A Critical Examination of the Experience of Judiciary-Executive Relations in Post-2010 Kenya

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Abstract

The Judiciary in Kenya has historically played a significant role in maintaining the rule of law and ensuring justice, but this has often been met with strong resistance from the executive branch of government. Political interference has consistently threatened judicial independence, crippling the Judiciary's ability to act impartially. The institution has faced persistent obstacles, ranging from attacks on individual judges to executive manipulation of judicial funding and appointments, despite the progressive framework established by the 2010 Constitution, which sought to strengthen judicial autonomy. This has eroded public trust and raised concerns about the Judiciary's capacity to hold the government accountable. This paper assesses these challenges by examining how recent political dynamics have impacted judicial independence and by drawing lessons from the experiences of South Africa and Zimbabwe. It argues that despite the fact that Kenya has made strides toward an independent Judiciary, reforms are still needed to safeguard its autonomy. The article proposes solutions such as constitutional amendments to secure financial independence, strengthening the Judicial Service Commission, and promoting transparency through public outreach. By implementing these changes, Kenya can restore confidence in its Judiciary and ensure that it continues to serve as a vital check on executive power.

Keywords: The 2010 Constitution, the Judiciary, Executive, Political Interference, Human Rights.

1. Introduction

In African emerging democracies, Constitutions are arguably considered the most potent antidote to failed constitutionalism and a blueprint for organizing state-building.[1] Indeed, this is one of the reasons the Kenyan people enacted

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the 2010 Constitution. This Constitution, in the opinion of many human rights activists and scholars both in the legal academy and other multidisciplinary fields, is tagged as 'progressive,' 'revolutionary,' and even 'transformative.'[2] This is due to the fact that there are many innovations provided in the charter, which merit these labels. Central to this was the establishment of an independent judiciary.[3] The Judiciary, being one of the three arms of the government, is expected to apply the law neutrally and independently in compliance with the key tenets of democracy, good governance, the rule of law, constitutionalism, and respect for human rights,[4] while at the same time upholding the doctrine of separation of powers that aims to promote inter-branch mutual respect and harmony.[5] Additionally, the constitutional project imposes a *sui generis* obligation on judges, as the "guardians" of the Constitution, to interpret, enforce, and apply its provisions jealously and judiciously in a manner that is compliant with the dictates of values and principles of governance on which Kenyan society and the state are founded, as evidently articulated in article 10 of the Constitution.[6]

Given this context, although existing literature and recent studies have shown that the post-2010 Judiciary has made significant strides in delivering bold and independent decisions compared to the pre-2010 Judiciary, which functioned as the handmaiden of the Executive,[7] it is, however, regrettable that in the recent past the political class, particularly the Executive branch of government, has attempted to threaten, intimidate, influence, and interfere

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Journal.

1 Martha Gayoye, "Constitutions without Constitutionalism' and Judicial Leadership in Kenya (2024) 18(3) *Journal of Eastern African Studies* 345.

2 Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation' (2015) *Specialist Jurisprudence* 6.

3 Demas Kiprono, '2010 Constitution Restored Confidence in a Truly Independent Judiciary' (Amnesty International Kenya, 2 September 2022) available at https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/ accessed on (17 April 2025).

4 Yash Pal Ghai and Jill Cottrell Ghai, 'The State of Human Rights and Freedoms in Kenya' (Katiba Institute, 10 December 2024) available at https://katibainstitute.org/the-state-of-human-rights-and-freedoms-in-kenya/ accessed on (17 April 2025).

5 Walter Khobe, 'Reinvigorating the Separation of Powers and the Politics of Inter-Branch Relations in Post-2010 Kenya' (IACL-AIDC Blog, 7 September 2021) available at https://blog-iacl-aidc.org/spotlight-on-africa/2021/9/7/reinvigorating-the-separation-of-powers-and-the-politics-of-inter-branch-relations-in-post-2010-kenya accessed on (18 April 2025).

6 Walter Khobe 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Fombad C (eds.) *Separation of Powers in African Constitutionalism* (Stellenbosch Handbooks on African Constitutional Law Series: Oxford University Press, 2016) 286-299.

7 Caroline Jones and Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015' (Open Government Partnership, 31 July 2017) available at https://opengovpart.medium.com/transforming-the-courts-4748a7f0d8f1 accessed on (19 April 2025).

with the independence of the Judiciary in a bid to control it.[8] As such, the ramifications of these attempts,[9] in the view of many stakeholders, would not only expose the Judiciary to a more vulnerable state of affairs, but also make it an experimental laboratory for political controversies.[10] The core discussion of this paper is recent attacks on the independence of the Kenyan Judiciary and their implications for the project of Constitution-building in Kenya.

The article first looks at the history of judicial independence in Kenya and examines the "operational meaning of an independent judiciary" in the context of judiciary-executive relations after the enactment of the post-2010 dispensation. It then proceeds to interrogate several decisions in which the Judiciary has spoken boldly despite their political sensitivity, thereby exhibiting its independent nature. The paper further looks at how the Judiciary has suffered threats and intimidation at the hands of the Executive. At the heart of this paper, I draw on the comparative experience of other African countries, particularly South Africa and Zimbabwe, whose Judiciaries have also faced threats and intimidation from the political class comparable to those facing the Kenyan Judiciary. It finally highlights lessons for strengthening and sustaining judicial independence against executive interference in Kenya and across the African continent.

2. Historical Evolution of an Independent Judiciary

2.1 Judicial Independence Before 2010

The history of judicial independence in Kenya reveals a complex struggle shaped by colonial influences, political interference, and subsequent reforms.[11] Kenya,

8 Kenya Human Rights Commission, 'We Will Not Allow Executive Tyranny Against Judiciary, Other Institutions and Kenyans' (4 January 2024)available at https://khrc.or.ke/press-release/we-will-not-allow-executive-tyranny-against-judiciary-other-institutions-and-kenyans/ accessed on (20 April 2025).

9 James Ngunjiri, 'Judiciary under Siege: Why Separation of Powers and Judicial Independence Must Be Protected' (2024) Vellum Kenya available at https://vellum.co.ke/judiciary-under-siege-why-separation-of-powers-and-judicial-independence-must-be-protected/ accessed on (20 April 2025).

10 Charles Jaika, 'Judicial Resilience and Resistance: Navigating Challenges for an Independent Judiciary' (ICJ Kenya, 2 February 2024) available at https://icj-kenya.org/news/judicial-resilience-and-resistance-navigating-challenges-for-an-independent-judiciary/ accessed on (20 April 2025).

11 Kenyan Section of the International Commission of Jurists, 'Submissions to the Special Rapporteur on the Independence of Judges and Lawyers for the Next Thematic Report on Safeguarding the Independence of Judicial Systems in the Face of Contemporary Challenges to Democracy' (Office of the United Nations High Commissioner for Human Rights, January 2024) available at https://www.ohchr.org/sites/default/files/documents/issues/ijudiciary/cfis/contemporary-challenges-democracy/subm-sr-independence-judges-cso-icj-kenya.pdf accessed on (21 April 2025)

as a British colony from the late 19th century until independence in 1963, witnessed a Judiciary deeply subordinated to colonial authority.[12] Judges were appointed by the colonial government, serving its interests rather than those of the Kenyan people.[13] This structure left little room for judicial autonomy, and the legal system reflected British legal principles without regard for the local context or needs of Kenyan society. When Kenya gained independence in 1963,[14] the country inherited a liberal Constitution that promised a multi-party system, democratic governance, and judicial independence.[15] However, the post-colonial state remained highly autocratic, largely because it adopted colonial laws and practices, thereby limiting the autonomy of the Judiciary.[16] This situation continued under the single-party rule of President Daniel Arap Moi, who assumed power in 1978.[17] During his tenure, the Judiciary became increasingly susceptible to political interference,[18] further undermining its independence and ability to act impartially.[19]

The 1990s brought increasing pressure for constitutional and political reforms, leading to the restoration of multiparty politics in 1991.[20] This era also saw calls for judicial reforms,[21] culminating in a report by the Kwach Committee in 1998, which exposed widespread corruption within the Judiciary.[22] The report highlighted both petty and grand corruption, noting

12 Sadam Issack, 'Recusal of Judges: A Coronary Concept to the Right of Fair Hearing in Kenya' (2 August 2016) SSRN available at https://ssrn.com/abstract=2817304 accessed on (21 April 2025).

13 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).

14 Gibson Kamau Kuria, 'Litigating Kenya's Bill of Rights' in Kivutha Kibwana (ed.), Human Rights and Democracy in East Africa: The Constitutional Implication of East African Cooperation (East Africa Law Society 1997) 87.

15 Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(2) *Human Rights Quarterly* 413, 415.

16 Ali A. Mazrui, 'Half a Century of the Post-Colonial Judiciary and State-Formation: The African Experience' (Kenya Law, 11 October 2013) available at https://kenyalaw.org/kenyalawblog/post-colonial-judiciary-and-state-formation-the-african-experience/ accessed on (25 April 2025)

17 International Commission of Jurists, *Democratisation and the Rule of Law in Kenya* (ICJ, April 1997) 13.

18 See Constitution of Kenya Amendment Act 4 of 1988.

19 Mikhail Nyamweya, 'Public Perception of Kenya's Judicial Independence' (The Elephant, 24 October 2024) available at https://www.theelephant.info/opinion/2024/10/24/public-perception-of-kenyas-judicial-independence/ accessed on (25 April 2025).

20 George Wilson, *Country Report – Kenya – 2010 Reforms* (Stanford Law School, April 2023) available at https://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf accessed on (25 April 2025).

21 George O Otieno Ochich, 'The Changing Paradigm of Human Rights Litigation in East Africa' in Kithure Kindiki (ed), *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (International Commission of Jurists – Kenya Section 2007) 29.

22 International Commission of Jurists, *Kenya: Judicial Independence, Corruption and Reform* (ICJ,

instances where bribes were paid to judges and magistrates to delay trials, misplace files, and even influence outcomes.[23] Political pressures, corruption, and concerns over impartiality continued to hinder the true autonomy of the Judiciary even after the constitutional reforms in 2010. Thus, while Kenya made progress in strengthening judicial independence, significant obstacles remained,[24] requiring continued efforts to ensure an impartial and autonomous Judiciary. This historical trajectory directly informed the design of Chapter 10 of the Constitution of Kenya, 2010.

2.2 Judicial Independence in the Post-2010 Period: The Normative Foundations and Constitutional Transformation

The Constitution of Kenya, 2010, represents a significant milestone in the effort to achieve judicial independence, clearly outlining provisions to ensure the Judiciary operates free from political interference. Chapter Ten focuses explicitly on the independence of the Judiciary, stipulating that it is subject only to the Constitution and the law.[25] This framework seeks to prevent the historical abuses of power, where the Judiciary was often manipulated by the Executive.[26] The creation of the Judicial Service Commission (JSC) under article 171 plays an instrumental role in safeguarding this independence by overseeing the appointment, discipline, and removal of judges. These provisions aim to provide a solid foundation for a Judiciary that can function independently and impartially.

Further reinforcing judicial independence, the Constitution grants judges security of tenure, ensuring they can only be removed under specific conditions requiring an investigation by the JSC and approval by Parliament.[27] This process is designed to shield judges from arbitrary dismissal, thereby allowing them to carry out their duties without fear of political retribution. Moreover, it grants the

April 2005) available at https://www.icj.org/wp-content/uploads/2012/04/kenya_judicial_independence_report_2005.pdf accessed on (25 April 2025).

23 *Ibid*., 15.

24 Advisory Panel of Eminent Commonwealth Judicial Experts, *The Kenya Judiciary in the New Constitution* (Constitution of Kenya Review Commission, May 2002) available at https://www.commonlii.org/ke/other/KECKRC/2002/8.html accessed on (25 April 2025).

25 Constitution of Kenya 2010, article 160.

26 Walter Khobe Ochieng 'The composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Ghai JC (eds) *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists –Kenya, Nairobi, 2016) 47-71.

27 *Ibid*., Article 168.

Judiciary financial autonomy,[28] ensuring that it is not vulnerable to executive or legislative pressures through control of its budget. These measures are essential in preserving the Judiciary's capacity to perform its duties impartially.

These commitments in Kenya's Constitution align with regional and international norms that emphasize the importance of judicial independence as a cornerstone of democracy. Key documents such as the Universal Declaration of Human Rights (UDHR),[29] the International Convention on Civil and Political Rights (ICCPR),[30] and the African Charter[31] provide for the separation of powers and safeguard the independence of the Judiciary. The UN Basic Principles on the Independence of the Judiciary,[32] the Bangalore Principles of Judicial Conduct,[33] and the Commonwealth (Latimer House) Principles[34] further solidify these guarantees, ensuring that Kenya's reforms are in line with best international practices.

Despite these substantial changes, Kenya continues to face challenges in fully implementing judicial independence. The problem lies in the gap between Constitutions and constitutionalism, where legal frameworks are in place but not consistently honoured in practice.[35] This problem is not unique to Kenya, as similar issues are prevalent across the African continent, where Constitutions are often breached in practice. The next part of this paper develops an operational definition of "judicial independence," exploring its practical implications in Kenya and the broader regional context.

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28 *Ibid.*, Article 173.

29 United Nations, *Universal Declaration of Human Rights* (10 December 1948) GA Res 217A(III), UN Doc A/810, article 10.

30 United Nations, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, article 14(1).

31 Organisation of African Unity, *African Charter on Human and Peoples' Rights* (27 June 1981) CAB/LEG/67/3 Rev. 5, 21 ILM.

32 United Nations, *Basic Principles on the Independence of the Judiciary* (1985) UN Doc A/RES/40/32, Principle 1.

33 United Nations, *Bangalore Principles of Judicial Conduct* (2002) UN Doc E/CN.15/2002/10, Value 1.

34 Commonwealth Secretariat, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003), Principle VI.

35 H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: An African Political Paradox' in Douglas Greenberg, Stanley N. Katz, Andrew Oliviero, and Stephen C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 65–80.

3. Operational Meaning of an Independent Judiciary and Its Implications in a Constitutional Democracy

Judicial independence has been described as a thermometer that measures the "temperature" of a democracy in a civilized society.[36] It is an outgrowth of the doctrine of separation of powers between the branches of government: the Legislature, Executive, and Judiciary. Judicial independence refers to a system where the judicial branch of government operates free from interference or influence by the executive and legislative branches.[37] This independence is essential for upholding the rule of law, ensuring fair trials, and protecting citizens' constitutional rights. It enables the Judiciary to make impartial decisions based on the law, rather than political considerations or external pressures. It is concerned with both the institutional and individual autonomy of judges, as well as the actual capacity of the Judiciary to render independent decisions. Besides this, an independent Judiciary allows courts to act as the guardians of constitutional rights, protecting individuals from state overreach and invalidating laws or executive actions that violate the constitutional guarantees.[38]

Unlike the pre-2010 Constitution, the 2010 Constitution gave fresh impetus to positioning the Judiciary as an independent and effective custodian of the rule of law, human rights, and constitutionalism.[39] The Constitution significantly established a more robust framework for judicial independence, emphasizing the separation of powers and enhancing the Judiciary's role in safeguarding democracy. In the years since, Kenyan courts have continued to play a significant role in breathing life into the Constitution by upholding judicial independence even amid complex and politically charged conditions that test it.

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36 International Association of Judicial Independence and World Peace, *Judicial Independence: The Contemporary Debate* (Shimon Shetreet & Jules Deschênes eds, Martinus Nijhoff Publishers 1985) 1.

37 Tomasz Milej, Evans Ogada 'Upholding Judicial Independence in Kenya' (2024).

38 D Juma 'The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future' in CJ Njue Murungi(ed*), Constitutional Change, Democratic Transformation and the Role of Judiciary in Government Reform: Questions and Lessons for Kenya* (2010) ICJ-Kenya, Nairobi) 215-24.

39 See Hon. Justice Martha Koome, 'The Changing Landscape of Justice in Kenya: A 60-Year Journey' available at https://judiciary.go.ke/the-changing-landscape-of-justice-in-kenya-a-60-yearjourney/#:~:text=The%20enactment%20of%20the%202010,independence%2C%20accountability%2C%20and%20transparency. accessed on (26 April 2025).

4. The Judiciary's Role in Adjudicating on Disputes

The role of the judiciary in safeguarding its independence has become increasingly crucial after the enactment of the 2010 constitutional order. Key cases illustrate how judicial adjudication has defined, protected, and at times been challenged in upholding the principles of judicial independence.

In *Hon. Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of Hon. Justice Said Juma Chitembwe, Judge of the High Court*, the Supreme Court of Kenya stated that judicial independence, as enshrined in the Constitution, protects judges from personal liability on account of decisions they made in their judicial capacity. This is supported by guarantees related to security, remuneration, working conditions, pensions, and retirement age.[40] Judges enjoy secure tenure until they reach the retirement age and can only be removed for defined causes, such as incapacity or behavior that makes them unfit to perform their duties. In *Hon. Mr. Justice Martin Mati Muya v The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya*, the apex court reaffirmed the principle outlined in Chapter 10 of the Constitution by stating that while judges, like all citizens, are subject to the law, their decisional independence must be protected for the benefit of the public.[41] This protection ensures judges can interpret and apply the Constitution and laws without fear of improper interference. Judges are not subject to direct discipline unless there is clear evidence of misconduct or misbehavior, as specified in article 168(a) to (e) of the Constitution. A judge may only be removed from office through the Constitutions' prescribed process.

In *Nancy Makokha Baraza v Judicial Service Commission and others*,[42] the then–Deputy Chief Justice, Nancy Baraza, challenged the removal process leading to her suspension from office arising from alleged gross misconduct. The High Court stated that the process of removal of a judge must respect the rights and fundamental freedoms in the Bill of Rights and must comply with the prescribed procedure anchored in the Constitution. However, given that in this particular case, the prescribed process had been adhered to, the Court declined to bar a tribunal formed to investigate her conduct. This case demonstrates the

40 *Hon. Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of Hon. Justice Said Juma Chitembwe, Judge of the High Court* [2023] Supreme Court of Kenya (Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) para 101.

41 *Hon. Mr. Justice Martin Mati Muya v The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya* [2020] Supreme Court of Kenya (Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) para 97.

42 Petition No. 23 of 2012.

Judiciary's internal mechanism for self-policing of judges through the JSC. It further shows judges, including senior members of the Judiciary, are not above the law. In other words, the process of removal of the Nancy Baraza as high-ranking member of the Judiciary demonstrates an important test for Kenya's reformed Judiciary and highlights its robust constitutional accountability mechanisms.

In *Gibson Kamau Kuria v Attorney General*, the High Court declined to enforce the constitutional right to freedom of movement, even though the applicant's passport had been unjustly confiscated.[43] The court reasoned that it lacked jurisdiction due to the procedural gaps within the enforcement framework.[44] This decision was criticized because, despite existing precedents, the court's refusal to intervene seemed motivated by the political nature of the case.[45] The applicant was a vocal critic of the government, and it has been argued that his status may have influenced the court's decision to decline jurisdiction. This is a lucid depiction of timidity on the part of the Judiciary during a period when judicial independence was undermined by political and executive control.

The post-2010 constitutional changes marked a significant shift in the Judiciary's relationship with the Executive, with the Constitution of Kenya, 2010 reasserting judicial independence by introducing provisions with the effect of significantly curtailing executive interference in judicial appointments and operations.

In the landmark case of *Attorney-General and others v Ndii and others,* one revolving around the constitutionality of the Building Bridges Initiative (BBI), and which migrated from the High Court, the Court of Appeal, and to the Supreme Court, a proposal for constitutional amendments was set out that was strongly backed by the political establishment. Initially, both the High Court and the Court of Appeal ruled that the BBI process was unconstitutional, asserting that it violated the Constitution's basic structure and the process required for amending it.[46]

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43 *Gibson Kamau Kuria v Attorney General* [1988] eKLR (Miscellaneous Civil Application No. 550 of 1988).

44 Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kivutha Kibwana (ed), *Law and the Administration of Justice in Kenya* (International Commission of Jurists, Kenya Section 1992) 93, 113.

45 Algeisa Vazquez, 'Is the Kenyan Bill of Rights Enforceable After 4th July, 1989?' (1990) 20 *The Nairobi Law Monthly* 7.

46 *Attorney-General and others v Ndii and others; Dixon and others* (Amicus Curiae) (Petition 12, 11 & 13 of [2021] (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with Dissent).

It was the Supreme Court that ruled ealier that the BBI process to amend the Constitution was unconstitutional. The apex court found that President Uhuru Kenyatta had initiated and promoted the BBI process in violation of the Constitution, as only ordinary citizens—not the President— have the mandate to initiate a popular initiative for constitutional amendment. Six out of seven judges agreed that the President acted outside his powers, making the BBI process null and void. The Court upheld earlier decisions by the High Court and Court of Appeal that had struck down BBI on multiple grounds.[47]

This decision shows the Judiciary's role in guarding the constitutional order, even when faced with political pressure from the highest levels of government. The Court's bold rejection of the political elites' attempt to circumvent constitutional amendment procedures was a strong affirmation of judicial independence.

Another significant case is *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, a petition challenging the 2017 presidential election results due to irregularities in voting, counting, and transmission of results.[48] The Court nullified the presidential election, holding that an election is not merely about numbers but also about the process and the integrity of that process.[49] The case demonstrated the Judiciary's willingness to intervene in political matters, assert its authority in ensuring that the democratic process adhered to constitutional principles, and affirm that no institution is beyond scrutiny, reinforcing the Judiciary's essential function as a check on executive power.[50]

In *Francis Karioko Muruatetu & another v Republic*, the Supreme Court ruled that the mandatory death penalty under Kenyan law was unconstitutional.[51] The judgment allowed for the possibility of re-sentencing and affirmed the Judiciary's power to review and adapt existing laws to align with the Constitution. It

47 Gautam Bhatia, 'Basic Structure and Tiered Amendment Processes: The Kenyan Supreme Court's BBI Ruling'(2022) *I.CoNnect blog of International Journal for Constitutional Law,* available at https://www.iconnectblog.com/basic-structure-and-tiered-amendment-processes-the-kenyan-supreme-courts-bbi-ruling/

48 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR.

49 *Ibid*.

50 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

51 *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae*) [2021] eKLR.

underscored the Judiciary's independence in shaping law in accordance with constitutional values, particularly the protection of individual rights.

In another instance, the Kenyan Judiciary firmly opposed the President's attempt to revive the position of Assistant Minister by using the Public Service Commission to establish the office of Chief Administrative Secretary.[52] This office had been abolished under the 2010 Constitution. A bench of three High Court judges ruled that the President's actions were unconstitutional, as they unlawfully created the office and appointed individuals to it. This ruling demonstrates the Judiciary's commitment to upholding constitutional principles and its independence in ensuring that the executive branch does not overstep its powers. Similarly, when the government, under pressure to meet election commitments related to affordable housing, introduced a housing levy tax on both employers and employees, the levy faced legal challenge. The High Court ruled that it was unjust, unfair, discriminatory, and unreasonable to impose the levy solely on individuals with formal employment, while excluding those in the informal sector.[53] The court found this action to be in violation of the Constitution. This decision highlights the Judiciary's role in safeguarding the constitutional rights of all citizens, reinforcing its independence in reviewing government policies that may not align with constitutional principles.

In *NGOs Co-ordination Board v EG & 4 others*, a case involving the government's refusal to register an NGO focused on LGBTQI rights on public policy grounds, the Court ruled in favour of the NGO.[54] It held that the refusal violated constitutional rights to freedom of association and non-discrimination.[55] This was a testament to the Court's commitment to upholding human rights and ensuring that no group is excluded from constitutional protections, despite societal or governmental opposition. This case reinforced the Judiciary's role in protecting individual freedoms and its independence when adjudicating sensitive issues without yielding to external pressures.

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52 *Matindi and others v The National Assembly of Kenya and others; Controller of Budget and others (Interested Parties)* (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J)

53 *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment).

54 *NGOs Co-ordination Board v EG and others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ).

55 *Ibid*.

These cases collectively show that the Judiciary has become a vital pillar in the separation of powers, ensuring that no branch of government can operate above the constitutional design.

5. Post-2010 Challenges to Judicial Independence and Executive Persistent Attacks

The constitutional order enacted by the people of Kenya in 2010 was designed to shield judges from the persistent culture of political interference. However, in practice, courts and judicial officers have instead found themselves the main theater of the target as they stand to defend judicial independence against powerful interests. A flashpoint came in 2017 when the Supreme Court annulled a presidential election for the first time in Kenya's history, provoking a furious backlash from the incumbent regime of President Uhuru Kenyatta. Chief Justice David Maraga and his fellow justices nullified the flawed August presidential election, asserting the Judiciary's role as guardian of electoral justice. President Uhuru Kenyatta reacted with scathing public attacks on the judges' legitimacy, even asking, "Who even elected you? … We have a problem and we must fix it."[56] He disparaged the Supreme Court as a collection of *wakora* (crooks) and warned that "we shall revisit" the Court's actions after the fresh election.[57] Such combative rhetoric from a head of state, constitutionally obliged to respect the Court's ruling, sent a chilling message about the government's unwillingness to tolerate an independent Judiciary. By brazenly framing the apex Court's judges as adversaries of the people's will, the president imperiled public confidence in the Judiciary and emboldened his supporters to treat judges as political obstacles rather than neutral arbiters of justice.[58]

The hostility toward the Courts in 2017 was not limited to words. It translated into actions that imperiled judicial officers and the rule of law. In the tense lead-up to the court-ordered re-run election, intimidation of judges escalated dramatically. On the eve of the repeat poll, unknown assailants ambushed Deputy Chief Justice Philomena Mwilu's official car and shot her driver in

56 Nation Team, 'Stop the insults, Judiciary tells President Kenyatta' (2 September 2017) Daily Nation available at https://nation.africa/kenya/news/stop-the-insults-judiciary-tells-president-kenyatta-446098 accessed on (26 April 2025).

57 Patrick Gathara, 'Uhuru Kenyatta to Court: "We Shall Revisit This"' (2 September 2017) Al Jazeera available at https://www.aljazeera.com/news/2017/9/2/uhuru-kenyatta-to-court-we-shall-revisit-this accessed on (26 April 2025).

58 Joshua Malidzo Nyawa, 'How Populist Politicians Are Weakening the Kenyan Judiciary' (12 March 2024) Verfassungsblog https://verfassungsblog.de/how-populist-politicians-are-weakening-the-kenyan-judiciary/ accessed on (26 April 2025).

an apparent warning to the Judiciary's top ranks.[59] The next day, the Supreme Court was scheduled to hear a last-minute petition, but most justices failed to appear—reportedly due to threats—leaving Chief Justice Maraga without a quorum to proceed.[60] Surrounded by riot police, the Court was effectively silenced at a pivotal moment. This episode demonstrated how far some political actors were willing to go to cow the Judiciary: even physical attacks and the withdrawal of security were used to interfere with judicial proceedings. Such intimidation during an electoral crisis strikes at the heart of Kenya's democracy, where an impartial Judiciary is essential in arbitrating electoral disputes. Indeed, the credibility of the Courts has been pivotal in defusing tensions in recent election cycles, and undermining judicial authority at such moments risks a descent into chaos.[61]

Beyond such flashpoints, Kenya's executive branch has repeatedly defied Court orders and continues to encroach on judicial authority conferred by the Constitution. In 2020, Chief Justice Maraga decried what he called "grave constitutional violations" by President Kenyatta's administration, citing its blatant disregard of Court orders and other steps aimed at diminishing the Judiciary's stature.[62] When Courts issued decisions inconvenient to the Executive, whether ordering the release of detained critics, nullifying unconstitutional actions, or halting controversial projects, compliance was often delayed or outright refused.[63]

Each act of defiance sent the dangerous signal that the government could ignore judgments it disliked. Legal watchdogs warned that the president's refusal to honour adverse rulings was setting the nation on "a dangerous path to

59 Cyrus Ombati, 'Deputy CJ Philomena Mwilu's driver shot in an attack along Ngong Road' (The Standard, 24 October 2017) available at https://www.standardmedia.co.ke/nairobi/article/2001258320/deputy-cj-philomena-mwilus-driver-shot-in-an-attack accessed on (26 April 2025).

60 Journalists For Justice**, 'The Day Supreme Court Judges Went Missing' (Journalists For Justice, 25 April 2025) available at https://jfjustice.net/the-day-supreme-court-judges-went-missing/ accessed on (26 April 2025).

61 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

62 Jayne Rose Gacheri, 'Defying courts set Uhuru Kenyatta on collision course with Judiciary' (The Standard, 8 June 2020) available at https://www.standardmedia.co.ke/health/national/article/2001452909/defying-courts-set-uhuru-kenyatta-on-collision-course-with-judiciary accessed on (26 April 2025).

63 Otieno Otieno, 'Judiciary: Executive disrespecting court orders, trying to control us' (The East African, 13 June 2020) available at https://www.theeastafrican.co.ke/tea/news/east-africa/judiciary-executive-disrespecting-court-orders-trying-to-control-us--1443176 accessed on (26 April 2025).

anarchy" by normalising impunity at the highest levels.[64] The routine flouting of judicial orders not only denied justice in individual cases but also chipped away at the Judiciary's authority. If court edicts can be ignored without consequence, the courts risk appearing impotent, and public faith in the legal system is badly undermined.

Political leaders have also targeted individual judges for vilification and even attempted removal when displeased with their rulings, threatening judicial independence through personal attacks. In recent years, high-ranking officials have made a habit of singling out judges after unfavourable decisions. Deputy President Rigathi Gachagua, before he was impeached, for example, publicly castigated a High Court judge after she froze his assets in a corruption case, accusing her of bias and vowing to petition for her removal.[65] Such personalised retaliation was a stark warning to other judges. Some of President Ruto's allies have even proposed extreme measures, including the mass sacking of judges deemed obstructive — a throwback to the "radical surgery" purge of the Judiciary in 2003.[66] These acts demonstrate a willingness to use political power to punish judges rather than respect institutional mechanisms for accountability due to the fact that a controversial verdict might provoke public attacks or career-threatening reprisals creating a climate of fear that can chill judicial independence. The principled adjudication that the rule of law requires may be eroded as judges who anticipate political retaliation for their decisions may hesitate to apply the law boldly.

Perhaps the most alarming rhetoric against the Judiciary came in 2023, when President William Ruto issued an ultimatum encapsulated in the phrase **"mambo ni matatu."**[67] Ruto used this Kiswahili catchphrase — roughly, "there are three options" — to warn purportedly corrupt individuals that they had only three choices: flee the country, go to jail, or "embark on a journey to

64 Sam Kiplagat, 'Pain of Increasing Non-Compliance with Court Orders' (Business Daily Africa, 25 March 2020) available at https://www.businessdailyafrica.com/bd/data-hub/pain-of-increasing-non-compliance-with-court-orders-2285070 accessed on (26 April 2025).

65 Martin K.N Siele, 'Kenyan president's war with judges emboldens his allies to defy courts' (Semafor Africa, 18 January 2024) available at https://www.semafor.com/article/01/18/2024/kenyan-presidents-war-with-judges-emboldens-his-allies-to-defy-courts accessed on (27 April 2025).

66 International Commission of Jurists (Kenya Section), 'Our Constitution Provides No Room For Radical Surgery Of Judiciary' (ICJ Kenya, 16 January 2024) available at https://icj-kenya.org/news/our-constitution-provides-no-room-for-radical-surgery-of-judiciary/ accessed on (27 April 2025).

67 International Commission of Jurists (Kenya Section), 'Statement Condemning President William Ruto's Attack on the Judiciary, Separation of Powers and the Rule of Law' (4 January 2024) https://icj-kenya.org/news/statement-condemning-president-william-rutos-attack-on-the-judiciary-separation-of-powers-and-the-rule-of-law/ accessed on (27 April 2025).

heaven."[68] The euphemistic reference to a heavenly journey left little doubt that the third option was death. Coming from the head of state, this stark warning was unprecedented in Kenya's recent political discourse and marked a dangerous escalation in open threats.

Despite public outcry, he reiterated the ultimatum days later.[69] Jurists and civil society groups denounced the menacing language and noted that it harked back to autocratic rule and had no place under a constitutional democracy.[70] The Law Society President told the Kenyan President openly and directly that lawyers were ready to "go to any lengths" to defend the rule of law and the Constitution in the face of such unconstitutional threats.[71] The phrase "mambo ni matatu" has since become synonymous with this administration's combative stance toward the Judiciary and anyone else it perceives as an obstacle to its unscrupulous projects. Its public invocation by the President carried a chilling implication suggesting that even judges could face extrajudicial consequences if they stood in the way of the Executive's agenda. By injecting this intimidation into the national conversation, Kenya's leadership demonstrated a blatant disregard for judicial autonomy and signaled that the Judiciary's constitutionally protected role could be imperiled by political fiat.

Similarly, in early 2024, after a three-judge bench nullified parts of the Affordable Housing programme under the Finance Act 2023, President Ruto launched fresh attacks on the Judiciary by publicly accusing certain judges of corruption and bias. The Court had halted key aspects of Ruto's government programme, including the Subsidized Housing Allowance/Social Housing Investment Fund (SHA/SHIF) Act. Aggrieved by the position adopted by the Court, the President claimed that there were unnamed actors within the Judiciary who were deliberately obstructing his government's flagship projects, including affordable housing and Universal Health Coverage. He went as

68 Brian Otieno, 'Memories of Dark Days as Lawyers Fight Ruto's Attacks on Judiciary' (The Standard, 13 January 2024) https://www.standardmedia.co.ke/article/2001488820/memories-of-dark-days-as-lawyers-fight-rutos-attacks-on-judiciary accessed on (27 April 2025).

69 Africa Judges and Jurists Forum, 'Africa Judges and Jurists Forum Concerned About President William Ruto's Public Statements Regarding the Judiciary in Kenya' (Africa Judges and Jurists Forum, 15 January 2024) available at https://africajurists.org/africa-judges-and-jurists-forum-concerned-about-president-william-rutos-public-statements-regarding-the-judiciary-in-kenya/ accessed on (27 April 2025).

70 Africanews, 'Kenyan Lawyers Protest Against Ruto's Threats on Judges' (Africanews, 12 January 2024) https://www.africanews.com/2024/01/12/kenyan-lawyers-protest-against-rutos-threats-on-judges/ accessed 20 April 2025.

71 Sharon Resian**, 'Kalonzo Cautions Ruto's 'Mambo Ni Matatu' Motto Could Fuel Persecution' (AllAfrica, 3 September 2023) available at https://allafrica.com/stories/202309040196.html accessed on (27 April 2025).

far as threatening to disregard court orders obstructing his administration's agenda.[72] This rhetoric by the President was seen as an attempt to pressure and undermine judicial independence, raising concerns across Kenya about the separation of powers doctrine cemented in the 2010 Constitution. Chief Justice Martha Koome, firmly defended the institution, stressing that allegations of judicial corruption do not require roadside declarations but rather require formal evidence and due process through the Judicial Service Commission, as mandated by the Constitution to handle such complaints. [73]She further cautioned that any unproven or unsubstantiated allegations against judges tend to undermine constitutional governance and the rule of law, a fulcrum of justice itself.

Similarly, legal experts, members of the opposition, and civil society movements such as the International Commission of Jurists (ICJ) condemned the attack, articulating the position that such public inflammatory statements from the head of state are likely to erode public trust and confidence in the Judiciary.[74] This conflict highlighted the fragile balance between executive authority and judicial autonomy amidst ongoing challenges in the Kenyan governance system.

Beyond speeches and personal broadsides, those in power have undermined judicial autonomy through legal and budgetary maneuvers designed to bring the courts to heel. A notable example was President Kenyatta's prolonged refusal to appoint 41 judges who had been vetted and formally recommended by the Judicial Service Commission in 2019, an act of executive intransigence that defied a court order and left many judicial vacancies unfilled.[75] Kenyatta claimed concerns about some nominees' integrity, but the Judiciary saw this as an attempt to claw back powers the 2010 Constitution had stripped from the presidency.[76]

This deliberate stalling of appointments undermined the Courts' capacity to deliver justice and was widely perceived as retribution against a Judiciary

72 Sam Kiplagat, 'Table evidence of judiciary corruption, CJ Koome tells Ruto,'(November *12, 2023)* Daily Nation, available at https://nation.africa/kenya/news/table-evidence-of-judiciary-corruption-cj-koome-ruto-critics-4489680 accessed on(27 April 2025).

73 Lilian Mueni, 'Judiciary adopts new strategy to fight corruption' available at https://judiciary.go.ke/judiciary-adopts-new-strategy-to-fight-corruption/ accessed on (5 May 2025).

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75 Carolyne Tanui, 'AG defends President Kenyatta's refusal to appoint 41 superior court judges' *Capital FM* (9 June 2020) available at https://www.capitalfm.co.ke/news/2020/06/ag-defends-president-kenyattas-refusal-to-appoint-41-superior-court-judges/ accessed (10 May 2025).

76 *Ibid*.

that had grown too assertive. Similarly, allies of the current president floated a proposal to pack the Judicial Service Commission with executive loyalists,[77] a plainly unconstitutional attempt to tilt judicial appointments in the government's favour. Another tactic has been control of the judiciary's purse strings. At times, judicial budgets have been slashed, hampering court operations and sending the message that funding will suffer if Courts rule against the government. Observers have cautioned that dangling financial incentives or wielding budgetary cuts in this manner threatens judicial independence.[78] By manipulating such structural levers of appointments and funding, Kenya's executive has tried to subdue the Judiciary in subtler ways, putting at risk the delicate balance of powers that the Constitution envisions.

The implications of undermining judicial authority are especially dire during electoral cycles, when an impartial judiciary is most critical. The Supreme Court's role in election oversight has been pivotal in preserving stability: it decisively settled the past three presidential election disputes, channeling grievances into a lawful process and thereby averting the kind of post-election violence Kenya experienced in 2007.[79] Attacks on the judiciary at such high-stakes moments imperil this progress. If judges are cowed or discredited, losing candidates and their supporters may refuse to accept judicial verdicts, raising the spectra of contested results spilling into the streets. Future elections could witness even graver scenarios if the trend of browbeating judges continues.

A Judiciary that is intimidated into tempering its judgments would fail in its duty to uphold the law, and a public conditioned to see judges as partisan "cartels" might reject even fair rulings. Courts can quickly be reduced to impotent "paper tigers" with no teeth to bite if their authority is not respected,[80] and Kenya risks that fate if judicial independence is eroded in the heat of political contests. Undermining the Supreme Court's credibility during an electoral crisis thus

77 Dorothy Otieno, 'Unprofessional court staff sabotaging judicial reforms' *Daily Nation* (27 February 2020) available at https://nation.africa/kenya/newsplex/unprofessional-court-staff-sabotaging-judicial-reforms-254380 accessed (12 May 2025).

78 International Commission of Jurists (Kenya Section), 'Judiciary budget cuts will negatively affect justice delivery – ICJ Kenya' (2018) available at https://icj-kenya.org/news/judiciary-budget-cuts-will-negatively-affect-justice-delivery-icj-kenya/ accessed on (20 May 2025).

79 Adam Teufel, 'Court in Transition: Kenya's Contested Presidential Election' (European Council on Foreign Relations, 24 August 2022) available at https://ecfr.eu/article/court-in-transition-kenyas-contested-presidential-election/ accessed on (20 May 2025).

80 Stephen Bright, 'Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?' (1997) 72(2) NYU Law Review 1 available at https://nyulawreview.org/issues/volume-72-number-2/political-attacks-on-the-judiciary-can-justice-be-done-amid-efforts-to-intimidate-and-remove-judges-from-office-for-unpopular-decisions/ accessed on (23 May 2025).

strikes at the foundation of democratic governance. In effect, weakening the Judiciary at the exact moment it is needed to referee the electoral process opens the door to constitutional uncertainty and potential unrest.

Meanwhile, an aggressive campaign to tarnish judges' reputations on social media has added a modern and insidious dimension to these attacks. Investigations have revealed that pro-government operatives orchestrated online smear campaigns using thousands of inauthentic accounts to portray the Judiciary as corrupt and biased whenever rulings impede the President's agenda.[81] In early 2024, as Courts blocked key tax and policy initiatives, coordinated trolls unleashed hashtags like **#CorruptJudges**, **#JudiciaryReformsNow**, and **#MamboNiMatatu**, all aiming to paint the Judiciary as an impediment to Kenya's progress.[82]

These sponsored disinformation drives seek to erode public trust in the courts and to justify executive overreach in "dealing" with the Judiciary. By casting judges as enemies of the people, the attackers stoked public anger and laid the groundwork for more drastic moves against the Courts under the pretext of reform. This onslaught of propaganda is essentially a new front in the assault on judicial independence. It not only attempts to cow judges through character assassination but also primes the public to accept or even support measures that undermine the Judiciary's autonomy.

The Judiciary's hard-won reputation as a fair arbiter is thus at risk, as online mercenaries work to delegitimize Court decisions and intimidate individual judges in the public eye. The post-2010 assaults on Kenya's Judiciary have gravely undermined the separation of powers and endangered the rule of law. Every instance of political interference—be it a defiant refusal to obey Court orders, a vitriolic threat like "mambo ni matatu," or a stealthy budgetary squeeze—chips away at the Judiciary's ability to function as a check on executive power. The cumulative effect is a weaker Judiciary, the very bulwark against tyranny that the Constitution intended it to be.[83] If judges are intimidated into submission or if the public loses faith in the Courts, Kenya risks sliding back toward authoritarian practices where leaders face few constraints. Upholding judicial authority is therefore not just an institutional concern but a societal imperative:

81 Code for Africa, 'The Digital Mercenaries Attacking Kenya's Media and Judiciary' (16 September 2024) available at https://disinfo.africa/the-digital-mercenaries-attacking-kenyas-media-and-judiciary-2c0be4256982 accessed on (23 May 2025).

82 *Ibid*.

83 International Commission of Jurists – Kenya, 'Press Statement: Judicial Independence and Accountability in Kenya' (25 April 2025) https://icj-kenya.org/news/press-statement-judicial-independence-and-accountability-in-kenya/ accessed on (23 May 2025).

it ensures that no one is above the law and that citizens can seek justice against the powerful. The resilience of Kenya's democracy will depend on repudiating these attacks and insisting that an autonomous Judiciary continue to hold the line. By preserving the independence and integrity of the Courts, Kenyans can safeguard the constitutional order and prevent a return to the dark days when judicial subservience enabled tyranny.

In addition to the challenges above, in the recent past, both Ahmednasir Abdullahi and Nelson Havi, prominent lawyers and former presidents of the Law Society of Kenya, have led coordinated online and social media smear campaigns targeting the Judiciary. While using platforms like X (formerly Twitter) and various media outlets, such as Facebook, they have systematically criticized the courts, individual judges, including the Chief Justice Martha Koome, and the institution of the Judiciary, often levelling accusations of corruption, incompetence, and bias.[84] Their coordinated and sustained attacks have included unsubstantiated claims and inflammatory language, with the clear aim of casting doubt on the credibility and integrity of Kenya's judicial system.

The Kenya Magistrates and Judges Association (KMJA) and other judicial offices have, for instance, described these tactics as "systemic" and "sustained" efforts to intimidate and delegitimize the Judiciary in the public eye, bypassing formal complaint channels such as the Judicial Service Commission.[85] Such campaigns frequently blur the lines between legitimate criticism and orchestrated misinformation or disinformation.[86] By circulating allegations without evidence and fostering narratives of widespread judicial corruption, these lawyers perpetuate public mistrust aimed at undermining judicial independence.[87] The Judiciary has warned that the continued propagation of falsehoods and personal attacks, especially through social media's rapid amplification, not only threatens the rule of law by fostering polarization but could also compromise

84 Kamau Muthoni, 'It's anybody's guess as Judiciary and senior lawyers dare each other' 21 December 2024, Standard Media, available at https://www.standardmedia.co.ke/article/2001508400/its-anybodys-guess-as-judiciary-and-senior-lawyers-dare-each-other#google_vignette accessed on (25 May 2025).

85 Joseph Muia, 'Judges, Magistrates fight back amid online attacks on the Judiciary (Citizen Digital, 13 December 2024) available at https://www.citizen.digital/news/judges-magistrates-fight-back-amid-online-attacks-on-the-judiciary-n354460; see also Statement on Persistent attacks on the Judiciary, available at https://judiciary.go.ke/statement-on-persistent-attacks-on-the-judiciary/ accessed on (25 May 2025).

86 Daniel Ogetta & Brian Wasuna, 'Judiciary under siege by attacks led by Nelson Havi and Ahmednasir Abdullahi', (January 17, 2025),' Daily Nation, available at https://nation.africa/kenya/news/judiciary-under-siege--4891762 accessed on (25 May 2025).

87 *Ibid*.

judges' ability to adjudicate impartially by subjecting them to undue pressure and harassment. In essence, these online onslaughts represent a modern threat to judicial independence—revealing how digital platforms, when used irresponsibly, can erode faith in legal institutions and weaken democracy itself.[88]

6. South Africa and Zimbabwe in Comparative Context

South Africa and Zimbabwe have experienced intense political interference in their Judiciaries, but their responses, and the structural safeguards they have in place, show contrasting approaches. Judicial independence in South Africa is enshrined within the Constitution of 1996 which guarantees judicial autonomy from any other branch of government.[89] Central to South Africa's democratic consolidation has been the judicial transformation after apartheid.[90] It has tasked the Judiciary with the duty of interpreting and enforcing constitutional principles even in opposition to governmental policies.[91] The clear judicial role to protect the rights of individuals, ensure government accountability and serve as an impartial body was seen during South Africa's transition to democracy.[92] Despite challenges like debates over judicial appointments and the government's initiatives like the 2000s "justices bills' that sought to increase executive influence over the Courts, the Judiciary has consistently stood firm in safeguarding its independence. The creation of the Judicial Service Commission (JSC) has played a significant role in ensuring transparency and impartiality in judicial appointments.[93] Despite this, tensions occasionally arise when judicial decisions conflict with governmental policies, as witnessed during the cases involving former President Jacob Zuma. Nonetheless, the South African Judiciary has continued to assert its judicial independence through

88 *Ibid*.

89 See section 165, which mandates that Courts are 'independent and subject only to the Constitution and the law'; see also Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa* (Centre for the Study of Violence and Reconciliation, October 2007) available at https://biblioteca.cejamericas.org/bitstream/handle/2015/3650/Transformation-and-the-Independence-of-the-Judiciary-in-South-Africa.pdf?sequence=1&isAllowed=y accessed on (30 May 2025).

90 David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) 89.

91 Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa, 20*.

92 C. Lewis, 'Making the Case for Judicial Freedom in a Democracy', *Business Day* (23 January 2006).

93 Carmel Rickard, *The South African Judicial Services Commission* (Paper presented at the Conference on 'Judicial Reform: Function, Appointment and Structure', University of Cambridge, 4 October 2003) available at http://www.law.cam.ac.uk/docs/view.php?doc=879 accessed on (1 June 2025).

constitutional architecture, principled adjudication of disputes, vigilance, and resistance to political encroachment by the civil society movement.[94]

In contrast, although the 2013 Constitution of Zimbabwe provides for judicial independence in section 164, the Judiciary has continued to face systematic compromise and erosion of its independence.[95] For example, the courts have been abused to score cheap political expediencies contrary to the constitutional imperatives.[96] There has been intimidation, detention without trial, and arrest with no bail of various members of opposition parties and civil society organisations, in some cases. Further, the former president, Robert Mugabe, was on record threatening judges who allowed opposition members to demonstrate, while the Minister of Justice Kazembe Kazembe has been making some disparaging remarks against the Judiciary.[97] Historically, the government of Zimbabwe has made serious threats against the Judiciary, including against individual members. The former Minister of Home Affairs has previously remarked as follows:

> "But even after this, recalcitrant and reactionary members of the so-called benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgment which smack of subverting the people's government. We inherited in toto the Rhodesian statutes which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now, apart from it being majority rule? Our posture during constitutional negotiations with the British … that the judiciary must be disbanded, can now be understood with a lot of hindsight."[98]

Against this background, the interference of the Zimbabwean Judiciary has worsened greatly since President Emmerson Mnangagwa assumed power through a military coup in November 2017. A substantial deal of research has

94 +See Ziyad Motala, 'Independence of the Judiciary, Prospects, and limitations of judicial review in terms of the United States Model in a new South African order: towards an alternative judicial structure'(1991) *Albany Law Review,* 55.

95 Brian Penduka, 'International Standards and the Judicial Function in Zimbabwe' in *The Judiciary and the Zimbabwean Constitution* (James Tsabora ed, 2022) 26–45.

96 Simbarashe Tembo *et al* Mutilation of the Independence of the Judiciary: Threats, Intimidation and Constitutional Amendments in Zimbabwe (2023) *Obiter* [online], vol.44, n.3, pp.546-560. ISSN 2709-555X; Mavedzenge "The Zimbabwean Constitutional Court as a Key Site of Struggle for Human Rights Protection: A Critical Assessment of Its Human Rights Jurisprudence During Its First Six Years" 2020 20(1) African Human Rights Law Journal 181-202.

97 ISS Africa "Mnangagwa Regime Continues to Score Own Goals" (1 June 2021) available at https://issafrica.org/iss-today/mnangagwa-regime-continues-to-score-own-goals accessed on (2 June 2025).

98 Karekwaivanane, The Struggle Over State Power in Zimbabwe: Law and Politics Since 1950 (2017) 208.

shown that under the current government, there is "continued capture and an attempt to undermine the judicial independence through the adoption of several strategies such as public attacks, threats and intimidation and pushing for constitutional amendments with the scheme to compromise its independence.[99]

According to Hofisi, the Judiciary in Zimbabwe is generally viewed as captured, "subject to the whims of the executive."[100] The threat to the independence of the Judiciary in Zimbabwe under President Mnangagwa's regime mirrors the infamous lowest ebb period in November 2000 when the War Veterans' wing of ZANU-PF invaded the Supreme Court and forced Chief Justice Antony Gubbay to retire early in 2001.[101] This was at the height of political tensions surrounding the acquisition of land from the White erstwhile commercial farmers. According to Magaisa: "The regime knew that it needed judicial support for this endeavour, and it viewed the Courts as hostile to its ideology and policy. The result was a wholesale turnover in key judicial positions.[102] The political climate pressures judges to conform to governmental interests.[103]

In addition to plotting threats against the Judiciary, political arms in Zimbabwe have also resorted to making constitutional changes that have the ramifications of weakening the Judiciary. This has been done by tampering with how judges are appointed and how their tenures are extended. For instance, the 2017 Constitutional Amendment No. 1 and the 2021 Constitutional Amendment No. 2 bear this testimonial initiative. The 2017 Constitutional Amendment No.1, reduced the role of public interviews in judicial appointments by granting the president significant control over the selection of senior judges contrary to section 180 of the Zimbabwean Constitution that vests such mandates to the Judicial Service Commission,[104] while the 2021 Constitutional Amendment No. 2, gives the President wide discretionary powers on the appointment of judges

99 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" Good Governance Policy Brief' available at https://gga.org/rebuilding-constitutionalism-and-rule-of-law-in-zimbabwe/ (2 June 2025).

100 Hofisi. "The Constitutional Courts of South Africa and Zimbabwe: A Contextual Analysis" 2021 35 Speculum Juris 55.

101 Goredema, "Whither Judicial Independence in Zimbabwe?" in Raftopoulos and Savage (eds) Zimbabwe: Injustice and Political Reconciliation (2004) 99.

102 Magaisa, "Zimbabwe: An Opportunity Lost" 2019 30(1) Journal of Democracy 143 154.

103 Lovemore Chiduza, 'Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?' (2014) 17(1) Potchefstroom Electronic Law Journal 368.

104 Bazana and Jackson, "An Appraisal of the Recruitment and Selection Process of the Judiciary (Chief Justice) in Zimbabwe" 2019 11(1) Inkanyiso: Journal of Humanities and Social Sciences, pp 39-40.

after the Judicial Service Commission has tendered its recommendations.[105] In addition, the amendment extends the age of retirement for judges by 5 years from 70 to 75 years contrary to section 186 of the Constitution.[106] In the views of various intellectuals, including, law scholars, and academics, this extension is nothing but another assault on the independence of the Judiciary as this amendment was solely crafted to retain the current Chief Justice, Luke Malaba, who was supposed to retire upon the attainment of the mandatory age of 70 years as prescribed by the Constitution. Section 328(7) requires that should there be an extension of the tenure of the Chief Justice, it should not benefit the incumbent.[107] The rationale behind this section is straightforward: it is meant to prevent the capture of sitting judges by incentivising their allegiance with tenure extensions. Madhuku, while protesting this move rightly pointed out that provisions that give unfettered power to the President to extend the retirement age of a judge provide a loophole through which the Executive may influence the Judiciary.[108] The extension of the Chief Justice's tenure was therefore "a well thought out plan to weaken vital institutions such as the judiciary and fill the Courts with judges beholden to the Executive".[109]

105 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" Good Governance Policy Brief available at https://gga.org/rebuilding-constitutionalism-and-rule-of-law-in-zimbabwe/ accessed on (3 June 2025).

106 Section 13, Constitution of Zimbabwe (Amendment No. 2) Act, 2021; see also section 186 of the 2013 Constitution titled "Tenure of office of judges" and states: "(1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office. (2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years, but– (a) they must retire earlier if they reach the age of 70 years unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) After the completion of their term, they may be appointed as judges of the Supreme Court or the High Court at their option, if they are eligible for such appointment. (3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of 75 years when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that the election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office. (4) Notwithstanding subsection 7 of section 328, the provisions of subsections (1), (2), and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court."

107 Section 328(7) of the Constitution of Zimbabwe, 2013.

108 Madhuku, "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa" 2002 46(2) *Journal of African Law*, pp 232- 243.

109 Makumbe, 2021 Academia Letters 2.

Madhuku notes that the privilege of extension of tenure beyond retirement age may be reserved for "good" judges. This means that the President is likely only to extend the tenure of judges who are viewed as favourable to the system. He adds that "[t]his, in the long term, undermines the independence of the Judiciary".

It must be borne in mind that a weak Judiciary is a perfect arena for legitimising illegitimate political conduct.[110] For instance, it is reported that when former president Robert Mugabe was removed from power on 17 November 2017, the Courts made two strange judgments that raised suspicions of a captured Judiciary.[111]One Court ruled that Mugabe's removal through a "military coup" was constitutional, and another Court ruled that the sacking of Mnangagwa (who became President through the coup) as Vice President by Mugabe was illegal.[112] These two rulings were not only startling in terms of legal reasoning but were also audacious; by no coincidence, they were extremely convenient for Mnangagwa's ascendancy to power and the legitimacy of his presidency.

Kenya can borrow South Africa's institutional mechanisms that ensure judicial appointments are independent of political influence. South Africa's judicial system emphasizes merit-based appointments, transparency in the selection process, and a strong commitment to the rule of law, all of which have contributed to the Judiciary's resilience in the face of political challenges. Kenya can also benefit from strengthening its own Judicial Service Commission to avoid the politicisation of judicial appointments. South Africa's ability to balance judicial independence with transformation efforts, such as the representation of historically marginalized groups in the Judiciary also offers an instructive model for Kenya. They have managed to make their Judiciary more reflective of the country's demographics without compromising its independence,[113] thus fostering public confidence in the judicial system and ensuring that the Judiciary remains impartial while also addressing historical imbalances.

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110 Simbarashe Tembo *et al*, 'Mutilation of the Independence of the Judiciary: Threats, Intimidation and Constitutional Amendments In Zimbabwe' (2023) *Obiter* (n96 above.)

111 See *Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General* HC940/17 and *Joseph Evurath Sibanda and Leonard Leonard Chikomba v President of the Republic of Zimbabwe* – Robert Gabriel Mugabe NO; Minister of Defence, Commander of the Defence Forces of Zimbabwe and the Attorney General of Zimbabwe HC10820/17.

112 These judgments were convenient for each other. The question of Mnangagwa's legitimacy as the successor to Robert Mugabe had to be addressed first and followed by the question of the constitutionality of the army's conduct.

113 Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Clarendon Press, 1992) 113.

We can also learn from the mistakes and weaknesses of other countries. Zimbabwe's experience demonstrates the consequences that we may have to bear if the Judiciary is not adequately insulated from political pressures. While their Constitution promises judicial independence, the effectiveness of the Judiciary is often undermined by political manipulation.[114] Instances such as judges being coerced into making decisions that are aligned with the political elite is a poignant reminder of the dangers of a politicized Judiciary.[115] Zimbabwe's example highlights the need for strong legal protections to shield the Judiciary from executive and legislative overreach. This lesson is vital for Kenya, as political interference in judicial decisions can severely undermine the integrity of the judicial system and public trust in its impartiality.

7. Recommendations: Lessons for Kenya and Africa

No problem is faced without a solution being established. The Constitution of Kenya is transformative, and if we adopt the recommendations suggested in this paper, Kenya can be a beacon that others can learn from. First, a constitutional amendment should be introduced to guarantee a fixed percentage of the national budget allocated specifically to the Judiciary Fund so as to prevent the Executive's coercion by use of financial threats and to strengthen the financial autonomy of the Judiciary further.[116] This will protect the Judiciary from the need to engage in political negotiations over funding and reduce the Executive's ability to withhold resources as a form of leverage. This dedicated and non-negotiable budget will guarantee the Judiciary's ability to function independently and effectively, free from political pressures that seek to manipulate judicial outcomes through economic control.

Second, judges adjudicating in politically sensitive cases should be encouraged to adopt a jurisprudential approach that is mindful of the political context.[117] This does not mean compromising on judicial principles or becoming

114 Robert F. Kennedy, Human Rights, 'Zimbabwe: President Mnangagwa Must Stop Undermining Judicial Independence' (3 June 2021) available at https://rfkhumanrights.org/press/zimbabwe-president-mnangagwa-must-stop-undermining-judicial-independence/ accessed on(4 June 2025).

115 Tendai Ruben Mbofana, 'The Perils of Zimbabwe's Weaponized Judiciary and the Need for Compensation for Wrongful Imprisonment' (2025) https://www.thezimbabwean.co/2025/03/the-perils-of-zimbabwes-weaponized-judiciary-and-the-need-for-compensation-for-wrongful-imprisonment/ accessed on (4 June 2025).

116 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

117 M Margaret McKeown, 'Politics and Judicial Ethics: A Historical Perspective' (2021) 131 Yale Law Journal Forum 1.

politically biased but rather understanding the potential implications of a decision in a charged political environment. Strategic decision-making in such cases might be necessary to avoid undue political retaliation that could threaten the Judiciary's long-term independence. However, such decisions should always be grounded in the law and should never compromise the integrity or fairness of the judicial process. Furthermore, in cases that hold significant political or public interest, judicial decisions must remain firmly rooted in the rule of law and constitutionalism.[118] Judges must base their decisions on the principles of justice, without yielding to political pressure or public opinion,[119] and must be careful not to overstep their mandate, as unchecked judicial activism could provoke retaliatory actions from the Executive or Legislature, leading to a breakdown of the doctrine of separation of powers.

In addition, any proposed amendments to the Constitution that affect judicial independence must be made via a national referendum so as to ensure that changes are made with the explicit consent of the public.[120] This will prevent the Executive from unilaterally altering judicial powers to serve its interests. These amendments must undergo rigorous scrutiny to ensure that judicial autonomy is maintained and that the Judiciary's ability to hold the Executive accountable is not eroded. The leadership of the Judiciary must always be proactive in defending the institution against attacks. Similarly, judges and judicial leaders must engage more directly with the public, not only to explain the decisions of the Courts but also to maintain and strengthen public trust in the judicial system. This will involve responding swiftly to any anti-judicial rhetoric or media attacks so as to demonstrate the Judiciary's commitment to transparency, accountability, and the rule of law. This is because public outreach is essential for maintaining the legitimacy of the Judiciary and protecting it from becoming isolated or misunderstood. Lastly, civil society organizations, bar associations, spirited- activists, civil society movements, and other non-governmental groups can help educate the public about the importance of an independent Judiciary and its role in upholding democratic governance.[121] They

118 Fuad Zarbiyev, 'Judicial Activism' (6 April 2019) available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2864.013.2864/law-mpeipro-e2864 accessed on (5 June 2025).

119 Demas Kiprono, 'Separation of Powers and Judicial Independence Must Be Protected' (5 January 2024) available at https://icj-kenya.org/news/separation-of-powers-and-judicial-independence-must-be-protected/ accessed on (5 June 2025)

120 Gautam Bhatia, 'BBI Appeal: The Doctrine of Basic Structure Revisited' (2021) *The Elephant* https://www.theelephant.info/features/2021/08/27/bbi-appeal-the-doctrine-of-basic-structure-revisited/ accessed on (5 June 2025).

121 Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland' (2021) 17(2) *Utrecht Law Review* 56.

can also mobilise public support for judicial decisions when the Executive or other political forces seek to undermine the Judiciary's authority. The political leaders who critique the Judiciary with no basis and evidential backup should also be prosecuted and vacate office as that amount to gross misconduct and a Constitutional violation.

8. Conclusion

The independence of the Judiciary in Kenya is currently facing numerous challenges that threaten its role as the cornerstone of the rule of law and democracy. While the Constitution provides a robust framework designed to safeguard judicial autonomy, political interference and executive encroachment have continuously undermined the Judiciary's function.[122] The threats range from overt attacks on individual judges to more subtle forms of interference such as budgetary manipulation and non-compliance with court orders. These actions weaken public confidence in the judiciary and risk eroding the very fabric of democratic governance. To counter these challenges, financial autonomy for the Judiciary must be guaranteed by ensuring that a fixed percentage of the national budget is allocated exclusively to the judiciary.[123] This will protect the Judiciary from the executive's leverage over its finances and guarantee its operational independence. Moreover, it is essential to encourage judges to adopt a jurisprudential approach that, while firm in upholding the law, remains mindful of the political climate.[124] This balance will aid in avoiding backlash that can undermine judicial independence in politically sensitive cases. Judicial decisions, particularly in high-stakes cases, must always be rooted in constitutionalism, ensuring that the Judiciary's impartiality is preserved even when facing external pressures. The Judiciary must also remain vigilant in enforcing the constitutional safeguards that protect its independence, particularly in matters that affect judicial appointments or amendments to the Constitution. Any constitutional changes that would impact judicial independence, ensuring that the people, not the political elites, decide on such matters must be through a national referendum.

122 Michael Sang, 'Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts' (2023) 11(1) *Journal of Constitutional and Management Studies* 328.

123 Amboko H. Julians, 'Kenya's Judiciary Wants Its Annual Budget Allocation Set at a Floor of 2.5% of the National Budget' (2025) www.linkedin.com/posts/amboko-h-julians-38231440_kenyas-judiciary-wants-its-annual-budget-activity-7317545297897762817-fwzI accessed on 24 April 2025.

124 James Gondi, 'The Kenyan Judiciary Should Adopt a Jurisprudential Approach That Is Alive to the Political Climate' (2025) https://icj-kenya.org/?download_id=5074&sdm_process_download=1 accessed on 24 April 2025.

Public outreach by judicial leaders, such as the Chief Justice and other senior judges is also essential in fostering transparency and maintaining public trust in the Judiciary's impartiality. Civil society organizations, bar associations, and the media also have a critical role to play in defending the Judiciary and educating the public on its importance in maintaining democratic governance. By implementing these solutions, Kenya can safeguard the independence of its Judiciary and ensure it continues to function as a neutral and impartial institution. Only through such reforms will Kenya be able to prevent a return to the era of executive dominance and ensure that justice is served impartially for all citizens, regardless of their political affiliation or status. Vigilance! Vigilance! Vigilance! With vigilance, the Court will easily overcome the threats from the Executive, as it is open that Kenyans have always stood with the Judiciary, where accusations that are unsubstantiated are made against them.