

## STATEMENT ON THE HIGH COURT JUDGEMENT ON THE BUILDING BRIDGES INITIATIVE AND SUBSEQUENT ATTACKS ON THE FIVE-JUDGE BENCH

**21 May 2021**

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) has analysed the recently rendered judgement of the Constitutional and Human Rights Division of the High Court of Kenya in *David Ndii and Others vs The Attorney General and Others*<sup>1</sup> delivered on 13 May 2021.

ICJ Kenya celebrates the Court's decision and applauds its salient findings, including the applicability of the Basic Structure Doctrine.<sup>2</sup> The orders issued by the Court have restated the foundation principles of our Constitution 2010, including limiting the amendment process of its core structure, which must take into account pertinent elements, most importantly – public participation.<sup>3</sup>

The finding by the Court that the Building Bridges Initiative(BBI) process was a deliberate attempt to usurp the people's exercise of Sovereign Power and that <sup>4</sup> the President in his person is in gross breach of the Constitution raises grave concern about the observance of the rule of law in Kenya. As a result, ICJ Kenya thereby explicitly supports the Court's decision to allow civil court proceedings to be instituted against the President for this egregious conduct.<sup>5</sup> This deliberate pronouncement is a reminder that no person, irrespective of their office, is above the law.

As a commission of jurists, we support the Court's direction on the role of County Assemblies in Constitution amendment processes and the Independent Electoral and Boundaries Commission (IEBC) to delineate boundaries.<sup>6</sup> The delineation of boundaries is a mandate of the IEBC, and any usurpation of the said role is an illegal undertaking. To this extent, we note the observations made by the Court that the IEBC does not meet quorum as stipulated by section 8 of the IEBC Act as read with paragraph 5 of the Second Schedule to the Act. Accordingly, we urge His Excellency, the President of the Republic of Kenya and Parliament, to ensure that the recruitment process of Commissioners to the IEBC is undertaken transparently and expeditiously.

Post fact the judgement issuance, ICJ Kenya has noted with great concern the inciteful and shameful utterances by a section of the political class that have targeted the individual judges. We are alarmed by the ostensible social media campaign aimed at undermining decisional independence and the judicial authority expressed in the judgement. We condemn the reprisals meted against the five-judge bench after making their pronouncement. We reiterate our support to this esteemed panel of judges and wish to remind the aggrieved parties that there is an appellate process in law to seek legal redress.

<sup>1</sup> Petition No. E282 of 2020 (Consolidated).



<sup>2</sup> Ibid 1 above, para 784 (i)

<sup>3</sup> Ibid 1 above, para 784 xvi and xviii

<sup>4</sup> Ibid 1 above, para vi

<sup>5</sup> Ibid 1 above, para ii

<sup>6</sup> Ibid 1 above, para 784 (x)



We particularly urge the leaders of the political parties to exercise restraint and steer the narrative clear from personal and vindictive attacks aimed at discrediting the ethos of these judges. The Constitution 2010 and the Judicial Service Act 2011 provide direction on lodging a complaint against a Judicial officer.

We recall the Bangalore Principles of Judicial Conduct and the Commonwealth Latimer House Principles, which guarantee judicial independence, impartiality, sanctity, and respect for judicial pronouncements. These are central elements of any conception of the rule of law. In addition, judicial officers are charged with protecting citizens' fundamental rights and freedoms and upholding the rule of law and democracy. We, therefore, call on the Attorney General, as a party to this suit, to explicitly condemn these vile utterances and disassociate the Government from these activities as it moves to the Court of Appeal to relitigate its case.

ICJ Kenya stands with all judicial officers who have remained steadfast in upholding the principles enshrined in the Constitution 2010, the rule of law and justice. In conclusion, ICJ Kenya urges and encourages judicial officers to remain steadfast and true to their oath of office in protecting and defending the Constitution of Kenya 2010. We pledge our continued support as a body of jurists to defend and uphold the independence of the Judiciary.

Signed,



Kelvin Mogeni  
Chairman

