Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya

Obert HODZI, MA , LLBs(Hon.)

15 March 2011

1. Introduction

1.1. Objectives of the Study

Lack of accountability and impunity are the hallmark of weak institutions operated on the dictates of patrimonialism. In a society where clientelism determines how institutions, such as the judiciary, prosecution authorities and the police operate, laws are applied selectively and justice is mocked; the public lose confidence in the justice system and the likelihood of mob justice is prevalent. At the ruling elite level, and to those well-connected in the corridors of power, impunity becomes a survival instinct.

But, what really is impunity? The amended set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity defined impunity as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."[1] And as observed in the Waki Commission Report the ingredients for impunity are: "elements of systematic and institutional deficiencies, corruption, and an entrenched negative socio-political culture."[2]

Without public accountability in the exercise of its powers, a government breeds corruption, abuse of office and impunity. In Zimbabwe, as it was in Kenya, both direct and indirect presidential control of the criminal justice system meant that institutions, such as the police, attorney-general's office and the judiciary's independence and impartiality are stifled. Resultantly, state officials and politicians enjoy widespread impunity, apply the law selectively and can hold the court in contempt at whim.

Through a comparative analysis of the criminal justice system of Kenya and Zimbabwe; this study will examine the role, action and issues affecting the two legal systems as they relate to issues of accountability and impunity. It will critically explore reforms and measures taken in Kenya to address issues of accountability and impunity in the country's criminal justice system, with the intention of making recommendations on how the criminal justice system in Zimbabwe can be reformed to purge the culture of impunity and lack of accountability seemingly characteristic of the system.

[1] UN Commission on Human Rights, "Report of the independent expert to update the set of principles to combat impunity," E/CN.4/2005/102/Add.1, February 8, 2005, page 6.

[2] The Report of the Commission of Inquiry into Post Election Violence (CIPEV), also known as the Waki Commission 2008, page 444.

1.2. Relevance of the Kenyan Experience to Zimbabwe

When supporters of the Orange Democratic Party (ODM) were told to channel their electoral grievances over the disputed elections of 27 December 2007 they refused; claiming that courts in Kenya were neither independent nor impartial. Instead, they took to the streets. A few months later, Zimbabweans held general elections; when a subsequent run-off election was declared, the Movement for Democratic Change (MDC) led by Morgan Tsvangirayi pulled out citing voter intimidation and violence. Electoral petitions were neither contemplated nor suggested. Like in Kenya, the courts were considered biased and incapable of conducting themselves independently. In both cases, previous handling of election petitions had illustrated the Judiciary's inability to effectively deal with such critical matters in a professional, robust and independent manner. "Accordingly, it became a matter of public notoriety over the years that presidential and parliamentary election petitions would not deliver electoral justice."[3]

Post-election happenings in both countries simply amplified demands for reforms that had long been demanded by progressive politicians and the civil society. Yet, they are by no means the only reasons for the need for reforming the judicial system in both countries. The Republic of Kenya's *Final Report of the Task Force on Judicial Reforms* cited patron-client based relations between the executive and the judiciary as having contributed immensely to the breakdown and subsequent loss of legitimacy of the judiciary system in Kenya. The same can be said of Zimbabwe were the appointment of judges, their promotion and patronage based rewarding system, such as the allocation of farms compulsorily acquired under the government of Zimbabwe's land reform programme and the giving of flat screen televisions, decoders and generators to judges by the Reserve Bank of Zimbabwe seemingly, compromised their independence and impartiality.

With both countries being led by governments of national unity and having suffered serious human rights violations arising from disputed elections that exposed deficiencies in their justice systems, the urge to compare their criminal justice systems is compelling. While Zimbabwe lags behind in reforming its justice system, Kenya seems to have made grant steps towards constitutional reforms in general and plausible criminal justice reforms in particular. Inroads made in transitional justice, the obvious aim being to break the cycle of impunity that characterized Kenya's justice terrain and to concretize accountability of government arms are plausible. With the new Constitution promulgated on the 27th of August 2010 at implementation stage, the wagon of reforms appears to be on track and in stop less motion. Yet, Zimbabwe trails behind, with no formal and serious transitional justice process, the constitution-making process marred by controversy and no meaningful discussion on the need to reform the criminal justice system.

[3] Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, page 3.

It is within this context that this study seeks to critically analyze developments that have been made in reforming the criminal justice system in Kenya with the obvious objective of informing and making considerable recommendations on how Zimbabwe can reform its own justice system. Kenya is by no means the ultimate model of criminal justice reforms, and in using it as a case study, this study does not infer that it is. It should be noted that many of the reforms provided for in its new constitution are still at implementation stage and the implementation has by no means been smooth. But, the fact that they have gone further than Zimbabwe has within a short period of time suggests that Zimbabwe can draw some lessons from their experiences.

Based on the Kenyan experience, recommendations will be made, yet a footnote has to be added: "Problems of corruption, political influence and patronage in the [criminal justice system], appointment of judges and in the constitution of the Judicial Services Commission, as well as the general lack of independence of the judiciary from the executive, cannot be addressed administratively but require a radical transformation of the relationship between the judiciary and the executive"[4] Hence, in order to adequately reform the criminal justice system of Zimbabwe administrative reforms should be accompanied by institutional reforms aimed at transforming the justice system, particularly the judiciary into an independent, transparent, legitimate and impartial institution. Institutional reforms will invariably require the enactment of a new constitution or at least far-reaching reforms on chapters that deal with the independence and impartiality of the judiciary and the overall administration of justice in Zimbabwe.

2. The Prosecution Office

2.1. Introduction

The objective of this section is to give a descriptive analysis of the prosecution authorities in Kenya and juxtapose it to that of Zimbabwe. Particular focus shall be on the Office of the Attorney General as provided for in Kenya's old constitution because reforms in the new constitution are not yet fully implemented. However, prosecutorial reforms in the new constitution of Kenya will be employed in two ways: (1) to expose weaknesses of Kenya's previous prosecutorial process; and (2) to formulate recommendations on reform measures to Zimbabwe's prosecutorial institutions.

In an endeavor to assess the independence and impartiality of the prosecutorial authority in Kenya, it should be noted that prosecutors rely on investigatory authorities for the effective execution of their duties. Where the investigatory authorities are corrupt, apply the law selectively and do clumsy investigations, prosecutors, no matter how competent and independent they are, are incapacitated. Cases of the police, who have investigative monopoly in both Kenya and Zimbabwe, refusing to take complaints from members of the public are common. In Zimbabwe, the police many a times have been accused of refusing to take complaints of a political nature particularly were alleged perpetrators are from the Zimbabwe African National Union – Patriotic Front (ZANU-PF). They have also been accused of arbitrarily arresting opponents of ZANU-PF on flimsy charges, while in Kenya the police have been reluctant to investigate cases of torture and extra-judicial killings by state security agents.

In its overall assessment of the justice system in Kenya, the Waki Commission observed that "the chain of criminal justice system is generally weak and the weakest link is the investigative function. The weakness in the system impacts on the rule of law and therefore promotes impunity."[5] Therefore, to seek reforms from the prosecution office level and upwards would be a misnomer if the investigating authorities are not reformed as well. Hence, this study recognizes the need to reform the investigation authorities in so far as they affect the criminal justice system.

2.2. The Office of the Attorney General

The office of the Attorney General (AG) occupies an important and strategic position in dealing with impunity, which is largely linked to the inability of the state either deliberately or otherwise to

[4] International Bar Association, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, 2010, page 8.

[5] The Report of the Commission of Inquiry into Post Election Violence (CIPEV), also known as the Waki Commission 2008, page 469.

prosecute criminal offences or were they do, use their prosecution powers selectively.[6] Accordingly, issues pertaining to the AG's appointment and his[7] powers are critical in determining whether the office prosecutes matters independently, objectively, impartially and in a manner that represents and protects public interest.

The Attorney General in Kenya as is the case in Zimbabwe is appointed by the President. In both countries the AG is endowed with the power to undertake criminal offences and to institute criminal proceedings against any person; take over, continue or discontinue any prosecution commenced by any other person and at any stage of the proceedings provided the judgment had not been delivered with or without the consent of the party that initiated the prosecution. In Kenya, the power to take over matters has often been abused and selectively applied, resulting in prosecutions being withdrawn and perpetrators of high level crimes not prosecuted. Under the old constitution of Kenya, the AG had multiple roles, such as being, a member of the Judicial Service Commission, an ex-officio member of the Cabinet and National Assembly, principal legal advisor to the government and chief prosecution officer. The diagram below captures some of his roles under the Old Constitution of Kenya.

The nature of the AG's constitutional responsibilities reflects an obvious conflict of interest, which neither guarantees his independence nor impartiality in the discharge of his duties. Rightly put, "the Attorney-General's advisory and political responsibilities mean that, on the one hand, he is a

[6] The Report of the Commission of Inquiry into Post Election Violence (CIPEV), also known as the Waki Commission 2008, page 445.

[7] 'His' has been used for easy reading but is by no means meant to be gender discrimatory.

representative of the executive. Yet at the same time, as Chief Public Prosecutor, he is required to discharge prosecutorial duties as a representative of the people."[8]

The same is applicable to Zimbabwe, where the AG is an ex-officio member of cabinet, principal legal advisor of the government, member of the Judicial Service Commission and the chief public prosecutor[9]. He is also a presidential appointee and past AGs have been known to be ZANU-PF loyalists. As a member of the executive he cannot be expected to be impartial, objective or act with some degree of autonomy from the executive that he is a part of; hence political influence in his prosecutorial duties is obvious. The situation is even made denser where the AG personally and publicly pledges his allegiance to a political party, like what Johannes Tomana, the AG of Zimbabwe did[10]. Thus, there is a dire necessity to separate the executive duties of the AG from his prosecutorial duties in order to guarantee impartiality, objectivity, independence and genuine representation of public interest, but most importantly break the cycle of impunity stemming from executive interference in prosecution as provided for in the United Nations Guidelines on the Role of Prosecutors and the Principles and the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Kenya's new Constitution seeks to redress these anomalies by establishing an independent office of the Director of Public Prosecutions (DPP)[11], who shall exercise state powers of prosecution. Although he shall be nominated and appointed by the President, it has to be with the approval of the National Assembly. Article 157(3) of the new Constitution provides that "the qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court." This sets a high standard and a definite criterion for appointment to that position.

The Attorney General is now confined to being the principal legal advisor of the government and representing it in legal proceedings[12]. The new Constitution also requires the current Attorney General to leave office not later than 12 months after it takes effect. This has been widely perceives to be a vetting exercise considering that the Attorney General, Amos Wako was "not just complicit in, but

[8] International Bar Association, Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, page 61.

[9] Constitution of Zimbabwe, Section 76(1) and 76 (3b)

[10] BBC News, 2009. Zimbabwe's Attorney General. Accessed on http://www.bbc.co.uk/worldservice/africa/2009/03/090306_attgen_zim.shtml

[11] Article 157 of the Constitution of the Republic of Kenya

[12] Article 156 of the Constitution of the Republic of Kenya

absolutely indispensable to, a system which has institutionalized impunity in Kenya"[13]. Contrary to the immense powers that the Attorney General had in the old Constitution, the DPP will only take over a criminal prosecution with the permission of the person or authority who instituted it; and can only withdraw or discontinue a prosecution with the consent of the Court.

Section 26(4) of the previous Constitution of Kenya gave the AG power to require the Commissioner of Police to investigate and conduct further investigation on any matter. The AG in Zimbabwe also has the same powers in terms of Section 76(4a) of the Zimbabwean Constitution. Theoretically, the Commissioner of Police shall conduct such investigation or further investigation as requested by the AG, but in practice, both the Kenyan and Zimbabwean Commissioners of Police have ignored such requests with no consequence. In a sworn statement, Amos Wako, the current Attorney General of Kenya lamented that although he "has power to request investigations to be carried out by the Commissioner of Police he has no enforcement mechanism to ensure compliance. Furthermore, the Police investigators are subject to discipline and control not by the Attorney General but the Commissioner of Police… He further acknowledged that there was a gridlock in the criminal justice system and particularly at the investigative stage."[14] Noteworthy, is that the AG in both Kenya and Zimbabwe have no constitutional powers to direct police investigations and ensure that they are done effectively. As argued above, it is needed to ensure that there are radical reforms in the investigative arm of the police. Thus, "there should be established a Directorate of Criminal Investigations that is constitutionally-independent, so it is not subject to political influence. This directorate should operate under the authority and control of a constitutionally-entrenched and independent Department of Public Prosecutions."[15]

2.2.1. Public Prosecutors

The Attorney General, under the old constitution of Kenya[16], the constitution of Zimbabwe[17] and the DPP[18] in terms of the new constitution of Kenya is constitutionally authorized to delegate his prosecutorial powers to subordinate officers acting in accordance with general or specific instructions.

[13] United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Kenya, May 26, 2009, pages 15-16.

[14] The Report of the Commission of Inquiry into Post Election Violence (CIPEV), also known as the Waki Commission 2008, page 449, 453.

[15] International Bar Association, Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya, 2010, page 64.

[16] Article 26(5) of the old Constitution of Kenya

[17] Section 76(5) of the Constitution of Zimbabwe

[18] Article 157(9) of the new Constitution of Kenya

In Zimbabwe, this power has been delegated to State Prosecutors who are either trained prosecutors from the now defunct Judicial College of Zimbabwe or hold a law degree from a recognized institution. In Kenya, for offences under the jurisdiction of the High Court, prosecutorial functions are delegated to a Department of Public Prosecutions. This Department of Public Prosecutions should be distinguished from the one established under Kenya's new constitution. It falls under the authority of the Attorney General's office and is neither independent nor separately provided for in the previous constitution. Thus, factors that affect the independence, impartiality and objectivity of the AG in Kenya affect this department as well. For offences under the jurisdiction of Magistrates' Courts, prosecutorial functions are delegated to the Kenyan Police.

An obvious effect is that prosecution standards are lower and likely to be partial and discriminatory; particularly, in cases were the police are suspects such as in torture of extra-judicial killing cases. The conflict of interest is too obvious to mention. It defies logic that the police are investigators and prosecutors and in some cases forced to investigate and prosecute themselves. On the other hand, although the police prosecutors have been delegated such power by the AG, they are ultimately under the authority of the Commissioner of Police. A report published by International Bar Association, observed that police prosecutors view themselves as police officers first and prosecutors second. The effect is that the AG is unable to "exercise effective direction and control over public prosecutions in the magistrates' courts… police prosecutors receive little and inadequate training on the law and are generally under-resourced"[19] In that respect, prosecutors are unable to protect the public interest and act with objectivity.

Arguably poor remuneration and uncompetitive conditions of service drove the AG in Kenya to engage the police as prosecutors due to high staff turnover. The AG's office in Zimbabwe is also faced with the problem of staff exodus due to poor remuneration and service conditions and in some cases political pressure. It has been reported that:

> "The attorney-general's office is facing very real challenges. These include a high staff turnover, the pressure of political interference, and scarcity of resources. Police are also using arrest and detention as tools of immediate repression rather than with a view to trial and conviction. Prosecutors are faced daily with the task of defending trumped-up charges, the absence of evidence and policing that is hampered by the scarcity of resources even when it is not politically motivated."[20]

[19] International Bar Association, Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, page 64.

[20] Karla Saller, The Judicial Institution in Zimbabwe, 2004, page 87

The effect to both countries is that prosecutors are not able to conduct their prosecutorial duties effectively, objectively shunning selective prosecution and independently from the executive. Resultantly, there is a general breakdown of the criminal justice system in both countries, to which Kenya has made significant moves to remedy by establishing a constitutional and independent Department of Public Prosecutions.

2.3. Recommendations

It is recommended that:

I. The functions of the Attorney-General should be limited to acting as the principal legal advisor and legal representative of the government, the Constitution of Zimbabwe should be amended accordingly.

II. An office of the Department of Public Prosecutions should be established in terms of the Constitution of Zimbabwe vested with powers on all matters of public prosecution handled by the Attorney-General.

III. The office of the Department of Public Prosecutions should be constitutionally enable to exercise its functions independent of interference, control or authority of any other person or any authority.

IV. A separate Directorate of Criminal Investigations under the sole authority of the Department of Public Prosecutions in order to effectively deal with partial and politicized investigations by the Zimbabwe Republic Police.

3. The Courts

3.1. Introduction

The legitimacy, independence and authority of courts are destroyed when their orders are treated with contempt. Contempt of court orders scorn the whole essence of having courts, breeds impunity and mock the criminal justice system. If the fight against impunity and non-accountability is to be fruitful, then contempt of court orders should be eradicated in all its subtle forms. It can be argued that in societies were contempt of court is rife; courts are in a state of neglect and are inadequately resourced. The question of courts' budget and financing become critical in discussing how courts can function effectively and whether they are independent, impartial or respectable.

As such, this section seeks to explore the extent to which court orders are followed in Kenya; whether the courts are adequately resourced and perform their functions effectively. In discussing whether courts are adequately resourced, their financial and budgetary autonomy will be analysed. The aim is to assess their level of independence and impartiality. Overally, lessons will be drawn for purposes of informing reform efforts in Zimbabwe.

3.2. Contempt of Court

The effective and impartial administration of justice demands that parties to disputes and the organs of justice tasked with enforcing court orders respect the dignity and sanctity of the courts of law. Accordingly, any court of law should be inherently furnished with the power to enforce its decisions in order to ensure that its authority and respectability is upheld. But, courts do not have the constitutional mandate or the machinery to execute their decisions; hence they have to rely on the executive to ensure that their orders are followed. In cases were their orders are not followed, courts are equipped with the power to punish such contempt. While contempt of court orders by ordinary civilians is easily punishable, similar acts by the executive and high ranking officials have for long been a headache for most courts in patrimonial societies such as Kenya and Zimbabwe.

The culture of contempt of court in Kenya can be understood within the country's political history. During the reign of Jomo Kenyatta and Daniel Arap Moi, cases of contempt were few because the judiciary was merely an extension of the executive. Without security of tenure, and some judges being

contract 'civil servants' they were prone to make decisions favourable to the executive. Hence, there were neither independent nor impartial in discharging their constitutional mandate, and were accountable to the president who had the power to dismiss them as and when he deemed necessary. Cases of Daniel Arap Moi ordering courts not to interfere in political matters were common and in some cases matters of a political nature were withdrawn at his orders[21].

As Kenya opened up the democratic space, and embraced principles of judiciary independence, rule of law and good governance at the beginning of the 21st century, contempt of court orders by politicians and the government became noticeable. Detailed documentation of contempt cases gained momentum with the ouster of President Moi. In an article titled "*Constitutionalism under a 'Reformist' Regime in Kenya: One Step Forward, Two Steps Backwards?*"[22] Morris Odhiambo listed the following cases of contempt of court orders by cabinet ministers in 2004:

a) On 28th January 2004, Cabinet Ministers Kalonzo Musyoka and Raila Odinga called upon Retired President Moi to defy a court order requiring him to attend the Goldenberg court proceedings.

b) Local Government Minister, Hon. Karisa Maitha refused to heed an order issued by Mr. J. Isaac Lenaola on 12th March 2004 cancelling the nomination of Shakeel A. Shabir as Councilor in Kisumu City Council.

c) On 20th April 2004, the Minister for Tourism and Information, Raphael Tuju again declined to observe an injunction given by the court requiring that a committee constituted by him to investigate KISS FM radio station terminate its activities.

d) Hon. Karisa Maitha ignored a court order from J. Isaac Lenaola preventing him from revoking the nomination of Councilor J. Wandi of Mombasa City Council. Order made in July 2003.

e) On 30th August 2004, Hon. Ali Mwakwere ignored court summons to appear before a city magistrate to answer claims of neglect of official duties in a suit filed by an NGO.

f) On 7th December 2004, the Electoral Commission of Kenya Chairman, Samuel Kivuitu vowed to defy a court order requiring that Kisauni by-elections slated for 16th December 2004 to be temporarily stayed.

Though cases of contempt of court by members of the cabinet, legislators and government officials are well documented, the courts in Kenya are ill-equipped to deal with such matters. In the *Final Report of*

[21] International Bar Association, IBA Report on the Legal System and Independence of the Judiciary in Kenya, November 1996, page 15.

[22] http://www.kituochakatiba.co.ug/Constm%20KEN%202004.pdf

the Task Force on the Judicial Reforms it was noted that "courts have refrained from punishing contempt of court, in part due to the inadequacies of the contempt of court law"[23] It further observed that under Section 5 of the Judicature Act (Cap 8 Laws of Kenya), the superior courts are empowered to adjudicate contempt of court matters. However, their jurisdiction is tied to that exercised by the High Court of Justice in England and due to constant amendment of the applicable law and regulations by the High Court of Justice in England; the superior courts in Kenya have not been able to keep pace. Due to this loophole in Kenya's laws, contempt of court continues with impunity. However, in a bid to remedy the situation the Task Force recommended that Section 5 of the Judicature Act be repealed and a substantive Contempt of Court Bill be enacted.[24]

In Zimbabwe, contempt of court has not been a result of inadequate legislation or a refrain by the courts to determine such cases. Simply put, the government of Zimbabwe has made it clear that they will not follow any orders contrary to 'national interest' and government policy; for instance, in matters on land reform, the government refused to follow any court orders it considered unfavourable. In a few cases that the court has dealt with contempt of court matters, the presiding judges were either intimidated or forced to resign and in any case their orders even on the contempt matters have remained unenforced. A case in point is the arrest of former High Court Judge, Mr. Blackie on trumped-up charges after he had found the Justice Minister, Chinamasa guilty of contempt of court, fined him Z$50, 000 and sentenced him to three months imprisonment[25]. Since then no cases of contempt of court by members of the executive and ZANU-PF officials have been heard in the country's courts. Thus the solution to Zimbabwe's problem is de-politicisation of the criminal justice system and an end to executive interference in the judiciary.

3.3. Court Infrastructure, Resources and Personnel

Financial autonomy and self-regulated administration of the judiciary are key ingredients to ensuring judiciary independence, impartiality and efficient discharge of its duties. Budgetary autonomy and the ability to finance that budget are therefore critical in ensuring that courts are adequately resourced. Before the passing of the Judicial Service Bill in September 2010, the budget allocation for the judiciary in Kenya was pegged at 1% of the state budget. This was grossly inadequate for the judiciary's 15 High Court stations and more than 105 Magistrates' Courts in Kenya[26]. 1% of the state budget could not meet

[23] Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, page 96

[24] Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, page 96

[25] Legal Resources Foundation, Justice in Zimbabwe, 2002. Pages 25-30

[26] The Judiciary, 2010. Accessed at http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=288&Itemid=327

the requirements for human resources, capital development and equipment for adequate administration of justice. Resultantly the courts' infrastructure especially in areas outside of Nairobi is dilapidated and unfit for a dignified judiciary.

As in Zimbabwe, the judiciary staff in Kenya including magistrates and prosecutors falls under the Public Service Commission and rely on the Treasury financially. Due to poor remuneration and conditions of service associated with the Public Service in Kenya, the AG has been forced to engage police prosecutors due to high staff turnover. Combined with the poor state of court infrastructure and resources, courts in Kenya have not been able to work efficiently. Consequently, "a total of 998,263 cases were pending in courts countrywide with 209,668 before the High Court and 788,595 before Magistrates Courts by December 2009."[27]

The passing of the Judicial Service Bill by the National Assembly of Kenya brings relief to the dire financial situation in the judiciary. Budget allocation for the Judiciary has been effectively increased from 1% to a minimum of 2.5% of the state budget. To enhance financial autonomy of the judiciary, the Bill establishes a Judiciary Fund, which allows the judiciary to draw its funds directly from the Consolidated Fund. Furthermore, the financial autonomy is entrenched in the new Constitution. Article 173 provides for that the Judiciary Fund shall be administered by the Chief Registrar of the Judiciary. It shall be used for administrative expenses of the Judiciary and for any other purposes necessary for the discharge of the judiciary's functions. To emphasise the budgetary autonomy of the judiciary from the Treasury and the executive at large, each financial year, the Chief Registrar shall prepare estimate expenditure for the following year, and submit them to the National Assembly for approval[28]; and upon its approval by the National Assembly, the expenditure of the judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund.[29]

Although Zimbabwean courts were fairly resourced, the economic meltdown over the past decade has eroded all the improvements that had been made. Most court facilities are poorly maintained and some in a state of dilapidation. There have been reports that some courts have gone for months without water, while the Prison Service has at times failed to present prisoners on remand in court due to fuel shortages. With the judiciary staff, magistrates and prosecutors employed by the Public Service Commission, which poorly remunerates its workers there has been massive staff exodus leading to case

[27] David Mugwe, Judiciary in for Facelift as Reforms Gather Pace, July 7, 2010. Accessed at http://www.businessdailyafrica.com/Company%20Industry/Judiciary%20in%20for%20facelift%20as%20reforms%20gather%20pace/-/539550/953468/-/view/printVersion/-/63xbx2z/-/index.html

[28] Article 173(3) of the new Constitution of Kenya

[29] Article 173(4) of the new Constitution of Kenya

backlogs. Furthermore, the Judiciary is heavily dependent on the Treasury for its financial resources and therefore lacks financial autonomy. Resultantly, the courts are lack essential resources and are operating inefficiently.

3.4. Recommendations

It is recommended that:

I. In order to effectively deal with matters of contempt of court orders by the executive, civil society organizations should aggressively campaign for the de-politicisation of the criminal justice system and an end to executive interference in the judiciary.

II. The financial autonomy of the judiciary should be entrenched in the Constitution of Zimbabwe. Any financial links between the Treasury and the Judiciary should be cut. The judiciary should present its budget directly to the Parliament. The expenditure of the judiciary should be charged on the Consolidated Fund and the funds should be paid directly into the Judiciary Fund.

4. The Judiciary

4.1. Introduction

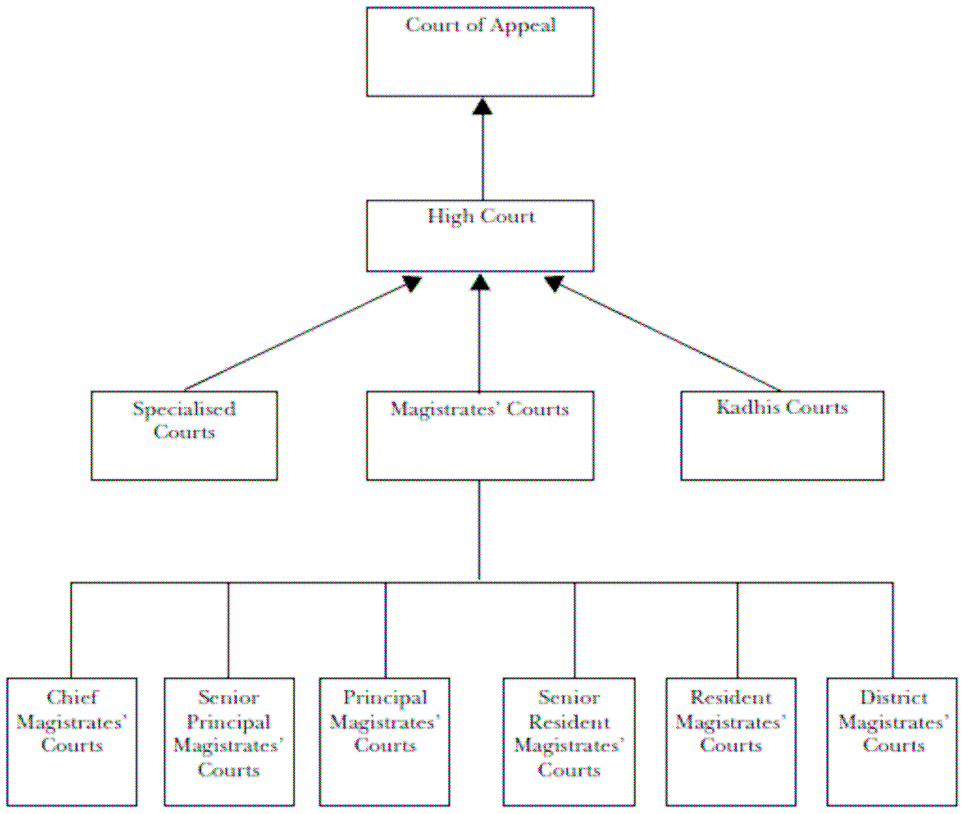
This section assesses the independence and impartiality of the judiciary in Kenya. As is the case in Zimbabwe, the judiciary in Kenya consists of the courts and officers that include the Chief Justice, judges, magistrates, judges and the Attorney-General. In assessing their independence, the study will examine the extent of transparency and integrity of their appointment process. In most cases, the appointment process determines whether the judiciary can operate without undue influence from the executive and other arms of the government. But, the transparency of the appointment status is directly linked to the composition and nature of the Judicial Services Commission. Hence, this study will do a comparative analysis of the Judicial Services Commission in Kenya and Zimbabwe. This section will conclude by proposing options and recommendations for reforms in the Zimbabwean judiciary.

4.1.1 Structure of the Courts in Kenya

The structure of courts in Kenya is provided for in terms of Chapter 10, Article 162 of the new constitution of Kenya. The Supreme Court, the Court of Appeal and the High Court are the superior courts[30]. Article 162(2) requires the Parliament to establish specialized courts to adjudicate matters relating to "employment and labour relations; and the environment and the use and occupation of, and title to land". These courts have the status of the High Court and their jurisdiction and functions shall be as determined by the Parliament. Subordinate courts are established under Article 169 or by Parliament in accordance with that Article. They include the Magistrates courts; the Khadis' courts; the Courts Martial and any other court or local tribunal established by an Act of Parliament.

The following diagram shows the structure of the judiciary in Kenya.

The Court Structure



Notes:

1. Appeal from all Magistrates' Courts lies to the High Court.
2. In the hierarchy of Magistrates' Courts, the District Magistrates' Courts are the lowest while the Chief Magistrates' Courts are the highest.

Adapted from International Bar Association Report, 2010:25

4.2. The Judicial Service Commission

[30] Constitution of Kenya, Article 162(1)

The composition of the Judicial Service Commission (JSC) of Kenya under the old constitution comprised of five members that included the Chief Justice as Chairman, the Attorney General, a Judge of the Court of Appeal, a *puisne* Judge of the High Court and the Chairman of the Public Service Commission.[31] The JSC comprised of direct or indirect presidential appointees whose independence from the executive was questionable. The same is the case with the JSC in Zimbabwe, which is composed of the Chief Justice, Chairman of the Public Service Commission, the Attorney General and not more than three other members appointed by the President. The commission cannot be expected to be independent nor objective in the discharge of its duties and there is no guarantee of non-interference from the executive.

In order to safeguard the independence of the JSC, the new Kenyan constitution provides that the JSC shall consist of the Chief Justice, who shall be the chairperson of the commission; one Supreme Court judge and one Court of Appeal judge elected by other Supreme Court judges and Court of Appeal judges respectively; one High Court judge and one magistrate elected by members of the association of judges and magistrates; the Attorney General; two advocates with 15 years' experience each, elected by members of the Law Society of Kenya; one person nominated by the Public Service Commission; and two people, a man and a woman who are not lawyers appointed by the President with approval of the National Assembly. The last two are meant to represent the public. With the exception of the Chief Justice and the Attorney General, all other members of the Commission shall hold office provided they remain qualified for a term of five years and can serve a maximum of two terms only[32]. It appears the composition of Kenya's JSC is representative and it can be expected to discharge its mandate with a fair degree of independence from the executive.

The JSC in Zimbabwe has no clear constitutional mandate save for vague functions provided for in terms of Section 91 of the Constitution. Its functions include tendering "such advice and do such things in relation to the judiciary as a provided for by this Constitution or by or under an Act of Parliament. Section 91(2) provides that the Act of Parliament referred to in subsection (1) may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of such officers and persons employed in the Supreme Court, High Court and the subordinate courts. It does not specify which officers. The functions of the JSC are left to be determined by the legislature which can amend them as and when they deem necessary. Thus the JSC is subservient to the legislature as far as its job description is concerned and under the influence of the executive, which appoints all its members. Its functions should be provided for in the constitution as is the case with the JSC in Kenya, whose functions are provided for in terms of Article 172 of the country's Constitution. Only then can its independence and transparency be secured.

[31] Article 68(1) of the old Constitution of Kenya

[32] Article 171 of the new Constitution of Kenya

4.3. Appointment, Transfer and Dismissal of Judges: Transparency and Integrity of the Process

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the United Nations Principles on the Independence of the Judiciary recommend that judicial officers should be selected by a body that is independent from the executive and the legislature to guarantee judicial independence and impartiality in the discharge of its constitutional duties. However, failure of past regimes to tame the powers of the President and Chief Justice to make judicial appointments and dismissals extensively undermined the independence, legitimacy and impartiality of the judiciary in Kenya. For decades there was no criteria of appointing judges hence the system was massively abused by the executive. Dr. Migai Akech argues that: "These powers [of appointing judges] have been exercised in ways that, respectively, undermine the institutional autonomy and authority of the judiciary and the independence of judicial officers. As a result, judicial officers are not only insecure in their positions, but may also become enablers of human rights violations and corruption."[33] Resultantly, a Report of the Task Force on Judicial Reforms concluded that "the process through which candidates for appointment are currently identified and vetted by the Judicial Service Commission is neither transparent, nor based on any publicly known measurable criteria and is certainly not competitive."[34] Article 61 of the previous constitution exacerbated the situation by enabling the president to appoint judges in an acting capacity, and while the judge awaited confirmation he worked under constant executive pressure.

Under the old Constitution, judges were appointed by the President at the recommendation of the JSC. However, vacancies were not advertised and neither was the criterion for appointment known. Accordingly, the process was not transparent and appointments were made on the basis of political or ethnic considerations. Nevertheless, the situation has dramatically changed with the promulgation of the new constitution and the establishment of a representative JSC that is far from the previous one constituting of presidential appointees. Article 166(1) provides that the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the JSC's recommendation and subject to approval of the National Assembly. Other judges shall be appointed in accordance with the recommendation of the JSC. Furthermore, judges including sitting judges will be subjected to vetting as a way of ensuring that they have adequate legal knowledge and possess a high moral character, integrity and impartiality. It is commendable that the JSC in Kenya is now playing a leading role in the selection and appointment of judges and the fact that the President can only appoint the Chief Justice and his Deputy at the recommendation of the JSC and subject to approval of the National Assembly ensures and guarantees the integrity and transparency of the appointment process of judges.

[33] Migai Akech, Kenya: Institutional Reform in the New Constitution of Kenya, October 2010, page 29.

[34] Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, page 24

Just as the appointment of judges was heavily influenced by the executive, so was their removal from office. In terms of Article 62 of the old constitution, the president could dismiss the Chief Justice and other judges for failure or inability to perform functions of their office or for behavior considered misappropriate for a judge. On paper, the president had to act on the recommendation of an impartial tribunal; on the contrary, the threat of dismissal was used on many a times to whip 'wayward' judges into line with executive demands. Other judges such as Hon. Mary A. Ang'wa, a judge in the High Court of Kenya who was irregularly transferred narrated her ordeal as follows: "The few judges who openly supported the review process found themselves transferred to stations far distant from the capital, which is what happened to me."[35]

To curtail the use of threat of dismissal as a means of influencing judges, Article 168 of the new Constitution establishes a concise process for the removal of a judge from office. Article 168(2) provides that such removal can only be initiated by the JSC acting on its own motion, or on the petition of any person to the Judicial Service Commission. If the JSC is satisfied that the petition discloses grounds for removal then it shall be send to the President who will suspend the judge and appoint a tribunal in accordance with the recommendation of the JSC. This should be done within 14 days of receiving the petition. In the case of the Chief Justice, the tribunal shall consist of the Speaker of the National Assembly as chairperson, three superior court judges from common-law jurisdictions, one advocate of fifteen years standing and two other persons with experience in public affairs. And in the case of any other judge, the tribunal shall consist of a chairperson and three other members from among persons who have held office or hold office as a judge of a superior court or qualified for such appointment but whom in the past three years would not have been members of the JSC. The other members will be one advocate of fifteen years standing and two other persons with experience in public affairs. Although these procedures are yet to be tested, it appears they are capable of guaranteeing the independence, integrity and transparency of the removal of judges or threat thereof as a means of either intimidation or exerting undue pressure.

4.4. Independence and Impartiality of the Judiciary in Kenya

Judicial independence is premised on the principle of separation of powers and can be reflected in four aspects, which relate to the decision-making process; the finality of the decision; administrative independence in relation to the autonomy of management of its affairs; and budgetary independence that is, being financially autonomous. Aspects of financial autonomy have been discussed in the section above and will not be discussed again in this section. This section will concern itself with the first two aspects in discussing the independence and impartiality of courts in Kenya.

[35] Hon. Mary A. Ang'wa, Judicial Independence Abroad: The Struggle Continues – A View from Kenya, *Human Rights*, Volume 36(1), Winter 2009, page 23.

In recognition of the importance of the principle of separation of powers the United Nations Human Rights Committee and the United Nations Basic Principles on the Independence of the Judiciary requires states to enact national laws and take measures that guarantee non-interference in the judiciary. Although in most countries such as Kenya and Zimbabwe the constitutions to some extent proclaim that the judiciary is independent, there are no clear measures taken to guarantee that independence. In Kenya, judicial independence has in the past been attacked in different forms. In most cases the "executive has taken the Court as a necessary step before extra-judicial (and illegal) mass action to justify the subversion of rule of law in the pursuit of the litigants' interests[36]". Secondly, the executive and the legislature have out rightly held the courts in contempt especially were court rulings adversely affected their interests. Lastly, the legislature "arrogated itself the role of a supervisor of the discharge by the Court of its judicial function.[37]" The legislature has in the past discussed pending court matters during its deliberations and in 2007 the Parliamentary Committee on Security purported to investigate the Court concerning the whereabouts of the cocaine haul the subject of pending criminal proceedings[38].

The root of the problem is that there seem to be competition between the legislature and the executive to oversee the functions of the judiciary. Whereas, the old constitution vested power in the president as head of the executive and vested legislative power in the Parliament, judicial authority is not vested in the judiciary. The impression given is that the judiciary is a junior member of the three arms of government that has no authority in itself. Hence, it is subjected to bullying and susceptible to political manipulation by the executive and the parliament. It has been reported that, the executive branch sometimes exert political pressure on judges and magistrates to decide cases other than in accordance with the law such as several controversial decisions of the High Court of Kenya in which the court allegedly absolved influential political figures facing corruption charges from criminal responsibility.

The new constitution of Kenya however guarantees judicial independence and impartiality by vesting judicial authority exclusively in the judiciary. Article 159(1) provides that "judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution." Article 160(1) further provides that "in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall

[36] Hon. Mr. J E Gicheru, Independence of the Judiciary: Accountability and Contempt of Court, *Kenya Law Review*, Volume 1(1), 2007, page 1.

[37] Hon. Mr J E Gicheru, Independence of the Judiciary: Accountability and Contempt of Court, *Kenya Law Review*, Volume 1(1), 2007, page 1.

[38] Hon. Mr J E Gicheru, Independence of the Judiciary: Accountability and Contempt of Court, *Kenya Law Review*, Volume 1(1), 2007, page 1.

not be subject to the control or direction of any person or authority." In all fairness, this is a positive move towards liberating the judiciary from subordination by the legislature and the executive.

In contrast, Article 79(1) of the Constitution of Zimbabwe ambiguously vests authority of the judiciary in the Supreme Court, the High Court and any other subordinate courts established by or under an Act of Parliament. However, Article 79(2) provides that notwithstanding provisions of Article 79(1), through an Act of Parliament can vest adjudicating functions in a person or authority other than a court referred to in subsection (1); or can vest functions other than adjudicating functions in a court referred to in subsection (1) or in a member of the judiciary. Simply put the legislature can vest judicial authority in any person or authority of its choice, thus judicial authority does not exclusively vest in the Judiciary. And where it is given to the judiciary it is vested in a person, chosen by the legislature and not in the judiciary as an institution. Additionally, Article 79B on independence of judiciary provides that "in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary" As it stands judiciary authority is not unambiguously vested in the judiciary and its independence is flouted by the legislature.

Judiciary accountability in the discharge of its constitutional mandate of judicial function is the other side of judicial independence, but the question is to whom the judiciary should be accountable to and in what ways can it prove its accountability. Chief Justice Gicheru argues that the judiciary is not accountable to any institution of the government but to the people on whose behalf it exercises the judicial power under the constitution and the law of the land. The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government provides that judicial accountability is when:

> "Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies"

To further safeguard its independence the judiciary in Kenya has opted for self-regulation through several internal accountability measures. These mechanisms include the establishment of biennial reviews on integrity and performance of the judiciary through the Ethics and Governance Sub-Committee of the Judiciary; the public complaints systems under the Office of the Chief Justice. It can be reasonable assumed that these measures will ensure an independent, impartial and accountable judiciary.

4.5. Recommendations

It is recommended that:

I. The composition of the Judicial Service Commission should be reformed to ensure that it is both independent and representative. The model set in the new Constitution of Kenya should be followed.

II. The functions of the Judicial Service Commission should be clear and concise as provided for in Article 172 of the new Constitution of Kenya.

III. The Constitution of Zimbabwe should be amended to ensure that judicial authority exclusively vests in the judiciary that is in the courts and tribunals that constitute the judiciary.

IV. Judicial independence should be categorically and expressly guaranteed in the constitution with the legislature stripped off the powers to determine in whom authority should be vested. It is proposed that Article 159 and 160 of the Constitution of Kenya provides a commendable model of constitutionally guaranteed judicial authority and independence that Zimbabwe can learn from.

5. The Legal Profession

5.1. Introduction

An independent and impartial judiciary, prosecution authority or investigating authority can be jeopardized by a suppressed legal practitioners' community. The efficiency and integrity of the criminal justice system is therefore dependent on a free, independent, impartial and robust legal profession. This section will examine and assess the extent to which lawyers in Kenya are able to perform their professional duties independent of government influence and without intimidation, hindrance or threat of irregular sanction.

5.2. Practice of the Legal Profession in Kenya since the Days of Moi

Government interference, intimidation and harassment of lawyers were prevalent during the oppressive, one-party regime of Daniel Arap Moi. Several methods were used by the government to stifle the ability of lawyers to practice. For instance, in February 1995, the offices of Kituo Cha Sheria, a legal advice centre in Nairobi were attacked by unknown gunman. A month later they were petrol bombed. To date no suspects have been apprehended.

Threats of arrest and detention were also used to interfere with the activities of lawyers representing opposition politicians. Paul Muite, a renowned lawyer in Kenya received numerous threats and was detained at police stations several times. No charges were laid against him, confirming that he was been persecuted for offering his professional legal services to opposition politicians. Other lawyers such as Mirugi Kariuki were once ordered by a District Commissioner to surrender a client's file, when he refused "he was summoned by a senior resident magistrate and told that a warrant had been issued for his arrest on the charge of disobeying a lawful order."[39]

Lawyers considered adverse to government interests, particularly those that represented opposition politicians or on human rights issues were subjected to other forms of sanction by the regime of Moi.

[39] International Bar Association, IBA Report on the Legal System and Independence of the Judiciary in Kenya, November 1996, page 32.

Most notably, they were excluded from government contracts or any contracts from any other government agencies and parastatals. Others received excessive tax demands as a means of towing them into line. Since Moi was in the habit of predicting pending cases in public as a way of intimidating the judiciary, most clients shunned lawyers who were not in good books with the government for fear that judges were prejudiced against them.

However, with the coming in of the Mwai Kibaki government in 2002, lawyers in Kenya have generally been able to carry out their professional functions in an independent manner; and there are no recent reports of improper state interference. They appear able to consult with their clients freely, to access all relevant information for the cases in which they are involved and they are able to exercise their right of audience in court unhindered. Their right to freedom of expression and association is also fully respected.

5.3. The Activities of the Law Society of Kenya

The Law Society of Kenya (LSK) has been hailed for its efforts in fighting for human rights and independence of the legal profession, especially during the period of the official one-party rule between 1982 and 1991. With all political parties banned, "the LSK took the lead in attacking the Government for its breaches of human rights, and the LSK's position as a statutory body enabled established by the Law Society of Kenya Act made it difficult for the government to silence it."[40] An International Bar Association report argues that during the one-party state regime, the divide between human rights issues and opposition politics was blurred and the LSK fulfilled both roles[41]. There was a general understanding within the LSK Council that they were statutorily empowered to play that role. Accordingly they interpreted Section 4(c) of the Law Society of Kenya Act that authorizes it to "assist the Government and the courts in all matters affecting legislation and the administration of and practice of the law in Kenya" and Section 4(e), which provides that it shall protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law, as empowering it to criticize the Government on issues of human rights and rule of law.

The debate on whether the LSK should engage in national issues or restrict itself to the concerns of its members arose with the return of political pluralism in 1992. In November 1995, Moi, accused it of acting as a political party and some legal measures have also been taken by disgruntled members of the LSK who are of the opinion that it is devoting excessive energy on matters of a political nature at the detriment of its professional members. In 1991 a court injunction was successfully made against

[40] International Bar Association, IBA Report on the Legal System and Independence of the Judiciary in Kenya, November 1996, page 32.

[41] International Bar Association, IBA Report on the Legal System and Independence of the Judiciary in Kenya, November 1996, page 32.

the LSK Council. Its aim was to force them to streamline LSK activities towards strict professional issues. On 1 August 2000, the Constitutional Court in Nairobi threw out a case in which a lawyer, Dr. Kenneth Kiplagat wanted the LSK to be barred from political activities[42]. He argued that the LSK was using members' subscription fees on political activities that did not concern them.

Although the Legal Practitioners Act of Zimbabwe that establishes the Law Society of Zimbabwe (LSZ) gives a narrow leeway for the LSZ to engage in human rights and issues of a political nature, the Society has over the past decade aggressively pursued human rights and rule of law issues to the discomfort of the government. Yet, it finds itself caught in the same web that affected the LSK: a blurred division between human rights issues and opposition politics. Resultantly, the LSZ has been accused of acting as a political party, and aligning itself with opposition political parties, such as the Movement for Democratic Change. The effect has been continued harassment, detention, torture and intimidation of the LSK secretariat and human rights lawyers as was the case during the one-party state regime of Daniel Arap Moi. While it is desirable that it stands up for human rights and rule of law issues, there is an equal need for it to avoid being considered partisan. Similarly, it should maintain a balance between issues of a national nature and its obligation to its professional members.

5.4. Recommendations

It is recommended that:

I. The Law Society of Zimbabwe should reform its activities and seek to strike a balance between the fight for human rights and rule of law issues and statutory obligations to its members.

II. Rebranding is critical to the Law Society of Zimbabwe, to ensure that establishes itself as a non-partisan professional body.

III. Partnerships and cooperation with regional and international bar associations should be strengthened.

[42] Maguta Kimenia, Bid Fails to Keep LSK Off Politics, August 2, 2000. Accessed at http://allafrica.com/stories/200008020209.html