

Kenya

Justice Sector and the Rule of Law

DISCUSSION PAPER



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Introduction

The justice sector in Kenya has been the subject of major reform efforts in recent years. The different arms of the sector have been the subject of intense discussion and there are concrete proposals for reform of the legal and institutional framework undergirding the rule of law, the justice system, the executive, the legislature, the criminal justice system and the bar. Some of the reform measures have resulted in positive changes in the implementation of the rule of law in Kenya since the installation of a new government with a reforming agenda in 2003. This is evident in, among other measures, the establishment of the Kenya National Commission on Human Rights and the National Commission on Gender and Development, as well as the revamping of the Law Reform Commission. Yet the National Rainbow Coalition (NARC) government under President Mwai Kibaki soon fell away from its reforming commitments, and by the end of its first term many promises for change had not been implemented.

The 2007–2008 post-election crisis in Kenya gave the law reform agenda a significant impetus. The traumatic events witnessed during the crisis demonstrated a real need for the evaluation and overhaul of fundamental institutions of governance. Above all, the inability of the system to resolve the electoral disputes through a legal process re-emphasised the need to transform Kenya's justice system and make it genuinely independent of political interference. Two commissions of inquiry with international representation – on the post-election violence and on the election management system itself – highlighted issues of the rule of law and impunity for abuses in their recommendations. The reinstated government of President Kibaki realised, despite – or because of – its weak and contested mandate, that it must become more serious about implementing the initial reforming agenda with which it had entered office in 2003.

Above all, the post-election crisis forced the government to return to its commitment to complete Kenya's long-standing quest for a new constitution. This time, a fresh review process culminated in the endorsement of a new constitution by more than two-thirds of Kenyans in the referendum held on the 4 August 2010. The new constitution includes many important reforms as well as the symbolic and actual opportunity to make a new start in enshrining respect for the rule of law. With respect to the justice sector, key reforms contained in the constitution include:

- Inclusion of the rule of law, equity, social justice, inclusiveness, equality, human rights and non-discrimination among the national values and principles of governance binding all state organs, state officers, public officers and others when applying or

interpreting the constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions;

- The anchorage of a revamped Kenya National Human Rights and Equality Commission with an expanded mandate.
- The specification of leadership and integrity requirements for public officers which can be used to stem impunity and disregard for law by the executive, legislature and the judiciary.
- The right to fair administrative action to enable citizens to participate in, and hold to account, governmental decision-making processes.
- Measures for greater independence of the judiciary including re-organisation, financial and operational autonomy and a revamped Judicial Service Commission.
- The re-organisation of the policing agencies and the establishment of the National Police Service Commission as a constitutional commission.
- The anchorage and elaboration of the rights of persons who are arrested, detained, imprisoned or held in custody.
- Enhancing the objectivity and accountability in investigations and prosecutions by assigning the state's powers of prosecution to the office of the Director of Public Prosecutions (DPP).
- The anchorage of access to justice and broadening of avenues for dispute resolution through alternative means such as reconciliation, mediation, arbitration and traditional dispute resolution.

However, for these important constitutional principles to translate into a concrete realisation of the rule of law ideal, the government needs to pass enabling legislation and put in place adequate administrative mechanisms to address a number of issues and align them to the new constitutional dispensation. Some of these include:

- The ratification of key international and regional human rights instruments that have not been ratified.
- The establishment of legislative and administrative mechanisms for realising the objectives of human rights treaties and implementing the rulings of regional courts, such as the African Commission on Human and Peoples' Rights.
- The enactment of the Kenya Law Reform Commission Bill into law as soon as possible to give the Commission operational autonomy and enable it to discharge its role in law reform and execute the huge mandate it has under the fifth schedule of the constitution.
- The need for exploration of customary or informal systems of criminal justice, because in some parts of Kenya, these are very prevalent and have been resilient despite efforts over the years to eradicate them. They should be allowed to operate to the extent that they are participatory, accountable, non-discriminatory and are not inconsistent with the constitution and any other written law.
- The establishment of a national legal aid scheme to enable more Kenyans to access justice given the levels of legal rights awareness and costs of legal services.

- There have been many proposals affecting actors in the legal and justice sector. The changes needed in these sectors for improved effectiveness and to support the attainment of the rule of law are known. The problem is implementation and follow-through. This raises the need to catalogue the proposals for change over time and in the new constitution and track these reforms over time in the police force, the judiciary and other actors in the sector. The tracking should go beyond 'ticking boxes' on what has been done to linking the reforms to improvement in the attainment of rule of law:
 - There should be synergy between the different legal and judicial sector actors to ensure that reforms are carried out holistically.
 - Research, training and capacity building are critical in moving from the old constitutional dispensation to the new.

I: Consolidating the legal and institutional framework to advance rule of law principles

A more effective domestication of international law

Kenya has ratified most of the important international and African human rights treaties, most of them without a great delay from the time when they were adopted by the relevant international bodies. Nonetheless, key international and regional human rights instruments need to be ratified by the government, including the Protocols to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the 'Maputo Protocol') and on the Rights and Welfare of the Child.

In line with the common law tradition, Kenya applies the dualist approach to international treaties, which does not have direct effect in domestic law and require implementing legislation. Since different legal norms apply, including customary law and international law provisions on gender equality for instance, some have remained unimplemented despite Kenya ratifying the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The provisions of the new constitution offer some respite but the period before implementation will leave a window open for gender discrimination.

The government has also in some cases taken deliberate action to domesticate treaty obligations by enacting new laws. Examples include the Children's Act of 2001, the Persons with Disabilities Act of 2003 and the HIV/Aids Prevention and Coordination Act of 2006.

Kenya has been slow and irregular in following the reporting procedures related to the international human rights treaties to which it is a party; though this has improved in recent years. For example, after submitting its initial report on the International Covenant on Civil and Political Rights to the Human Rights Committee in 1979, due in 1977, it then submitted its next report (consolidating the second, third, fourth and fifth reports) only in 2004. The next report was due in 2006 and is yet to be submitted. Kenya has so far failed to submit any report to the Committee Against Torture despite acceding to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997, which obliged it to submit reports at intervals of four years from 1998. The report to the Committee on Economic, Social and Cultural

Rights submitted in 1992 was rejected by the Committee for being too scanty and not following the established guidelines, and then only resubmitted in 2007. Kenya submitted its first report to the African Commission on Human and Peoples' Rights in 2006, combining all overdue reports into one.

The government has taken measures to enable it to improve its performance, including the establishment in 2002 of an inter-ministerial committee on human rights reporting obligations, whose responsibility is to prepare and produce country reports on human rights treaties. The membership of this committee includes non-governmental organisations (NGOs). In addition, the government has been consulting stakeholders such as civil society organisations working on human rights in the process of preparing its reports. This has improved the quality of the reports as more people are involved bringing in a broad range of competences.

Kenya has been the subject of several complaints to the African Commission on Human and Peoples' Rights (ACHPR) for being in violation of its obligations under the African Charter. However, the government has a poor record of implementing the rulings of the Commission. In the *Ouko* case, for example, the government failed to comply with the ruling that it 'facilitate the safe return' of John Ouko, a student union leader who was forced to flee the country after being subjected to arbitrary arrest, detention and acts of torture.

A more recent complaint is the *Endorois* case, involving violations resulting from the displacement of the Endorois, an indigenous community, from their ancestral lands without adequate compensation. In its decision, the ACHPR found that the government was in violation of the rights to freedom of religion, property, health, culture and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered. The government is yet to comply with this ruling.

Strengthening the independence of the Kenya Law Reform Commission

The Kenya Law Reform Commission (KLRC) has the mandate to keep all the laws of Kenya under review to ensure their systematic development and reform. The KLRC works with other sectors of society to identify areas that need legislative reform, then they conduct research and then recommend appropriate legislative action. The KLRC has been an important actor in the push for reform, including the development of the Children Act of 2001 and the Sexual Offences Act (SOA) of 2006, both milestones in the protection of the rights of women and children. These new laws offer useful lessons both to the KLRC and to civil society organisations on successful reform efforts, including the importance of sensitising important constituencies through an effective media strategy and engaging in negotiations and displaying willingness to compromise.

However, the KLRC has also faced constraints on its work due to a lack of operational independence. The body responsible for approving the KLRC's work programmes (the Attorney General) is different from the body responsible for controlling the funds allocated to it in the government's budget (the Ministry of Justice and Constitutional Affairs). The draft Kenya Law Reform Commission Bill of 2006 would remedy this by providing the KLRC with full institutional independence and the operational autonomy it requires. It should be enacted as

soon as possible to enable the KLRC to execute its task of law reform as required by the new constitution. The implementation of the constitution requires the enactment of new laws as well as a review and revision of others. A robust operational context for the KLRC will greatly facilitate the performance of these tasks.

II: Promoting mechanisms that guarantee greater independence of judges

The lack of independence of the judiciary has historically been one of the greatest threats to the rule of law in Kenya. The lack of trust in the courts directly contributed to the post-election violence of 2007/2008, and has undermined the rule of law in all aspects of national life.

The 1963 constitution gave the president complete discretion in the appointment and dismissal of the Chief Justice; while the Chief Justice has had extensive administrative powers over the functioning of the courts. Together, these powers have undermined the legitimacy of the judiciary and the decisional independence of judicial officers. As a result, many judicial officers are insecure in their positions. The system for appointing judges has also been open to abuse, since it establishes no standards or criteria for vetting candidates. Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Although the constitution required courts to be independent and impartial, there were no constitutional provisions on immunity of judicial officers, thus judges and magistrates were not ensured immunity from executive-branch pressure. Judges and magistrates who acted with independence and impartiality to the executive's detriment have been penalised by transfers to outlying stations.

The constitution also failed to establish due process mechanisms to ensure that the process of removal was transparent, impartial and fair. The importance of this issue was highlighted by the Integrity and Anti-Corruption Committee established in 2003 to investigate corruption in the judiciary (the Ringera Committee). While the purge of judges that followed the Ringera Committee's recommendations was partially welcomed, and it fulfilled the technical letter of the 1963 constitution's requirements for dismissal of judges, it was at the same time heavily criticised for failing to respect basic due process and therefore for implicating some judges who were not in fact guilty of corruption. Some judges were not even informed of the action that was to be taken against them.

These various problems were identified by the 2010 Report of the Task Force on Judicial Reforms. This latest task force, chaired by a judge of the High Court and with membership

drawn from the judiciary, civil society and government, highlighted critical changes that needed to make the judiciary more effective in executing its mandate. These include: restructuring of the Judicial Service Commission; need for merit-based appointment of judges and other judicial officers; need to address the backlog and delay of cases; need to improve the administration of the judiciary; need for a performance management system for judges and judicial officers; need for ethical conduct and prevention of corruption in the judiciary; need to promote human rights and access to justice; improved access to information and communication; and improvement of terms and conditions of judicial officers.

The new constitution implements many of these recommendations. It seeks to enhance judicial independence and accountability by dispersing judicial authority, giving the judiciary autonomy from the executive, establishing transparent and accountable mechanisms for the appointment of judges, and circumscribing the power to dismiss judicial officers. The 2010 constitution provides for the re-establishment of the Judicial Service Commission, with a new mandate to 'promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice', including by recommending judges for appointment to the president. It also provides for due process in the removal of judges, providing very limited grounds and requiring the adoption of legislation within one year to regulate the use of these powers. The transitional provisions in the sixth schedule to the new constitution require legislation within one year that will establish mechanisms to vet existing judges and magistrates and remove those who are found not to be fit for office. The sitting Chief Justice must vacate his office and may either retire from office or, subject to vetting, continue to sit on the reconstituted Court of Appeal.

These measures are comprehensive and necessary as an effort to restore the legitimacy of the judiciary in the perception of citizens. They provide the details for which the constitution sets the framework and should therefore be seen as part and parcel of the reform package.

The independence of the judiciary is further threatened by its poor performance due to the poor conditions of service, poor funding and severe shortage of qualified personnel. These problems contribute both to poor quality decision-making and also to the backlog of cases in the courts. The issue of resources will need to be urgently addressed by the new Chief Justice, playing an advocacy role with the Minister for Justice and Kenya's development partners for increased support to the judicial system.

The constitution requires the reconstituted Judicial Service Commission to have regard for, among other things, the promotion of gender equality in the judiciary, something that has been notably lacking from the previous commission. The 2010 Task Force found that females were grossly under-represented in the justice sector. There were no women designated in the Chief Justice or Chief Court Administrator posts, neither were they present in the Court of Appeal as judges or as Kadhis. There is a higher, but still insufficient, ratio of women in the magistracy. An affirmative action legislative amendment was rejected by Parliament in 2007, although it was followed by a presidential directive that at least one-third of all appointments to public office should be of women. The Judicial Service Commission did not appear to have any policy to actively increase the number of qualified women in the judiciary.

As the appointment procedures for judges are reviewed, including by the adoption of new legislation on the judiciary, the appointment of more women to senior judicial positions should be a priority. If the Chief Justice is a man, the Deputy Chief Justice should be a woman. It is encouraging that the JSC has ensured gender representation by requiring, for instance, that of the two advocates representing the Law Society of Kenya, one should be a man and the other a woman. This is also the case with the two representatives of the public. One of the factors that may keep women from the judiciary is the failure to make conditions conducive for them to perform roles in public and in private as wives and mothers. For instance, frequent transfers are likely to affect women who tend to be the anchors of homes and carers for their families. Such transfers may affect children's learning and discourage women from judicial service.

Finally, there is a need to review the powers of the judiciary to impose penalties for contempt of court. While in theory a protection designed at ensuring respect for the judicial system, the courts have in practice used the power to punish for contempt to squelch legitimate public criticism of judicial conduct. The *Republic v. Gachoka and Another* case in 1999 relating to allegations of corruption in the judiciary illustrates this problem. Here, the Attorney General had instituted contempt of court proceedings against the respondents for publishing articles in the *Post of Sunday*, alleging that they had contravened the sub judice rule by commenting on an ongoing case, and that they were scurrilous and malicious attacks on the character of the judiciary and the Chief Justice. The new legislation on the judiciary envisaged by the constitution should also regulate the use of this power and ensure that punishment for contempt of court is only imposed in such a way that it does not prevent reporting in the public interest on the courts.

III: Breaking a long tradition of government disrespect for the rule of law

Successive governments in Kenya have circumvented the prescriptions of law when they found them to be a hindrance to the attainment of their short-term political interests. The result has been a self-destructive culture of impunity and lawlessness, as the law has ceased to be authoritative. The current government has not been exempt from this disregard for established rules and procedures. In 2003 for instance, the Minister for Tourism and Information defied a court injunction restraining the government from taking over a building whose ownership was in dispute. The same government minister subsequently defied a court order requiring him to disband a committee he had constituted to investigate the affairs of a radio station. Again in 2003, the Minister for Local Government defied a court order which sought to prevent him from revoking the nomination of a councillor of the Mombasa City Council. The same minister defied a court order quashing the nomination of an individual to serve in the Kisumu City Council. No action was taken against these defiant government ministers.

Parliament has also eroded the separation of powers by passing laws that give its members executive powers and control over significant budgets. The Kenya Roads Board (KRB) Act of 1999 established a 'districts road committee' for every district and provided that all MPs from the district be members of this agency of government, thus conferring executive powers on legislators. This was unconstitutional as it subverted the separation of powers doctrine by giving legislators the power to enact and enforce the laws. The Constituency Development Fund (CDF) Act 2003 gave MPs the power to expend public resources and account to Parliament for such expenditure. In both cases Parliament did not take steps to amend such laws despite the High Court's rulings, in 2000 and 2005 respectively, that they are unconstitutional. Both laws should be reviewed to ensure that they conform to the new constitution, and in particular to bar MPs from administering funds that should be the province of the executive.

The new 2010 constitution includes within its bill of rights a new provision on 'fair administrative action', stating that 'every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair' (article 47). It requires legislation to be enacted within four years that would give force to this right, in particular by allowing for

review of all administrative action by a court or tribunal. Applying to all public officials and agencies, this law would establish principles and procedures for controlling governmental power to ensure that public authorities do not abuse the powers granted to them by the constitution and acts of Parliament. It should regulate the procedures and acts of public administrators by, for example, guiding the initiation of investigations of complaints against public functionaries, and provide for remedies and applicable orders directing parties to conform to governing statutes or rules. It should also entrench the principles of natural justice to ensure fairness and procedure and reasonableness in decision-making.

Legislation on fair administrative action should be supplemented by stronger judicial action on the failure, neglect or refusal of public officers to comply with court orders. In the well-known *Kisya Investments Ltd v. Attorney General & Another* of 2005, the High Court has adopted an interpretation of the Government Proceedings Act which precludes courts of law from issuing orders 'for enforcing payment by the government of any money or costs'. This precedent should be directly addressed by the legislation on fair administration action requiring courts to interpret the Government Proceedings Act and other relevant statutes in a manner that fulfils the broad intentions of the new constitution, especially government respect for the rule of law.

The Kenyan government has, since independence, made frequent use of the appointment of commissions of inquiry under legislation that is similar in many Commonwealth countries. Such commissions are chaired by a judge or former judge, have quite broad powers of investigation, and are appointed in response to public demand for action on a particular issue. Since independence, successive presidents have established about 25 commissions of inquiry. Though they may produce useful reports and recommendations, commissions of inquiry are in many cases established as a means of containing public anger where it appears the executive does not intend to implement their recommendations: the president is under no obligation to make the reports of such commissions public nor to implement their findings. Moreover, since successive presidents have tended to appoint sitting judges as heads of commissions of inquiry, these judges are drawn into political controversies, while their determinations as members of the commission may then be challenged in courts of law. As the Bosire Commission observed, 'judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined'.

There is a need for review of the Commissions of Inquiry Act, including the provisions surrounding appointment of sitting judges as commissioners in non-judicial processes. Commissions of inquiry are a tool used by the executive and therefore tend to be political in nature. They are therefore not in the realm of judicial decision-making and can open judges who sit on them to situations of conflict of interest if from the evidence, triable issues are raised. Moreover, if matters raised in the commission are subjected to judicial review, there is the likelihood of a High Court judge sitting in judgment over a matter overseen by a Court of Appeal judge as the chair of the commission. In the circumstances, and to maintain the decorum of the court, judges should not serve on commissions of inquiry. Such exemption is important for enhancing the independence of the judiciary. In addition, new legislation should enhance the autonomy, transparency and accountability of commissions.

IV: Transforming a largely unfair criminal justice system

There has been a rapid increase in the levels of crime in Kenya over the last two decades. These high crime levels have been attributed to a number of factors, including rapid growth in urban populations coupled with acute housing shortages, declining economic prosperity, rising urban unemployment, the collapse of municipal institutions of governance, the emergence of vigilante groups and perceptions of impunity among criminals. The Kenya Police Crime Report notes the current threat to national security posed by organised criminal gangs like the Mungiki and the sustained proliferation of firearms from countries such as Somalia and Southern Sudan. Police and prison officers work under deplorable conditions and terms of service, which may predispose them toward oppressing the public they are supposed to serve.

The criminal justice system is characterised by wide but unregulated discretionary powers whose exercise often leads to the criminalisation of poverty and the persecution of citizens. A majority of convicted prisoners are petty offenders, who could have been dealt with other than by imprisonment. As of 31 May 2009 for instance, out of the 34 500 convicted offenders, 18 956 prisoners had been sentenced to less than three years imprisonment. The existing policy and legal framework has served to ensure that public security agencies only serve the interests of the political regime in power and the *samaki kubwa* ('big fish'), the influential top few stakeholders, to the detriment of the realisation of the rule of law for the majority.

The Kenya Police Force (KPF) is understaffed and the officers are not adequately equipped in terms of resources to effectively perform their duties. The current 1:850 ratio of police officers to citizens falls short of the UN recommended ratio of 1:450.

A number of critical reform measures have already been initiated, while the new constitution should provide a firm anchorage for these reform measures. Nevertheless, there is a need for many more measures to be taken in order to supplement the constitutional guarantees of a fairer criminal justice system.

Improved intelligence and strategy on crime

One of the key factors that aggravate the deficit of effective criminal justice relates to the poor quality of information about the crimes that are committed. There is little existing information beyond official records produced by the criminal justice administration, which are hardly made

available to the public. These records are in any event not conclusive since many crimes are never reported to the police.

Currently, several factors have contributed to the failure to report crimes. First, the reluctance with which the police handle certain cases discourages the reporting of crimes. Some cases are normally labelled as ‘unfounded’ claims even where investigations have not been instituted. For example, domestic violence cases are trivialised and offenders are not always charged when victims report them to the police. Secondly, the lack of adequate resources and infrastructure impacts adversely on the efficiency of the police in responding to crime. For example, sexual offences require immediate medical examination and collection of evidence for a conviction to be made possible. However, some victims do not have easy access to police stations and hospitals to obtain the required evidence in good time. The longer this takes the harder it is to obtain sufficient evidence warranting a conviction. Low conviction rates thus discourage victims from reporting such crimes.

These problems of low reporting rates are shared with many countries, even the richest. Nevertheless, the Kenyan government and police could improve their response on the crimes that most affect ordinary people by commissioning independent victim surveys to identify those crimes that are most common and of most concern, and developing policing strategies designed to address those problems.

Improving policing

Policing in Kenya is mainly the preserve of the Kenya Police Service (KPS). The Police Act also provides for an Administration Police Force (APF), whose function is to ‘assist the provincial administration in the exercise of their duties’.

Policing in Kenya has been characterised by poor performance and abuse. At the most egregious level, the Kenya Police Force (KPF) has often been deployed as an instrument for the political repression of the citizenry, as pointed out in the report of the Commission of Investigation into Post Election Violence (CIPEV).

At the level of day-to-day policing, KPF officers frequently arrest and detain suspects they do not intend to charge with any particular offences, especially through a practice known as ‘the Friday Collection’. They make arrests on Friday evening, solicit bribes from those arrested and tell those who refuse to pay that they cannot have access to a lawyer or magistrate until Monday. Police officers have been accused of using firearms indiscriminately. A 2009 report by the UN special rapporteur on extrajudicial, arbitrary or summary executions, Prof. Phillip Alston, concluded that extrajudicial killings in Kenya appeared to be ‘widespread and some of the killings are opportunistic, reckless or personal’. Police officers also commit or participate in criminal activities. Between 2001 and 2004, 312 police officers were arrested for being involved in violent crime. Further, they are often heavy-handed, insensitive and use excessive force in their dealings with citizens. The international corruption watch organisation Transparency International has consistently ranked the KPF as the most corrupt national institution in Kenya.

The key legislation governing the police, the Police Act of 1960 (revised in 2002) and the Police Standing Orders of 1962 (revised in 2001) adopted under the Act, are out of date and inadequate. For example, the Commission of Inquiry into Post-Election Violence argued that

their main weaknesses were: unclear responsibilities and confused lines of accountability; constraints around the ability to place the right people in the right jobs; an inadequate system for managing staff performance and discipline issues; little guidance to work with partner agencies, domestically or internationally; and few supports to enable the use of modern policing tactics.

To address these problems, the government should carry out a comprehensive vetting of police staff, as recommended by the National Task Force on Police Reforms, appointed in 2005 to look into these issues. The institutional and legislative framework that has been promoted thus far for the vetting process is not conducive to promoting positive codes of conduct among the staff of the Kenya Police Force and the Administration Police. This framework needs to be revisited and specific legislative instruments must be calibrated in order to ensure stricter oversights over the forces and also, importantly, to require the training of these staff members and to create clear legislative guidance on how to govern the vetting process. In particular, policing needs to be democratised by sharing policing information with the citizenry, and by giving them a voice and an influence in the decision-making process. Establishing civilian oversight bodies constitutes one way of democratising the policing decision-making process. The establishment in September 2008 of a Public Oversight Board was a giant step that acknowledged the need to develop accountability mechanisms for the KPF. But the Board was not yet in operation and its secretariat was yet to be set up at the time of writing this report. Moreover, the setting up of this Board was not fully expected to address the underlying issues stemming from the fact that the KPF was established, and continues to be based upon a regime that does not demand police accountability.

The National Task Force on Police Reforms also recommended that the conditions of service and the welfare of police officers should be improved. Among other things, the Task Force has asked the government to: improve the remuneration and allowances of police officers; take the interests of family members into account when transferring police officers; provide medical and life insurance cover; and improve the quality of their housing and accommodation.

After receiving the report of this Task Force, the government established a Police Reforms Implementation Committee, which is currently preparing draft laws on civilian oversight of policing, administration of policing and regulation of private security providers for consideration by Parliament.

Appropriate sentencing

The current practice in sentencing convicted criminals is largely discretionary and highly variable, while it does not provide adequate measures for non-custodial sentencing in the case of petty offences. Section 35 of the Penal Code which addresses conditional discharges merely hints at sentencing principles and directs the judicial officer to take into account the circumstances of the offence and the character of the offender. Where only the maximum penalties are provided, but not minimum, the judicial officers have wide discretionary powers on the appropriate sentences. General sentencing principles are well-developed in case law in Kenya, but they should be reviewed to bring them up-to-date and make sentencing more transparent. Comprehensive sentencing guidelines should be established either in statutory or policy documents.

Where an offender has been convicted, the law allows courts to make probation orders in place of custodial sentences. Furthermore, the court is entitled to commit offenders convicted of an offence punishable by imprisonment for a term of up to three years to perform community service. But courts have generally been reluctant to give non-custodial sentences, although this trend is now beginning to change. Nevertheless, the use of non-custodial services demands the enhancement of the capacity of the Probation Department to administer such sentences. In addition, the community service orders programme should take into account the need to rehabilitate offenders by, for example, counselling offenders.

Increasing the independence of the prosecution system

The new constitution seeks to enhance objectivity and accountability in investigations and prosecutions. Section 26 of the old constitution vested in the Attorney General the power to decide if and when an individual should be prosecuted for a criminal offence. Further, it gave the Attorney General the power to take over and continue criminal proceedings that had been instituted or undertaken by persons or authorities, and to terminate any prosecution. This power was often abused, and resulted in individuals being prosecuted, only for charges to be dropped along the way. The failure to regulate this power resulted in the law being used to persecute innocent citizens, to the detriment of the legitimacy of the criminal justice system. In the context of human rights violations and economic crimes, this power was often applied selectively, with the result that the perpetrators of these crimes were hardly ever punished.

In the new constitution, the task of exercising the state's powers of prosecution will now be undertaken by the office of Director of Public Prosecutions (DPP) (article 157). The primary functions of the Attorney General will be to give legal advice to the government and represent it in legal proceedings (article 156). It is worth noting that the new constitution requires the current Attorney General to vacate office not later than 12 months after it takes effect. This should be seen as a vetting exercise, given that the Attorney General is considered to be 'not just complicit in, but absolutely indispensable to, a system which has institutionalised impunity in Kenya', according to the 26 May 2009 Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. The DPP can only take over a criminal suit with the permission of the person or authority who instituted it. In addition, the DPP can only discontinue a prosecution with the permission of the court. And to preclude the abuse of the power to prosecute, the new constitution requires that its exercise 'shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process'.

Regulating informal systems of criminal justice

The deficiencies of the criminal justice system have led to the emergence of private modes of security provision. Among the poor, vigilante groups have emerged to fill the vacuum created by the state. And among the rich, there has been a proliferation of corporate security. A culture of 'mob justice', which involves the lynching of criminals by the public, has also developed. Thus in effect, the public have taken the law into their own hands due to the perception that the police and the courts are unable to guarantee justice. The dark side to this has been the resulting manifestation of vigilante groups. Examples include the Mungiki, Taliban, Jeshi la

Mzee, Baghdad Boys, Kagio, Kaya Bombo Youth and Sungu Sungu. Although these groups often engage in criminal activities, sections of the citizenry perceive them to be an appropriate response to crime in many cases, in particular when they operate to curtail the criminal activities of other vigilante groups. In some cases, moreover, vigilante groups are touted as a form of community policing, as they consult with police officers in their areas of operation.

V: Enhancing mechanisms for a broader access to justice

Access to justice is quintessential to the realisation of the rule of law ideal. Yet many Kenyans remain unaware of their basic rights while the courts are structured in a way that does not facilitate equal access to justice. Court fees are high for an ordinary citizen and for many, legal services are unaffordable. To promote access to justice it is of paramount importance that the government and civil society should establish mechanisms for educating citizens on their rights and assist them in accessing justice.

The government should establish a national legal aid scheme to enable more Kenyans to access justice. Currently, the government provides minimum legal aid which does not cover all people who cannot afford legal services. The state only provides legal aid for persons charged with murder in the High Court, and conditional legal aid for a child offender having no other recourse to legal assistance. The Civil Procedure Act also makes provision for pauper briefs where people who do not have sufficient means may apply to the court to be allowed to sue as paupers. Such applications are however dependent on the availability of lawyers to take up the brief. Most free legal aid and associated clinics are consequently provided by non-governmental organisations to disadvantaged groups of people especially children, women and the poor. However, free legal advice from non-governmental organisations (NGOs) is restricted by the fact that they do not have a countrywide presence. Some NGOs and the Kenya National Commission on Human Rights (KNCHR) offer free legal aid clinics, but the assistance does not extend much further than providing legal opinions. A national legal aid scheme would not only support the efforts of these smaller organisations, but would effectively ensure a nation-wide knowledge of such access as an entitlement, as at present many Kenyans are unaware that they have any rights to legal aid.

In most of the rural parts of Kenya, justice is sought through the use of non-state justice systems such as a council of elders or extended family members, and religious institutions. Cases which are most commonly brought to these institutions include matters to do with land disputes, livestock disputes, marital and domestic matters as well as domestic violence. Some crimes such as assault and sexual violence are also referred to the elders for resolution. Being closer to 'the people', as well as much easier to access, much more familiar and less bureaucratic, the governmental *de jure* recognition of customary systems of justice would be beneficial as a way to increase access to criminal justice for all citizens.

The government should encourage and institutionalise alternative dispute resolution to ease the backlog in courts and ensure expedient resolution of justice, as proposed by the 2010 report of the Task Force on Judicial Reform. Generally there has been no effort to formalise these courts. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process. It is important to note that the 2010 constitution requires the National Land Commission (section 67) 'to encourage the application of traditional dispute resolution mechanisms in land conflicts' and thus the crystallisation of alternative justice methods in a legal sense would indeed be a step forward in the justice sector for increasing the access to justice across the country.

The court structure as it is does not afford equal access to justice for all. Most of the courts are found in major towns and at times far from rural areas or vulnerable populations in refugee camps. The 2010 Report of the Task Force on Judicial Reforms noted that in Northern Kenya courts are situated as far as 500km away from the users and that in such marginal areas, there is a dearth of legal service providers. It also pointed out that apart from a shortage of space, there is also a personnel shortage. The staff establishment for the judiciary is 4 681 but there are only 1 456 people in posts. With regard to judicial officers, the total number of magistrates in post is 277 against an establishment of 554; 11 Court of Appeal judges out of an establishment of 14 judges and 46 High Court judges out of an establishment of 70. The Judicial Service Commission should ensure that there are enough judicial officers and in the interim, find innovative ways of ensuring access to justice for all Kenyans. This could be through mobile courts, moving judges and magistrates temporarily from courts with fewer cases to those with a big backlog and reviewing court procedures and processes for faster justice.

The government should also implement the provisions of the new constitution and the recommendations of the report of the Task Force on Judicial Reforms related to access to justice, namely that:

- Physical facilities of courts be made more accessible to persons with physical disabilities and other vulnerable groups;
- Courts administer substantive justice without undue regard to procedural technicalities;
- Rules of procedure of Kadhi courts be developed and enacted to standardise the procedures and practices of the courts; and
- Court rules and procedures are reviewed regularly to ensure that they are efficient and simple.

VI: Ensuring national accountability of external funding in the justice sector

While development assistance has contributed to the realisation of the rule of law in Kenya, donors continue to set much of the agenda and the conditions for cooperation, even in the context of sector-wide approaches (SWAp), such as the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme in Kenya. Here, there is a concern that donors continue to exert too much influence as they are too involved in the detail of the programmes, which can only work to the detriment of the SWAp objective of ensuring governmental leadership and ownership of development assistance programmes. Furthermore, such donor influence means that the main flow of accountability will continue to be outward, that is from the recipient government and SWAp institutions to the development partners.

By far the most significant concern is the ambivalence of development partners over the use of recipient government administrative procedures and accounting systems. While they acknowledge the need to rely on national procedures and systems, donors are exceedingly reluctant to do so, arguing that these procedures and systems are inefficient and corrupt. As a result, they create parallel structures which only end up undermining national systems. Even more worrisome, these parallel structures bypass national accountability mechanisms. In the case of the GJLOS Reform Programme, for example, the private firm responsible for procuring goods and services is entirely unaccountable to national constituencies. Thus in order to circumvent this potential threat and enhance the effectiveness of aid in general and in promoting the rule of law in particular, several measures need to be taken.

One such measure could consist of a mandate given to the government to keep an inventory of all development assistance agreements and facilitate public access to those agreements. The GJLOS Reform Programme is an important case to examine in this regard, as it was created to strengthen the capacities of the institutions in the governance and legal sector to enable efficient, accountable and transparent administration of justice. The principal document governing the Reform Programme was a memorandum of understanding (MoU) between the government of Kenya and the development partners. The MoU set out the funding arrangements for the Programme. It provided that most of the development partners would provide funding through

a basket fund, the GJLOS Basket Fund, while others would do so on a bilateral basis. Further, the MoU set out the terms and procedures for the joint management, funding, monitoring and evaluation of the Programme. Thus it provided for the appointment of a Financial Management Agent (FMA) to manage both the basket and non-basket funds, through a holding account in a commercial bank. It also gave the government overall responsibility and accountability for the implementation of the Programme. Nonetheless, one of the major shortcomings of this Programme was related to the fact that it has not been sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems have been noted because of the poor linkage between the programme and the Ministry of Finance, where the GJLOS is not well-known or understood.

Perhaps the most important unfulfilled expectation relates to the Programme's efforts to strengthen the government's financial management and procurement capacities. Because the development partners were convinced that the government's financial management and procurement systems are cumbersome and corrupt, they insisted on the appointment of the FMA. In effect, therefore, they created financial management and procurement structures that by-passed the national systems. With respect to financial management, whilst the FMA is contracted to improve the government's capacities, it appears that neither indicators nor a timetable for doing so were provided. The review team thus found no evidence of the FMA proactively identifying financial management capacity gaps and filling them. And a subsequent review conducted some two years later reported that the participating government ministries and departments were concerned about poor communication, procurement delays and – perhaps most importantly – no real demonstrable evidence of financial capacity building. Furthermore, bypassing the government's financial management system is likely to weaken the government's financial management capacity since disbursements take place outside of the governmental financial system. A vicious cycle – in which the government's financial management system is bypassed and weakened thereby justifying the continued demand for an FMA – is thus formed. It is, however, encouraging that a consensus seems to be emerging among the development partners towards moving to an arrangement under which the Programme's finances are managed by the Ministry of Finance through a special account. Thus this Programme is an important marker of the real necessity for the government to enact a law to govern the administration of all forms of aid as a way to not only streamline and make more efficient the funding and consequently the administrative process, but it would also increase the accountability of the institutions to the public.

The government should subject the private firms appointed as the FMAs of sector-wide aid programmes to the requirements of the Public Procurement and Disposal Act of 2005. This Act gives standing to 'any person who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity'. This need was further reinforced by the experiences and bottlenecks of the GJLOS Reform Programme which illustrated the need for a national law on the administration of aid, establishing clear institutional and accountability frameworks, and also structuring the participation of all stakeholders. This would therefore make the process more transparent and reduce the available channels for corruption since this legal mechanism would attenuate the lines of accountability. Moreover, it would in effect create

a framework through which the local electorate can hold such governments to account if aid funds have not been used for their intended purposes, further meaning that the electorate could demand accountability directly from the development partners too.

VII: Conclusion

Most of the recommendations in this paper expand on and are meant to facilitate full implementation of the proposals of the 2010 Report of the Task Force on Judicial Reforms. They also stem from the legal guarantees enshrined in the new constitution adopted in the 4 August 2010 referendum. The independence of the judiciary is key to the implementation of these recommendations. It is also crucial to maintain a systematic process that enables the tracking of the implementation of the proposals of the Report of the National Task Force on Police Reforms, and the provisions of the new constitution on the reform of the criminal justice system. The implementation of these recommendations would also require an adequate tracking of the enactment of legislation required for the implementation of the new constitution, and auditing existing legislation (including subsidiary legislation) to ensure that they adhere to the values and principles of the new constitution.

Civil society groups should participate in and monitor the implementation of all these reforms, including the drafting of the laws needed to transform the justice system. Civil society actors, such as NGOs working on human rights, have played an influential role in getting the government, as well as the concerned institutions, to meet their obligations to date. Their ongoing involvement will be crucial to the advancement of the implementation process.