

Judicial Reform in Kenya

In 2010, Kenya adopted a new constitution. Part of the goal of this constitution was to ensure the creation of an independent and trustworthy judiciary. This paper offers a brief overview of Kenya's legal reforms through its new constitution, and the impact these reforms have had on public perceptions of the judiciary.

I. History of the Kenyan Judiciary

The History of the Kenyan courts and their relationship with the citizens of the state is inextricably tied to Kenya's colonial past. Early colonial courts were designed to implement the desires of a powerful and distant executive arm. This tilt of the courts in favor of the executive carried over into Kenya's 1963 independence constitution.¹ The judicial selection process offers an apt example of how this bias in favor of the executive, at the expense of the judiciary, was enshrined in the constitution. Kenya's Judiciary Service Commission (JSC) was created around 1961-1963 to advise on the appointment of judges to the judiciary and aid in the appointment of more Kenyan lawyers to the bar.² The JSC members were all presidential appointees, thereby granting the executive indirect control over the composition of the judiciary.³ The only officer who was not under direct control of the president was the Governor General, who was appointed by the Queen of England.⁴ A second consequence of the colonial legacy was that the air of "majesty" borrowed from

¹ See Njeri Thuki, *A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England*, 19 Ann. Surv. of Int'l & Compar. L.45, 9(2013).

² *Id.* at 8. Prior to independence in 1963, most of the people who sat on the Kenyan bar were British men, who held British law degrees. *Id.*

³ THE CONSTITUTION OF KENYA Dec. 1963, art. 184(1)(Kenya); see also Makau Mutua, *Justice under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 Hum. Rts. Q. 96, 104 (2001).

⁴ THE KENYA INDEPENDENCE ORDER IN COUNCIL [CONSTITUTION] Dec. 1963, art. 31 (Kenya).

English legal tradition only served to alienate the very people the courts were meant to serve. The use of Latin and Anglicized Latin words, and of white British powdered wigs, to name a few, all contributed to this symbolic alienation of the population from the courts.⁵ Kenya's judicial reform addresses these issues of strong presidential control over the judiciary, and alienation of the population by the courts.

II. Impetus for Judicial Reform

The judiciary in Kenya was viewed, by the public, as subservient to the executive and captured by the interests of the ruling party.⁶ In fact, in 1982, through constitutional amendments, the ruling party, the Kenyan National African Union ("KANU"), declared Kenya a one-party state.⁷ The role of the courts became to protect the "political monopoly" of KANU.⁸ By 1990, political dictatorship, deteriorating economic and social conditions, and external pressures from globalization led to a rising demand for constitutional reform, and inquiries into systematic review of the constitution began as early as 1990.⁹ In 1991, an amendment to the constitution allowed for a multi-party system. Nonetheless, deep constitutional and judicial reforms were not seriously considered until 2007, following particularly violent protests after a presidential election.¹⁰ In a damning indictment of the Kenyan judicial system, the aggrieved presidential contender, who claimed the election had

⁵ See Thuki, *supra* note 1, at 10.

⁶ Mutua, *supra* note 4, at 98.

⁷ *Id.*

⁸ *Id.* at 99.

⁹ See Abdirizak Arale Nunow, *Constitution Making and Legal Reform Process in Kenya 6* (2004)(unpublished manuscript)

(<https://dlib.indiana.edu/dlib/bitstream/handle/10535/6526/Constitution%20Making%20and%20Legal%20Reform%20Process%20in%20Kenya.pdf?sequence=1&isAllowed=y>).

¹⁰ See Thuki, *supra* note 1, at 58

been rigged in favor of the incumbent president, rejected the idea of bringing a case before the courts, citing that judiciary's subservience to the executive and referring to the Kenyan judicial system as a "kangaroo" court.¹¹

The violence and disruption that accompanied the 2007 presidential election, and fears that the next election would be even more violent and destabilizing, provided the political and social will that spurred constitutional and judicial reform.¹² In 2010, Kenyans voted for a new constitution through a national referendum.¹³ The new constitution included significant changes to the judiciary, under an agenda item known informally as the 'Annan Accord'.¹⁴

III. The Kenyan Judiciary Under the Prior Constitution

Kenya's 2010 constitution was preceded by two different constitutions. At independence in 1963, Kenya promulgated an independence constitution. This was followed by a series of undemocratic amendments to the independence constitution, including amendments that increased presidential influence over the removal of High Court judges (formerly Supreme Court Justices).¹⁵ Prior to that amendment, the president played no role in the removal of Supreme Court Justice—the equivalent of a High Court Judge.¹⁶ The independence

¹¹ *Id.*

¹² *Id.* at 60.

¹³ *Id.* at 58.

¹⁴ *Id.* at 61.

¹⁵ The amendment to section 173 placed the power to appoint the special tribunal, responsible for removing judges, in the hands of the Governor General, a representative appointed by the Queen of England. However, the amendment also removed all reference to several officers appointed by the Queen, including the Governor General, and conferred their powers to the president. This change granted the president significant power over the judiciary. *See* CONSTITUTION OF KENYA (AMENDMENT NO. 14) 1965, art 6(7); *Id.* at art. 173(7)(b)(Kenya).

¹⁶ THE CONSTITUTION OF KENYA Dec. 1963, *supra* note 4, at art. 173(4).

constitution was replaced with the 1969 constitution, which was amended several times and revised in 2001.¹⁷

The 2001 constitution revision also granted the president expansive power over the judiciary, including the power to appoint all justices to the High Court, appoint a replacement judge when the Chief Justice was temporarily unable to discharge his duties, the power to remove all judges, including High Court judges upon referral by a tribunal—which was also appointed by the president—and the power to revoke the removal of a judge.¹⁸

The president also wielded significant power over the Judicial Service Commission, a body designed to work under the president in the management of the judiciary. Under the 2001 revision of the constitution, the Judicial Service Commission consisted of the Chief Justice, Attorney General, Chairman of the Public Service Commission, and two puisne judges selected by the president.¹⁹ The president had the power to appoint and remove all the members of the Commission.²⁰ The judiciary was effectively controlled by the president who wielded appointment and removal power at all levels. It is no wonder that the general population believed the judiciary was designed to serve the interest of the president and could not be trusted to pass impartial judgments, particularly where the president was involved.

¹⁷ See generally CONSTITUTIONAL AMENDMENT HISTORY, <http://kenyalaw.org/kl/index.php?id=9631> (last visited Apr. 2, 2022) (listing the amendments and changes to the Kenyan constitution from 1963, to present).

¹⁸ THE CONSTITUTION OF KENYA (Rev. (2001) (1998)), art. 60(5), art. 61(4)–(5), art. 62(4)–(5), art. 62(6) (Kenya).

¹⁹ *Id.* at art. 28.

²⁰ *Id.* at art. 109, art. 60–62, art. 106.

IV. 2010 Reforms to the Kenyan Judicial System

Reduced Presidential Power over the Judiciary

The 2010 Constitution of Kenya includes significant changes to the structure of the judiciary and the amount of power the president could directly exercise over the courts.

The salaries and benefits of judges are constitutionally protected, and no judge's salary or retirement benefits can be "varied to the disadvantage of that judge" during their tenure or lifetime.²¹ While the president retains appointment power over all judges, his

appointments must be "in accordance with the recommendation" of the Judicial Service Commission.²² Furthermore, the president's role in the removal of a judge is a significantly limited role wherein removal can only be initiated by the Judicial Service Commission.²³

Upon a removal recommendation by the Commission, the president has to suspend the judge within fourteen days.²⁴

The Judicial Service Commission has been granted more independence. Under the new Constitution, the Commission, now consists of:²⁵

- The Chief Justice
- One Supreme Court judge, elected by the other Supreme Court judges
- One Court of Appeal judge, elected by the other judges of the Court of Appeals
- One High Court judge and one magistrate, each of a different gender and each select by the association of judges and magistrates,
- the Attorney-General
- Two advocates, each of a different gender and each selected by Kenyan Bar
- One representative selected by the Public Service Commission

²¹ THE CONSTITUTION OF KENYA Aug. 2010, art. 160(4) (Kenya).

²² *Id.* at art. 166(1).

²³ *Id.* at art. 168.

²⁴ *Id.*

²⁵ *Id.* at art. 173.

- One woman and one man neither of whom are lawyers, and who are selected to represent the public. They are appointed by the president and approved by the National Assembly.

Given the significant expansion of the Commission and the various bodies that select representatives, the power of the president over the Commission has been greatly reduced.

The Commission has also been granted significant powers over the management of the judiciary. With regards to the appointment of judges, the Commission provides the president with a list of recommendations.²⁶ On daily managerial tasks, the Commission reviews and makes recommendations regarding the staffing and conditions of service of the judiciary.²⁷ On removal power, a judge can only be removed after initiation by the Judicial Service Commission either on its own, or after petition by any individual.²⁸ A judge who believes they were improperly removed, may appeal the Judicial Service Commission's decision to the Supreme Court.²⁹ The 2010 Constitution also provides for a judiciary fund, which is designed to provide for the expenses of the judiciary, thereby preventing the executive branch from exercising financial control over the judiciary.³⁰ However, the budget is still subject to parliamentary approval, so the judiciary is not entirely financially independent.³¹

²⁶ *Id.* at art. 172(1)(a).

²⁷ *Id.* at art. 172(1)(b). However, the Judicial Service Commission exercises no power over the remuneration of judges. Article 160(4) provides for salary and benefits protection, thereby forbidding the downward revisal of their salaries and benefits, and the Salaries and Remuneration Commission, established under Article 230 of the Constitution oversees and manages the salaries and benefits of all state officers, which includes judges. *Id.* at art. 160(4), art. 230.

²⁸ *Id.* at art. 168.

²⁹ *Id.*

³⁰ *Id.* at art. 173.

³¹ *Id.*

Public Participation

Aside from weakening presidential power over the judiciary, the reforms also create a significant avenue for public participation. The ability for individuals to petition the Commission to remove a judge provides a means for public accountability. Individuals who doubt the integrity of a judge now have a constitutionally protected avenue through which they can request an investigation into the judge. This, in conjunction with the inclusion of public representatives in the Judicial Service Commission, indicate that in reforming the judiciary, Kenya also sought to increase public participation in, and oversight of, the judiciary.

Judicial Vetting

The Constitution also provides, as part of the nation's move towards a more independent and accountable judiciary, for a vetting of all sitting judges including the Chief Justice.³² The structure of the vetting process was left to Parliament and vetting was to begin within a year.³³ In 2011, parliament adopted the Vetting of Judges and Magistrates act, which outlined the vetting process.³⁴ Vetting was conducted by the Judges and Magistrates Vetting Board. The nine-person board was appointed by the president, in consultation with the National Assembly.³⁵ The Chairperson had the power to divide the board into three or more panels, who would work concurrently, to ensure the timely disposition of cases.³⁶ After considering all the evidence related to the judge being vetted, a public hearing was

³² This process applied to sitting judges at the time of the implementation of the 2010 constitution. Subsequently appointed judges are assessed and overseen by the JSC.

³³ THE CONSTITUTION OF KENYA Aug. 2010, *supra* note 23, at Schedule 6 (23).

³⁴ Vetting of Judges and Magistrates Act, 2011 (act No.2 of 2011) (Rev. 2021).

³⁵ *Id.* at art. 9.

³⁶ *Id.* at art. 17.

held for each trial.³⁷ The vetting act set a strict deadline of 31st of December for the conclusion of the entire vetting process.³⁸

V. Popular Support for the Reforms

There has been popular support for the constitutional reforms. Following the electoral violence in 2007, public confidence in the courts fell steadily. In 2008, public confidence was at 36%, and in 2009 it reached a low of 27%.³⁹ However, in the 2010 referendum, Kenyans voted overwhelmingly in favor of the new constitution, with 68% supporting the its adoption. This 68% figure shows that Kenyans believed they needed a new constitution, and they had faith in the *potential* of the 2010 constitution.

VI. Impact of the Reforms Thus Far

Several high-profile rulings by the Supreme Court support the notion that the 2010 constitution is working to ensure the integrity and independence of judges.

In August 2021, the Court of Appeals upheld a ruling that found the president's proposed amendments to the constitution, unconstitutional.⁴⁰ At the core of the ruling was the holding that the president does not have the power the initiate changes to the constitution,

³⁷ *Id.* at art. 19.

³⁸ *Id.* at art. 23(2).

³⁹ Maya Gainer, *Transforming the Courts: Judicial Sector Reforms in Kenya*, PRINCETON UNIVERSITY: INNOVATIONS FOR SUCCESSFUL SOCIETIES, 3 (2015).

⁴⁰ Michelle Gavin, BBI Ruling Leaves Kenya at a Crossroads, COUNCIL ON FOREIGN RELATIONS (Aug. 25, 2021), <https://www.cfr.org/blog/bbi-ruling-leaves-kenya-crossroads>.

but rather this power lies with the Parliament.⁴¹ The ruling is notable because not only was it a decision against the sitting president, but it placed ongoing limits on the power of the office itself. This suggests that the judiciary is not afraid to exercise independent judgement and therefore retains some degree of power over the other branches of government.

As part of the constitutionally mandated vetting process, the Board of Judges and Magistrates vetted 53 judges and 298 magistrates, removing 11 of those judges and 14 magistrates from their position because they were found unsuitable for office.⁴²

In the years since the end of the vetting process, several more judges have been removed through investigations by tribunals under the Judicial Service Commission after accusations of corruption. In 2016, High Court Judge, Justice Mutava was removed after being found guilty of trying to influence a corruption case in which he was being investigated.⁴³ Even a supreme court justice, Justice Tunoi, was investigated by the tribunal for allegedly accepting a bribe.⁴⁴ However he retired before the tribunal issued a verdict.⁴⁵

⁴¹ John Mukum Mbaku, Is the BBI ruling a sign of judicial independence in Kenya?, THE BROOKINGS INSTITUTE (Aug. 19, 2021), <https://www.brookings.edu/blog/africa-in-focus/2021/08/19/is-the-bbi-ruling-a-sign-of-judicial-independence-in-kenya/>; <http://kenyalaw.org/caselaw/cases/view/205553/>.

⁴² Jan van Zyl Smit, Kenya's New Chief Justice Must Press On with Cleaning Up the Judiciary, THE CONVERSATION (Oct. 6, 2016), <https://theconversation.com/kenyas-new-chief-justice-must-press-on-with-cleaning-up-the-judiciary-66372>.

⁴³ Abdiu Ochieng, Tribunal Recommends Joseph Mutava's Removal for Misconduct, NATION (Sept. 21, 2016), <https://nation.africa/kenya/news/Tribunal-recommends-removal-of-Justice-Joseph-Mutava/1056-3389746-format-xhtml-t4letf/index.html>; <https://www.standardmedia.co.ke/kenya/article/2000084846/president-uhuru-suspends-judge-joseph-mutava-in-goldernberg-controversy>.

⁴⁴ Kenya judge Phillip Tunoi probed over '\$2m bribe', BBC (Jan 27., 2016) <https://www.bbc.com/news/world-africa-35417897>.

⁴⁵ Samuel Karanja, Tribunal ends Sh200m bribery probe Against Judge Tunoi, NATION (June 27, 2016), <http://www.nation.co.ke/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html>.

Individuals and interests groups in Kenya have also employed the judge removal system, and have on numerous occasions petitioned the Judicial Service Commission to remove judges.⁴⁶ The active removal process, the ability of the Commission to investigate even the highest ranking judges, and the willingness of individual to petition for removal of a judge all suggest that reforms are working towards creating a more accountable judiciary in which the public also has a means to monitor and check the behavior of judges.

VII. Public Perception of the Efficacy of Kenyan Judicial Reforms

The 2010 reforms created avenues for judicial impudence and public oversight of the behavior of the judiciary. The reforms also enjoyed large public support when the constitution was approved. Polling of the Kenyan population shows that while the reforms have been effective in creating increased trust in the courts, perceived corruption remains a persistent problem.

The number of Kenyans expressing “somewhat/a lot” of popular trust in the courts has grown from 37% in 2003, to 57% in 2019. However, within the same time frame the percentage of people with the belief that “most/all” judges and magistrates are corrupt grew from 28% to 35%. Furthermore, while 57% of Kenyans trust the courts, , 65%,

⁴⁶ Petitions to remove judges included, a petition to remove Judge Onyango, after accusations of judicial misconduct for reassigning a case to herself (Dzuya Walter, *Petition Filed Seeking Removal Of Judge Maureen Onyango*, CITIZEN DIGITAL (Dec. 9, 2021) <https://www.citizen.digital/news/petition-filed-seeking-removal-of-judge-maureen-onyango-n288529>), Judge Mrima, for abuse of judicial discretion in singling out a defendant (Stephanie Wangari, *Petition to Remove Judge Who Sentenced DCI Kinoti Filed*, KENYANS.CO.KE (Dec. 21, 2021) <https://www.kenyans.co.ke/news/71793-petition-remove-judge-who-sentenced-dci-kinoti-filed>.), and Judge Chitembew for accusations of corruption (Paul Ogemba, *Sonko Petitions JSC for removal of judge*, THE SUNDAY STANDARD (Nov. 25, 2021) <https://allafrica.com/stories/202111250066.html>).

believe that officials who commit crimes are treated more favorably than regular citizens who commit crimes, and such officials “often/always” go unpunished by the courts.⁴⁷

It appears that while the belief and trust in the judiciary as an institution has grown, the population still sees corruption among individuals as a persistent and likely growing problem.

⁴⁷ This contrasts with 21% who believe ordinary citizens often/always go unpunished by the courts. (See Kenyans trust the justice system but decry unequal treatment under the law, including impunity for officials who commit crimes, AFROBAROMETER (Aug. 19, 2020), <https://afrobarometer.org/press/kenyans-trust-justice-system-decry-unequal-treatment-under-law-including-impunity-officials>.)