

Incremental Judicial Reforms in Kenya

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Judges deal in fear, pain and death. However exercised, judicial power has a tremendous impact on the socio-economic, political and cultural systems of a nation. Kenyan masses remain alienated not merely by the foreign language and condescending demeanor of courtrooms but also the centralization of justice. Consequently, we must ask: is the quality of justice determined by the performance of an incumbent occupant of a judicial position? If so, who should appoint judges? What is to be done when the actions of a politically partisan Chief Justice cow an entire judiciary to bow to executive whims?

These questions have come to focus among the Kenyan legal fraternity following recent appointments of High Court Judges in April 2009: Joseph Nyamu and Alnashir Visram gained appellate status; Chief Magistrates Aggrey Muchelule and Maureen Odero and Senior Principal Magistrate Florence Muchemi became judges; as did Abida Ali-Aroni, former chair of the Constitutional Review Commission, and Said Chitembwe, Cooperation Secretary of The National Social Security Fund. Rife speculation and intense lobbying ensuing among prospective candidates re-opens the old debate regarding deficiencies afflicting the appointment process. As legal power is derivative of judicial power, the Law Society of Kenya (LSK) at its 2009 Annual General Meeting passed three resolutions. First, the LSK proposed the establishment of transparent criteria to guide the Judicial Service Commission (JSC) in its recommendations of suitably qualified individuals. Second, the LSK resolved to recompose the JSC so as to include two of its own members. Third, members mandated their Council to petition President Kibaki to convene a tribunal to inquire into the conduct of the Honourable Chief Justice Evans Gicheru whom they consider unfit to hold that lofty office. Such radical stance is predicated on the grounds that the Chief Justice is *perceived* to have directly compromised the independence of the bench by centralizing justice and by swiftly swearing-in President Kibaki for a second term, thereby precipitating the degeneration of widespread post-election violence.

In justification of LSK's first resolution, the common law training and JSC's confidential appointment criteria lends loyalty to the President as appointing authority and should be reformed. Repeal of jury-trials in 1967 and gradual replacement of lay magistrates both Africanized and professionalized the judiciary. The constitutional qualification of appointing judges with at least 7 years of legal practice effectively standardized the culture of appointees to persons assimilated into middle-class values who are not only well-connected among lawyers but also politically and ethnically representative. Recently, a Ministry of Justice task force suggested that the minimum qualifications be raised to advocates of 10 and 15 years standing for high court and appellate judgeship respectively. No mention was made to institutionalize gender-parity, ethnic or religious balance considerations reflected in recent appointments. Given Kenya's volatile post conflict heterogeneous society, there is clear need for broad political and ideological diversity. To secure the *appearance* of justice, it is not sufficient to merely resolve disputes *objectively*, according to primary rules prescribed in advance. Our constitution must also ensure that laws are democratically made. John Rawls' justice as fairness therefore encompasses tolerating *subjective* values which condition experiences perceived by the most vulnerable social classes. Significantly, the Kenyan struggle for independence from colonial rule was waged partly to remove a sense of injustice emanating from the *appearance* of a discriminatory judicial system which restricted Supreme Court access to minority Whites only. One alternative would be to take the path of the US and elect judges; however, such a process promotes political acumen over constitutional interpretation. A middle ground could work in Kenya; requiring parliamentary vetting of proposed

nominees.

In answer to LSK's second resolution, criminologist Clive Walker would argue that the vital role of judiciaries is to guard against majoritarianism and its crude impact on individual rights and unpopular minorities. Human rights violations are primarily caused by the criminal justice machinery. Adjusting public perceptions of the JSC currently constituted by the Chief Justice, an Appellate Judge, the Attorney General, the head of the Public Service Commission and a High Court Judge, may restore public confidence in our courts. Reconstitution of the JSC may widen the pool from which potential judges are selected so as to include liberal judges.

The LSK's third resolution aims to dislodge Chief Justice Gicheru ostensibly partly for rendering opposition candidate Raila Odinga's genuine post-2007 election complaint, *fait accompli* which ultimately contributed to over 1000 deaths and the forcible displacement of 350,000 people. Further complaints against the Chief Justice include the fact that in early 2007, he directed that all cases lodged to question administrative action, be heard exclusively in Nairobi, requiring all up-country litigants had to travel to the capital city and engage expensive lawyers. This is unconstitutional. Obviously, every judge has equal powers to hear any dispute. In February 2009, following a two year stand-off, the Chief Justice suddenly but sullenly reversed his irrational decree thus re-diverting judicial review cases to their original locations. Yet much damage was already done. He has inflicted irreparable hardship on up-country litigants who were alienated from obtaining prerogative orders during the post-election violence. Further, the Chief Justice declined to allocate any judge to listen to the LSK's application challenging his illegal centralization order. Instead, policemen tear-gassed protesting lawyers inside Nakuru courts. In retaliation, Mombasa practitioners boycotted *pro bono* services traditionally rendered in capital murder cases. Yet in *reality*, even LSK's three resolutions preferring incremental "quality control" through *apparent* piecemeal constitutional amendments preceding the awaited *real* maximalist overhaul, are conservative. Such interim reforms represent well-intentioned attempts to circumvent anticipated political obstacles presented by contentious comprehensive constitutional review issues.

While the Chief Justice may not be personally responsible for the *reality* of corruption and bribery in our courts at individual magisterial or para-legal levels, his leadership personifies the *appearance* of the judicial institution as a whole, yet he publicly dismissed the new Grand Coalition Government's plan to compel judges to sign performance contracts, as unconstitutional. Nonetheless, members of his Kikuyu ethnic group within the LSK published a double page advertisement in the Daily Nation seeking signatures defending the Chief Justice's security of tenure. His track record? Since appointment to the bench in 1982 Justice Gicheru has delivered one memorable judgment. His dissenting ruling in the 1994 case of *Republic v The Post on Sunday* where to this credit, out of seven appellate judges he disagreed with the government's attempts to silence a publisher through contempt of court. That case ironically involved an editor, Tony Gachoka's, allegations that the then CJ, Zacheus Chesoni, received a Kshs. 30 million bribe from Goldenberg Scandal architect Kamlesh Pattni. An unfortunate precedent was subsequently set by the Kibaki administration in 2003 which forced the resignation of Gicheru's predecessor Chief Justice Bernard Chunga for his association with the infamous Nyayo House torture chambers during his reign as the Director of Public Prosecutions. Gicheru subsequently appointed an *ad hoc* Committee into Judicial Corruption chaired by Judge Ringera to conduct a purge. In October 2003, 18 High Court and 5 Appellate Judges, 82 magistrates and 142 subordinates resigned upon being publicly named and shamed in the Report. Following this "radical surgery," Ringera's majority decision in the *Njoya case* deflated the Bomas Draft constitution which threatened devolution of Kibaki's power. Worse still, on the eve of the 2005 national constitutional referendum, *the Referendum case* instead

validated the executive-driven “Wako Draft New Proposed Constitution.”

The failure of the judiciary to cope with election petitions has led former UN Secretary-General Kofi Annan to act as our receiver-manager. Former Justice and Constitutional Affairs Minister Honourable Martha Karua, in a scathing attack on the judicial corruption conceded that appointments are predicated on favouritism, cronyism and incompetence. Upon her swift rebuff by the President’s mysterious appointment of 7 new judges recommended by a conservative JSC, she resigned in a huff. The president unceremoniously trashed all three LSK resolutions. Now, a Truth, Justice and Reconciliation Commission has been established to supplement the failed judiciary, alongside a range of other prosecutorial arrangements. The legal profession should urgently provide a lead not only on how to deal with real intransigent institutions and *apparent* individual impunity so as to inspire accountability and personal responsibility in the attitudes of incumbents but also to infuse *real* transparency into our structures.

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