

THE JUDICIARY AND THE RULE OF LAW IN KENYA

AN ICJ KENYA PRESENTATION

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1. PROGRESS HAILED IN THE 3RD UPR CYCLE

The constitution of Kenya 2010 is progressive as far as positive impact on socio-political life of Kenyans is concerned. An expansive Bill of Rights and protection from violations (and threats of violations) of human rights through the courts. Establishment of independent institutions tasked with promoting human rights, good governance and democracy. A fairly independent judiciary that has made bold and progressive decisions. For example, a decision in August 2019 that all governors implicated in corruption cases cannot continue to hold office until they are cleared. This is contrary to decision made in 2013 when the court ruled that Uhuru and Ruto could run for presidency despite having cases at the ICC. Another example is the nullification of the 2017 August presidential elections on account that it had violated human rights standards of a free, fair and credible elections.

However, Kenya still struggles with adherence to the rule of law. ICJ Kenya has on several occasions within the reporting cycle called out the State for its acts and omissions that have undermined the rule of law and is in clear violation of human rights of Kenyan. Through our work, ICJ Kenya has flagged out 3 key areas of concern to address in this UPR process- with the aim of bringing them to the attention of the Human Rights Council, to enrich the discussions among states in the UPR review for Kenya and for the HRC to make informed recommendations to the government of Kenya in these areas of concern.

2. ISSUES OF CONCERN

a. Lack of implementation of court decisions

At the regional level, Kenya has endeavored to submit state reports and present itself for review. However, Kenya has not shown good will as far as implementation of the recommendations is concerned. In 2015 for example, Kenya reported to the ACHPR its 8th to 11th report- yet on the contrary, Kenya continues to be unwilling to implement the recommendations/ decisions by the African Court and African Commission: African Commission on Human and Peoples' Rights v. Kenya on wrongful evictions against the Ogiek community in 2017; the 2010 African Commission decision on the Endorois community eviction from their native land which has not been implemented almost 10 years later

At the national level, the state has gone out of its way to avoid/ delay compliance with court orders. For example, the 2017 high court decision to produce Miguna Miguna to court- and instead he got deported to the UK by the State; the 2016, 2017 and 2018 decisions by the High Court to operationalize the Public Benefits Organization Act which has not been complied with to date.

b. Continuous and discriminate budget cuts to the judiciary

In the last 4 years, there has been a decline in the budget given to the judiciary. For example, last year, the judiciary was given only 40% of the budget requested. This financial year, judiciary requested for

31.2B, Parliament drastically reduced it to 17.4B and in September this year, Treasury issued a circular further slashing the budget to 14.5B- which decision, through a court order was stopped.

This has been synonymous with decisions made by the judiciary against the State. For example, in 2017 after the decision by the supreme court to nullify the presidential election, the judiciary budget was slashed by 75% a move to cripple the judiciary from operating.

c. Deliberate undermining of the independence of the judiciary

One of the ways has been through institution of malicious accusations against them, whether complaints at the JSC or through instituting criminal proceedings against them- meant to intimidate the judges. The cases are sometimes withdrawn after sometime before hearing, others the court determines that the manner of prosecution was against the rights of the judge.

Another way is in attempts to make amendments to provisions that support judicial independence. For example, the attempt by Parliament to amend the Judicial Service Act so that the President has the power to decide who the Chief Justice is.

Another way is through delay of appointments that the President constitutionally ought to appoint. For example, delay in gazetting Judge Wasame to the JSC, delay in appointment of 41 judges forwarded by JSC.

3. RECOMMENDATIONS

- a. Respect court decisions and adhere to court orders, nationally, regionally and internationally
- b. Operationalize the judiciary fund and give a fixed percentage of 2.5% from the national budget to the judiciary fund
- c. Utilize appointment powers to further human rights and access to justice rather than to undermine human rights and access to justice. Specifically, and in the immediate, appoint the 41 judges to the respective courts as per JSC recommendations.

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