



## IS THE DUE PROCESS OF THE LAW AN OBSTACLE TO ANTI- CORRUPTION?



*Interview with George Kegoro, Executive Director, Kenyan section of the International Commission of Jurist (ICJ). In the interview he says that the judicial surgery (in 2003) was not radical enough and allowed unresolved issues to fester and develop into a full-blown sense of grievance. He also adds that there was no justification for the Vice President writing to the magistrate and in so doing directly jeopardised the judiciary's independence. Here are the excerpts:*

### **What role should the Judiciary play to ensure accountable governance in Kenya?**

The sole purpose for the existence of the Judiciary is to exercise judicial authority in resolving disputes. Disputes can be between private persons, public authorities, or between private and public persons.

The adjudication of the courts in such disputes is the basis of the rule of law. The courts, in their decisions help to clarify the law- if this is in dispute, to assert rights-if these are under threat, or to give redress-where rights have been deprived. The parties to such disputes are required to abide by the

decision of the court and such adherence is not lessened by the fact that one party is the government while the other is a private person.

### **How independent is the Judiciary?**

Two forms of judicial independence have been identified. First, the decisional independence of every judicial officer to decide a case in accordance with the law and his/her conscience. This kind of independence comes under attack if a judicial officer, for fear of reprisal or in exchange for a reward, makes a decision that is inconsistent with the law

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under question in the context of revelations of elaborate correspondence exchanged between the Vice President and a magistrate regarding a case pending before the mag-

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## The Due Process of Law And Anti-Corruption

istrate. The Vice President had no justification to write to the magistrate and in so doing directly jeopardised the judiciary's independence.

It would also appear that he (the Vice President) is not the only politician who has been in direct communication with the courts and the Judiciary has a duty to protect itself from this emerging trend. It must avoid, imploring the public to respect its decisions, and should deal with any contempt for its decisions in a judicial setting on a case-by-case basis.

Two, the provision of resources to the judicial institution to enable it to function independently and effectively. Overall, Kenya has not attained this goal. The Judiciary is still dependent on the Executive for resources and, internally, the allocation of resources in the Judiciary is not necessarily rationally conceived. There is patronage in the allocation and sharing of resources within the Judiciary.

### Is the Judiciary one of the most corrupt institutions?

The classification of the Judiciary as one of the most corrupt institutions is now commonplace in all the surveys that are conducted in Kenya. To be fair to the Judiciary, the run-away levels of corruption that existed before the purge on the Judiciary are not in evidence at the moment.

This may be the result of either the Judiciary having improved or the forms of corruption having mutated. However, there is still work to be done given the poor public perception of the Judiciary. The Judiciary needs to invest in a culture of zero tolerance for corruption that is visible and which enjoys continuous, rather than sporadic support from its own leadership.

Corruption is ultimately a function of opportunity, and has little to do with the remuneration that a person receives. However, remuneration should be adequate and the risk that the judiciary would have to take to maintain their independence is the chief reason why they deserve to be paid well. In Tanzania, the reform of the revenue collection system, which was prone to corruption, by providing better remuneration, only resulted in greater forms of corruption. Improved remuneration alone will not work and has to be matched with the establishment of a culture of integrity, demonstrated visibly by the leadership, and clear and judicious sanctions in the event of breach of the integrity rules.

### How can the Judiciary gain public confidence?

Public confidence in the Judiciary will only come from the performance of individual judicial officers in their work on a day-to-day basis. It cannot be the result of any extra-ordinary one-off measure. Leadership of the judicial institution will be the basis of public judgment as to whether the Judiciary is performing well or not.

### Is the due process of the law an impediment to the fight against corruption?

The answer is an emphatic NO. The due process of the law is never an impediment to the attainment of justice and has not been to the fight against corruption in Kenya. The impediment has been the use, by persons who are brought to account for corruption, of due process arguments to defeat justice. Justice is a double-edged sword and the court has the duty to make the two edges cut with equal efficiency.

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Unfortunately, the courts have not been enlightened enough to do so and have allowed their forum to be used for empty grandstanding in the name of due process rights. A judge has the duty to establish and maintain a balance between the private interests of an accused person to receive a fair trial and the right of society as expressed in the legal instruments that it enacts, to punish those that transgress its rules.

The courts have lost the balance and have allowed unlimited and frivolous pursuits by defendants in corruption cases, whose only intention is to delay or defeat accountability. Persons that society would consider owes it an explanation have appropriated the language of due process and the courts have meekly allowed this to happen.

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The courts need to realize that it is the function of the legislature to legislate and, subject to a law being constitutional; the courts must enforce it even if they do not consider the law to be very enlightened. The so-called constitution arguments against legislation have been entertained on the spurious basis that the courts do not consider the law to be very good and would therefore not enforce it.

The courts are also guilty of tendentious decisions in corruption cases whose only result is to give an unfair advantage to the accused. There is no other way of explaining the decisions in the Gachiengo

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## The Due Process of Law And Anti-Corruption

case and the Kipngeno arap Ngeny case. Further, the decision in the Saitoti case follows the trend of these two earlier decisions and is difficult to justify. In summary, it is the courts, and not the law, who are responsible for the problems with the fight against corruption in this country.

### Why has the "radical surgery" been criticised?

The overwhelmingly negative view of the radical surgery is revisionist. When the surgery happened, it was popular and it was viewed as a difficult, but necessary step at that point in time. Politically, there was fear that the Moi regime that was devastatingly rejected in the last elections would retreat into the courts and continue to have a backhanded hold on the people. So the radical surgery also served the ill-stated function of achieving political consolidation.

Two things have contributed to the revisionist view of the radical surgery as a bad thing. First, this government has, in the long run, not risen far above the Moi government that it replaced, and so the view is that it replaced the past regimes appalling individuals with its own equally appalling persons. Secondly, the surgery was not radical enough and allowed unresolved issues to fester on and develop into a full-blown sense of grievance.

It needs to be emphasized, in fairness to the architects of the radical surgery, that they had the full

support of the body politic, who considered the surgery a dire necessity at the time.

**It has been argued that entrenched corrupt practices with the public sector hamper the clear definition and enforcement of the laws, and is a symptom that the state is functioning poorly. What is your opinion?**

Corruption is entrenched. But so is the tradition of informality. The theory behind written laws as the basis of running a modern state is that all public action should be traceable to a rule and that, that rule should itself be written down somewhere.

In Kenya, we write the rules and then we put them aside and make decisions according to our own individual wisdom. There are therefore two states: the modern state which is the one that Parliament regulates through its law-making power, and secondly, the African state, wholly informal and presided over by wise elders, which has no written rules and which never establishes or maintains written records.

The challenge of decision-making in accordance with the written law is greatly under-appreciated. Kenya cannot overcome the problem of inconsistent public decision-making until we properly appreciate this challenge. The Attorney General is in a strong position to encourage formal compliance with written rules but has not appeared interested in doing so.



# THE ROLE OF THE JUDICIARY IN THE ANTI-CORRUPTION CAMPAIGN IN KENYA

By Peter Wendoh

The judiciary plays a pivotal role in any modern democratic society. As an arm of government, it is essential to the process of checks and balances that is fundamental to the functioning of societies. Criminalization of corruption in Kenya means courts are expected to play a vital role as the final arbiters of guilt.

Ordinarily, the judiciary adjudicates over matters including corruption, when moved to do so. Thus, naturally, the courts are not intended to descend into the arena neither are they meant to seek out this scourge with a view to stamping it out. In the performance of its traditional role, the judiciary is only expected to ensure that justice is dispensed fairly and impartially in accordance with the guiding principles, while ensuring adherence to and respect for all safeguards.

Similarly, they are expected to ensure that corrupt practices do not become a platform for bargains in the commercial or civil context. Thus, the courts can nullify contracts that are illegal or against public policy. Such as, contracts which were entered into as a result of corruption; or were entered into on the understanding that its performance would be affected through corruption; or that they can only be performed through corrupt practices. In addition to this traditional role, it can be argued that the judiciary can play other critical roles in the fight against corruption, its limitations notwithstanding, at an optimum level.

For instance, the judiciary can play a major role in creating and restoring public confidence in the system of governance by appropriately punishing errant public officers guilty of abuse of office and other corrupt practices.

It can also enhance the recognition that the right to a non-corrupt society is a basic human right. However, such evolved roles call for the highest level of judicial activism on the part of judicial officers.

From the foregoing, it is evident that the judiciary is undeniably one of the cornerstones of any effective strategy against corruption. Regret-

tably, critical assessment of the judiciary in Kenya in this regard, depicts underperformance. The creation of an Anti-Corruption Court in 2002, albeit its weak legal and institutional framework, which was intended to spearhead and fast track corruption-related cases in Kenya has not done much to date.

## Judicial Corruption

Various indicators have been developed to identify judicial corruption. These include *inter alia*; delay in the execution of court orders; unjustifiable issuance of summons and granting of bail; suspects not being brought to court; lack of access to records of court proceedings; disappearance of files; unusual variations in sentencing; delays in delivery of judgments; high acquittal rates; conflict of interest; prejudices for or against a party witness; prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; unprofessional interaction with particular litigants or potential litigants; and post-retirement placements.

All this can be done in exchange for money or other rewards and considerations for the judicial officer.

Unfortunately, the trend has increasingly shown that judicial corruption and abuse of the due process of the law are closely linked in Kenya. In numerous instances, suspects of grand corruption have abused court processes in disguise of affirming the due process of law.

For example, most of the public officers suspected for grand corruption and abuse of office have filed constitutional references whose dissection shows that they are merely meant to delay the criminal proceedings against them.

The government has been painstakingly slow in dealing with suspects of grand corruption alluding to the respect of the due process of law. This leaves a lot to be desired on the merits of the

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## The Independence of the Judiciary and the Executive

due process of the law in the fight against corruption in the eye of ordinary citizens.

International and regional human rights instruments recognize as fundamental the right of everyone to the due process of the law. This is the right to a fair and public hearing before a competent, independent and impartial tribunal established by law. Independent and impartial tribunal is an essential element of the right to a fair trial as is the procedural equality of parties. However, such elements cannot exist in a corrupt judicial system.

Corrupt parties often acquire privileged status and thus can access documents to which the other party has no access, or can cause such documents to disappear thereby, obliterating objectivity and neutrality from the judicial process.

Granted, in the bid to stamp out corruption the rights of the individuals cannot and should not be sacrificed for the greater good, but courts must not be perceived to be favouring or shielding culprits, who more often than not are capable of compromising the courts through bribes and other unscrupulous acts and gestures.

Public acceptance of and support for court decisions depend upon public confidence. It is this confidence that grants the legitimacy of the judiciary as a key governance institution.

### The Independence of the Judiciary and Executive Control in Kenya

Currently, the President exclusively appoints the Chief Justice and all other judges without consultation with key stakeholders making them 'his judges'. The impression and perception within the public domain is that judges are appointed by the government in power to protect its interests as opposed to merit and integrity can therefore not be wished away.

The recent cancelled "swearing-in" ceremony of new high courts judges is a clear illustration that appointment of judges in Kenya is a prerogative of the president, and can therefore make any decisions as he deems fit irrespective of the consequences. The aforementioned incident would not have happened if other stakeholders had a say in the process. An independent judiciary requires that judges are independent in the exercise of their powers, and that the judiciary as a whole is independent and protected from the in-

fluence, overt or insidious of other government actors.

Institutional independence would entail protection from systemic influence of other organs of government on the judiciary, such as through allocation of resources. In this regard, financial autonomy of the judiciary is absolutely vital. On the other hand, individual independence requires that judicial officers are protected from the threat of reprisals, and the method by which they are appointed and the ethical principles imposed upon them are properly constructed to minimize the risk of corruption and outside influence.

The subjective judicial purge of 2003 negated these expectations because it instilled fear among judicial officers. Lack of clear and transparent appointment, promotion and removal criteria for judicial officers and a lack of financial autonomy are some of the key indicators of the lack of independence of the judiciary in Kenya.

### Conclusion

For the fight against corruption to be effective and successful, it is imperative that all actors in the multi-disciplinary approach perform their roles effectively. Thus, government and political goodwill; appropriate legislation; effective and efficient prosecuting and investigating arms are all critical to the cause and to the effectiveness of the judiciary in the fight against corruption.

Therefore, it is important to establish an effective, functional and well coordinated National Integrity System which will seek to make corruption a "high risk", "low return" undertaking a system which is designed to prevent corruption from occurring in the first place, rather than relying on penalties after the facts event.

It is incumbent upon the government of Kenya to prove in words and deed that it is committed to the fight against corruption. It must not only ratify but also *implement* the African Union Anti Corruption Convention and the United Nations Anti Corruption Convention to prove to the international community and the Kenyan public of its commitment to the fight against corruption, in addition, taking objective and decisive steps against all suspects of corruption irrespective of their status in society.

*Peter Wëndoh is a Programme Officer, Konard Adenauer the views does not represent TI-Kenya opinion.*

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# HIGHLIGHTS OF THE GLOBAL CORRUPTION REPORT 2007 : TACKLING JUDICIAL CORRUPTION

Our review of 32 countries illustrates that judicial corruption takes many forms and is influenced by many factors, whether legal, social, cultural, economic or political. Beneath these apparent complexities lie commonalities that point the way forward to reform. The problems most commonly identified in the country studies are:

1. **Judicial appointments:** Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges.
2. **Terms and conditions:** Poor salaries and insecure working conditions, including unfair processes for promotion and transfer, as well as a lack of continuous training for judges, lead to judges and other court personnel being vulnerable to bribery.
3. **Accountability and discipline:** Unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency.
4. **Transparency:** Opaque court processes prevent the media and civil society from monitoring court activity and exposing judicial corruption.

These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has been spent training judges without addressing expectations and incentives for judges to act with integrity.

Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

## Recommendations

The following recommendations reflect best practice in preventing corruption in judicial systems and encapsulate the conclusions drawn from the analysis made throughout this volume. They address the four key problem areas identified above: judicial appointments, terms and conditions, accountability and discipline, and transparency.<sup>1</sup>

### Judicial appointments

1. **Independent judicial appointments body:** An

objective and transparent process for the appointment of judges ensures that only the highest quality candidates are selected, and that they do not feel indebted to the particular politician or senior judge who appointed them. At the heart of the process is an appointments body acting independently of the executive and the legislature, whose members have been appointed in an objective and transparent process. Representatives from the executive and legislative branches should not form a majority on the appointments body.

2. **Merit-based judicial appointments:** Election criteria should be clear and well publicised, allowing candidates, selectors and others to have a clear understanding of where the bar for selection lies; candidates should be required to demonstrate a record of competence and integrity.

3. **Civil society participation:** Civil society groups, including professional associations linked to judicial activities, should be consulted on the merits of candidates.

### Terms and conditions

4. **Judicial salaries:** Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.

5. **Judicial protections:** Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive and the legislature to punish independent judges and/or reward those who rule in favour of government.

6. **Judicial transfers:** Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.

7. **Case assignment and judicial management:** Case assignments that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.

8. **Access to information and training:** Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgment writing and case management, as well as ethical and anti-corruption training.

9. **Security of tenure:** Security of tenure for judges should be guaranteed for around 10 years, not

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subject to renewal, since judges tend to tailor their judgments and conduct towards the end of the term in anticipation of renewal.

10. **Widely publicised due process rights:** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.


11. **Freedom of expression:** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.

12. **Quality of commentary:** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the general public in an understandable form. Academics should be encouraged to comment on court judgments in legal journals, if not in the media.

13. **Civil society engagement, research, monitoring and reporting:** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.

14. **Donor integrity and transparency:** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be reviewed in light of the widespread concern that has emerged in the last decade over the need for greater judicial accountability.

There is no magic set of structures and that will reduce corruption in all situations. The country reports in part two of this volume highlights the wide variety of recommendations for judicial reform that are context-specific and therefore not applicable in a general way. Differing situations may require specific measures some of which would not be helpful elsewhere. Nevertheless, the recommendations serve as a guide for reform efforts to promote judicial independence and accountability, and encourage more effective, efficient and fair enforcement. As this volume demonstrates, multi-faceted, holistic reform of the judiciary is a crucial step toward enhancing justice and curbing the corruption that degrades legal systems and ruins lives the world over. 

*Adapted From GCR 2007*

## KEY MESSAGES: Global Corruption Report 2007

### **Judicial corruption erodes the foundations of society.**

1. It undermines justice around the world, denying victims and the accused the basic human right of a fair and impartial trial, sometimes even to a trial at all.
2. It allows criminals to go unpunished, destroying effective governance and democratic participation.
3. It diminishes trade and economic growth.

### **Ordinary people suffer from judicial corruption.**

1. It is often the poor who lose when justice is denied. 'Why hire a lawyer if you can buy a judge?' is a common saying in Kenya.
2. Justice delayed is justice denied: demanding bribes for a speedy trial erodes the rule of law and undermines confidence in the justice system.
3. By making justice unequal, corruption lets discrimination go unpunished or even reinforces it.

### **An impartial judiciary must be based on transparency.**

1. Judicial and prosecutorial appointments and removals must be transparent, independent of the executive and legislative branches, and based on experience and performance.
2. Journalists must be freely able to monitor and comment on legal proceedings, bringing reliable informa-

tion on laws, proposed changes in legislation, court procedures and judgements to the public.

3. Judicial associations and other civil society organisations can monitor early warning signs like delays and poor quality judicial decisions, allowing corruption to be recognised and addressed.

### **Africans perceive that corruption is rife in the African judicial systems.**

1. A majority of people in all but one African country polled (South Africa) perceive the legal system/judiciary to be corrupt.
2. In Africa, about one in five of people who had interacted with the judicial system had paid a bribe.
3. In Cameroon, one in three people had paid a bribe.

### **The Africa region has a specific set of issues when dealing with judicial corruption including:**

1. Political influence and direct interference in judicial process by threats, bribery and intimidation of judges as well as manipulation of judicial appointments, salaries and conditions of service.
2. And social tolerance of corruption in many African countries where some view it as an acceptable way of doing business.

## SOME INDICATORS FOR ASSESSING THE JUDICIARY

- Do judges have the jurisdiction to review the lawfulness of government decisions? If so, are these powers used? Are decisions respected and complied with by the government? Is there a perception that the Executive gets special treatment be it hostile or preferential?
- Have the judges adequate access to legal development on comparable legal system elsewhere?
- Are members of the legal profession making sufficient use of the courts to protect their clients and to promote just and honest government under the law? If not, is access to the courts as simple as it can be? Are the requirements unnecessarily complicated?
- Are appointments to the senior judiciary made independently of the other arms of government? Are they seen as being influenced by political considerations?
- Are judges free to enter judgment against the government without risking retaliation, such as the loss of their post, the loss of cars and benefits , transfer to obscure and unattractive parts of the country?
- Are cases brought on for trial without unreasonable delay? If not, are these delays increasing or decreasing? Are judgments given reasonably quickly after court hearings? Are there delays in implementation/executing order of the courts, e.g issue of summons, service grant of bail listing for hearing? Are there delays in delivering judgments?
- Are court filing systems reliable?
- Are the public able to complain effectively about judicial misconduct (other than appeal through the formal court system)?

*Adapted from Transparency International Source Book 2000*

### Up coming Events

**Event:** International Federation of Journalists (IFJ) World Congress.

**Date:** 28<sup>th</sup> May-2<sup>nd</sup> June 2007

**Venue:** Moscow, Russia

**Event:** Transparency, accountability and anti-corruption in Education

**Date:** 6<sup>th</sup>-15<sup>th</sup> June 2007

**Venue:** Paris, France.

For more information on Corruption in Kenya, and previous issues of *Adili*,



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**Pasha Nikupashe radio programme will be back soon**

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