

COMMUNIQUE ON JUDICIARY FUNDING IN KENYA AND THE REGION

5 MAY 2021

Introduction

1. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) convened a first in a series of its Rule of Law Webinars on 3 May 2021 to discuss Judicial funding in Kenya the Region.
2. The panelist and participants were drawn from diverse fields representing jurists, legal practitioners, civil society, academia, and the general public across East Africa.
3. The discussions were informed by the need to evaluate the trends in Judiciary funding resourcing, the impact of underfunding on the delivery of services, and the Judiciary's independence in Kenya and the region.
4. Participants followed the deliberations through ICJ Kenya's social media platforms and online streaming services, including YouTube, Twitter, Facebook, and WhatsApp.

The panelists and participants acknowledged and noted THAT:

1. The institutional autonomy of the Judiciary, including management and fiscal independence, are critical facets of a democratic society. Financial sovereignty and administration are essential elements of judicial independence.
2. Judiciary financing should be exercised free from interference by the Executive and the Legislature. Judiciary funding should not be subject to political interference; however, the arms of government should engage in a meaningful discussion to ensure that the Judiciary is well resourced to achieve its mandate while bearing in mind the principle of separation of powers.
3. The Executive and the Legislature allocate budgets to most Judiciaries across the globe. The recommended budget for the Judiciary under International standards is between two to six percent. Unfortunately, Kenya's budgetary allocation to the Judiciary still falls below the recommended minimum standard compared to the budget of Parliament, which has been steadily rising to reflect the changing context.
4. The Judiciary Fund in Kenya, which is established under Article 173 of the Constitution of Kenya 2010 and its enabling legislation, the Judiciary Fund Act 2016, is yet to be operationalised.
5. Regionally, the Principles on the Funding and Resourcing of the Judiciary in the Commonwealth recognises that funding of the Judiciary reaches adequacy if it provides facilities and equipment to the courts to enable its operational functions as per the international standards. In this regard, judicial officers should work efficiently and promptly, with facilities appropriate for maintaining judicial independence. It is noteworthy that Kenya is yet to achieve this standard with some courts in a dilapidated state.

6. Since 2015, the Kenyan Executive and Legislature have stifled the independence of the Judiciary through budgetary cuts. These cuts have affected the administration and access to justice. The percentage fiscal allocation to the Judiciary has consistently been below one percent of the national budget, which is lower than the required international minimum standards. Further, the bulk of the budget to the Judiciary goes towards the recurrent cost and a lower percentage on development, thereby undermining infrastructural advancement, which is critical in facilitating the judicial processes and access to justice.
7. Access to justice following the outbreak of the COVID-19 pandemic has proved challenging for a majority of Kenyans. The Judiciary has put in place commendable measures to mitigate the circumstances, including embracing technology. Unfortunately for a vast majority of Kenyans, particularly self-representing Kenyans, access to the internet poses a challenge; therefore, they cannot access justice within the new policy framework.
8. The government should channel resources to ensure legal aid for marginalised and vulnerable groups, including providing legal representation for Sexual and Gender-Based Violence (SGBV) cases.
9. The Judiciary is an essential and equal arm of the government. It should have a reserved percentage of the national budget to meet its operational needs and grow its financial allocations.
10. The Judiciary should be accountable to the public by adhering to all financial regulations and value for money in service provision.

Therefore, in view of the foregoing, we call upon the following stakeholders:

A. The Executive to:

- i. Respect the Judiciary as an equal arm of the government in realisation of the spirit of separation of powers;
- ii. Provide sufficient funding and resources to the Judiciary through appropriate budgetary allocation that meet the international minimum standards;
- iii. Collaborate with the Judiciary to operationalise the Judiciary Fund, which is a requirement of the Constitution of Kenya 2010; and
- iv. Respect the Judiciary as an independent institution and provide an enabling environment for Kenyans to enjoy their right of access to justice.

B. The Legislature to:

- i. Respect the Judiciary as an equal arm of the government in realisation of the spirit of separation of powers;
- ii. Respect the rule of law by refraining from stifling Judiciary funding, which undermines the independence of the Judiciary and hinders access to justice by ordinary Kenyans; and
- iii. Query the minimal budgetary allocations to the Judiciary by the Exchequer. This trend has continued for the last five years and in total disregard of the budget estimates submitted by the Judiciary.

C. The Judiciary to:

- i. Continue to spearhead efforts to operationalise the Judiciary Fund;
- ii. Perform its constitutional mandate through the efficient and effective administration of justice and promoting access to justice for every Kenyan;
- iii. Seek amicable solutions to end the current impasse with the Executive that has led to budgetary cuts and threats to the administration of justice; and
- iv. Ensure that its financial systems are correctly set up to ensure the timely absorption of Exchequer's funds and invest in accountable and transparent financial management.

D. Civil Society Organisations to:

- i. Support the Judiciary in advocating for the operation of the Judiciary Fund to enhance access to justice; and
- ii. Develop advocacy strategies that call on the government to commit a minimum percentage of the total national budget to the Judiciary per international standards.

ICJ Kenya commits and undertakes to:

- i. Continue with the discourse on the rule of law and constitutionalism;
- ii. Collaborate with regional and national partners to advocate for and breathe life to international frameworks such as the UN Basic Principles on the Independence of the Judiciary, The Bangalore Principles, IBA Minimum Standards of Judicial Independence, and the Latimer House Principles, amongst others;
- iii. Collaborate with other civil society organisations to strengthen the independence of the Judiciary, including advocating for the setting up of the Judiciary Fund; and
- iv. Continue to support the full implementation of the Constitution to ensure judicial independence, access to justice, and respect for the rule of law.

Signed



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Chairman
ICJ Kenya