i. The public should provide information on court orders that have not been obeyed to the Law Society of Kenya to enable the LSK to hold the public officers responsible accountable;
- ii. They should follow the process prescribed in law while raising their complaints against public officers including judicial officers;
- iii. They should always consider Chapter Six of the Constitution as a measure for suitability for public office;
- iv. They should seek accountability from the Executive on the implementation of laws, fair administration of public resources and furtherance of their right to access justice through the Judiciary;

7. ICJ Kenya commits to:

- i. Defend and support judicial independence, accountability, integrity, the rule of law, and good governance in Kenya and throughout the Africa continent;
- ii. Strengthen judicial institutions and the legal fraternity in upholding constitutionalism; and
- iii. Deepen advocacy efforts to ensure that the recommendations above are implemented.

Signed



Kelvin Mogeni
Chairman.