SECURING THE INDEPENDENCE OF THE JUDICIARY IN SOMALILAND, PUNTLAND AND SOUTH CENTRAL SOMALIA

CONCEPT NOTE

Comment [I1]: Insert IRI Logo

THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

TABLE OF CONTENTS

1. INTRODUCTION

This is a joint effort of ICJ Kenya and IRI. Achieving judicial independence in order to ensure impartiality in judicial decisions is a complex undertaking. There are various ways in which countries, with and without donor support, have sought to attain this goal. Much depends upon indigenous customs, expectations, and institutional arrangements.

The project recognizes the need to build support for reforms. Opposition to these reforms is often high, since so much is at stake. Many stand to lose. Often, the actors within the system fear the impact that reforms will have on them. At times, the vision for what the reforms should achieve, and how, is not widely understood or shared. At the same times, donors are often under pressure to show tangible results quickly.

ICJ Kenya has been involved in the generation of democracy, human rights and rule of law programs for over 45 years. In many, promoting judicial independence is an explicit objective. Where it is not already an explicit objective, it almost inevitably will become one at some point. Judicial independence lies at the heart of a well functioning judiciary and is the cornerstone of a democratic, market-based society based on the rule of law.

IRI has been involved in various initiatives in Somaliland geared towards the advancement of democracy in Somaliland for X years . Both organizations realize the importance of a strong, independent judiciary as a key institutional pillar geared towards sustaining a healthy democracy.

This project has four primary objectives; first, we want to identify gaps within the Judiciary as the organ charged with enforcing democracy, human rights and rule of law.. This will be realized by designing interventions that are programmatic in their approaches to guarantee judicial independence. In addition, the project will carried out in phases after identifying priority areas for reform and mapping out which ones could be emphasized over others. Second, we want to bring together stakeholders and experts in the field to address the most intransigent problems involved in promoting judicial independence.

It has been our experience that although it is relatively straightforward to shape programs that could incrementally improve the independence of the judiciary, it can be very difficult to overcome opposition to those reforms. In many cases, this is opposition that with one deft and politically astute move could tear down years of progress. Where one is not careful in mapping out all the relevant stakeholders, it can prove difficult to identify the exact sources of the opposition. This is the reason why as part of the first phase of this project, we will be carrying out a baseline survey to identify all the stakeholders as well as any capacity gaps that exist, which will then inform in greater detail the required interventions.

The third objective, and of equal importance is to produce a series f technical documents that will guide stakeholders in the justice sector in light of the fact that they are expected to cover a variety of technical areas. Those involved in democracy, rule of law and human rights are unlikely to have expertise on all facets of the subject. The guides, digests and policy papers are therefore intended to be useful to persons with varying levels of expertise, to provide basic education as well as new insights to those with more experience.

The forth objective which will be an added bonus will be the relationships and networks built through the process.

2. BACKGROUND

Somaliland has been engaged since 1991 on a journey to build systems of legitimate and accountable governance with some form of social contract with civil society. Lack of international recognition has given Somalilanders the opportunity to build their own system. Their history of conflict resolution has involved a bottom-up approach to building societies from local communities upwards, gradually widening the arena of political agreement and political consensus.

The government signed the Universal Declaration of Human Rights, saw peace restored, demobilized former combatants, brought social and economic rehabilitation, and oversaw the drafting of a Constitution based on universal suffrage, decentralization and multi-partism.

More recently Somaliland has been in transition, seeking to move from traditional institutions of clan governance to western-style governance structures. The future is by
no means determined, but despite some setbacks the road to democracy has at least been mapped out – although there are some concerns over corruption, commitment to human rights standards, fair representation for women and minorities, and indeed how Somaliland is responding to the war on terrorism. These latest elections were, yet again, carried out peacefully – in contrast with the situation in some of Somaliland's neighboring territories. It is apparent that the process in Somaliland has had exemplary if unintended consequences in Mogadishu and Puntland, and may be a useful lesson for the region's people in pushing for a voice in their governance.

On 29 September 2005 the people of the Republic of Somaliland, an internationally-unrecognized country in north-west Somalia, elected a new parliament. These parliamentary elections, the first to be held in the Somali region since 1969, were the latest and, arguably, most important step in establishing a constitutionally-based, democratic governmental system in Somaliland.

Since breaking away from Somalia in May 1991, the people of Somaliland have sought to build a new state by charting a path away from violent conflict to a competitive and democratic political system. The process began with a constitutional plebiscite in 2001, and since 2002 all of Somaliland's key political institutions – district councils, the presidency and vice presidency, and, with these latest elections, parliament itself – have been subjected to popular vote.

Furthermore, the establishment of an elected parliament has the potential to restore a more equitable balance to political authority, by curbing the excesses of the executive and the increasing corruption of political life that had begun to corrode the political project in Somaliland. The process of establishing an elected government in Somaliland has occurred in parallel with regional and international efforts to restore a national government to Somalia.

Given that this was the first parliamentary election in 36 years (and the first time women have been democratically elected to a Somali parliament), Somaliland has some claim to be making a little progress on representation of women. But can a patriarchal clan system, with the strengths and weaknesses that that provides, now listen and respond to the voice of women, and recognize not only the rightness of the case but also the economic power that they wield?

Constructing a new state has brought many challenges. Between 1992 and 1996 the country was twice embroiled in civil wars. A ban on imports of Somali livestock by Saudi Arabia since 2000 has deprived the country of a key source of revenue. Demographic and economic pressures are affecting the environment and fuelling rapid urban migration, which in turn is straining the capacity of urban infrastructure. There is also evidence of growing disparities in wealth between social groups,

between the east and west of the country, and between urban and rural populations. Critically, after 14 years Somaliland's sovereignty claim remains unrecognized by Somalis in Somalia or any foreign government and is contested by people in eastern Somaliland.

The lack of international recognition has deprived people in Somaliland of the type of governance support that many post-conflict countries receive. It also restricts the possibilities for developing international trade relations and encouraging inward investment. With meager levels of international assistance, recovery has largely been achieved from the resources and resourcefulness of Somalilanders themselves. The main
sources of finance have been the production and export of livestock, trade, and the remittances sent by Somalis living abroad. This has served to forge a separate identity and a feeling of self-reliance and has enabled Somalilanders to craft a political system suitable to their needs.

Unrecognized internationally, Somaliland has many of the attributes of a sovereign state, with an elected government that provides security for its population, exercises some control over its borders, retains stewardship over some public assets, levies taxes, issues
currency, and formulates development policies. It has also adopted many of the symbols of statehood, including a flag, its own currency, passports and vehicle license plates. The latest phase in this process of state building has involved submitting its legislature to democratic elections.

Having committed itself to an elected government, the government needs to demonstrate its respect for civil liberties, human rights standards and the rule of law that
are expected in a democratic society. Since 2002, Somaliland's reputation for this has been called into question by some high profile legal cases, creeping corruption, and an increasing investment in internal security. Immediately after the elections, the government demonstrated again its intolerance of anyone that it does not agree with, by declaring the European Union delegate to Somaliland *persona non grata*. Such arbitrary action will not win Somaliland foreign friends.

Somaliland has a Bicameral legislature in which the upper house composed of elders in not elected and thus not democratically accountable. This lack of accountability is subject to abuse. There is a need to strengthen the institutions which serve as the pillars of democracy (the Judiciary included) to secure democratic gains made so far. It is important to ensure that the Judiciary is immune to the intrusion of the Executive and give it sufficient power to adjudicate upon injustices which occur as a result of Executive excesses sanctioned by the upper house, in view of the current administration's minority in the lower house and tendancy to use the upper house (house of elders) to rubberstamp its dictatorial tendancies.

3. PROJECT JUSTIFICATION

An independent and accountable Judiciary is key to the realization of the rule of law, social, political and economic stability of any nation. The Judiciary is one of the three arms of the state and the primary constitutional guarantor. The Judiciary should be concerned with the rule of law and access to justice, which twin objectives should be the pillars for judicial reform. To achieve its mandate, substantial attention must be given to institutional and legal infrastructure reforms necessary to support, implement and sustain these ideals as well as to promote a rule of law culture. For a long time, the Judiciary has been dogged by problems such as chronic case backlog, rampant corruption and inept personnel. These problems have led to the virtual collapse of the judicial system and this has serious implications on access to justice by the majority.

Part of the problem with judicial reform remains ideological. There is little unanimity among government officials, politicians and the judicial hierarchy on the ideological objective of judicial reform. The result is incongruous measures. The institution remains in dire need of reforms to enhance judicial independence and accountability.

A judicial system in any country is central to the protection of human rights and freedoms. The administration of justice is essential to the full and non-discriminatory realization to the human rights and indispensable to the processes of democracy and sustainable development. The United Nations General Assembly has realized that has repeatedly stated that rule of law and the proper administration of justice […] play a central role in the protection and the promotion of Human rights and that " the administration of justice including law enforcement and prosecutorial agencies and especially an independent judiciary and the legal profession in full conformity with the standards contained in international human rights instruments, are essential to the full realization of human rights an indispensable to democratization processes and sustainable development."[1]

In Kenya, judicial reform in Kenya is an urgent task in the process of strengthening democracy in the country. The current structures available for the administration of justice fall far short of the minimum that would be required to enable access to justice at least to a sizeable proportion of the population.

The Universal Declaration of Human Rights (UDHR) enshrines principles of equality before the law. The components of this Principle include presumption of innocence, and a right to a fair and public hearing before a court of competent, independent and impartial tribunal established by law.

The above provisions are echoed in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR goes further than the other 2 conventions to include a right to be heard without undue delay. It is noteworthy that Kenya is a party to both conventions, although domesticating legislation has been enacted in piecemeal.[2] It is worth emphasizing though that whereas the latter two conventions require a domesticating law, the UDHR does not require one by virtue of the fact that its provisions have risen to the status of customary international law and hence apply to all states without a requirement of ratification or accession.

[1] See resolutions 51/181 of 22 December 1995 and 48/137 of 20 December 1993, entitled, "Human Rights in the administration of justice.

[2] The date of accession of the ICCPR was 1st May 1972

Thus, the organization and administration of justice should therefore be inspired by the above principles and efforts should be made to translate the above principles into reality. The most comprehensive standards on the independence of the judiciary are contained in the UN Basic Principles on the Independence of the Judiciary (1985), [3]the Basic Principles on the Role of Lawyers (1990) and the Guidelines on the Role of Prosecutors (1990).[4]

4. A CASE FOR THE URGENCY AND NECESSITY OF JUDICIAL REFORMS

The consensus for reforms of the judiciary is informed by several factors which include;

i) Restoration of public confidence in the judiciary
ii) Enhancing transparency, independence and accountability in the judiciary by reforming processes of judicial appointments, evaluation, promotions, discipline and removal from office.
iii) The need to speed up the settlement of cases and elimination of case back-logs
iv) Increasing citizens access to the courts and to effective remedies by enhancing access to legal aid; providing information and setting up alternative dispute resolution mechanisms, developing small claims courts and transferring non-contentious matters to administrative agencies; and
v) Securing an independent legal profession

5. PROJECT FOCUS AREAS

5.1 Independence of the Judiciary

Independence refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. Independence is of to kinds:-

- Institutional independence – this is independence from other branches of power as captured in the doctrine of separation of powers.
- Individual independence – This refers to the independence of particular judge or judicial officer to enable him or her undertake judicial functions. It includes independence from the other members of the judiciary. Aspects of independence include provision of competitive remuneration and facilities to undertake judicial functions.

Independence requires that neither the judiciary nor the individual judges who compose the judiciary are subordinate to other public powers.[5] There are various aspects that touch on judicial independence, in the absence of these factors, judicial independence is impaired.

Generally, there are various factors that limit/ impede judicial independence or can be seen to limit the judicial independence. These include:-

5.1.1 Mode of appointment of judges and magistrates

In Kenya, the Chief Justice is appointed by the president, the judges are appointed by the president with the advice of the Judicial Service Commission (JSC). The Judicial Service Commission tasked with the duty of advising the president on the judicial appointees is also made up of presidential

[3] Adopted by the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly resolutions 40/32 and 40/146, 1985.
[4] The two Basic Principles were adopted by the eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990.
[5] ICJ – Practitioners guide No. 1 - Independence of the judges, Lawyers and Prosecutors.

appointees. The members include the CJ, the AG, the Chairman of the PSC, and 2 judges of the superior court.

5.1.2 Security of tenure

Whereas the judges in Kenya enjoy security of tenure, the same does not extend to the magistrates. Removal of judges from office can only be upon formation of a tribunal to investigate the reasons for their removal. It is worth noting that a majority of the cases are dealt with by the magistrates. The appeal process is very expensive and thus keeps most litigants away. Keeping in mind the bulk of the work is done by the magistrates, it is imperative that they are given security of tenure. The magistrates are governed by the Magistrates Judicial Service regulations and the Magistrates Courts Act, Chapter 10 of the Laws of Kenya. It has been opined that magistrates are treated by the JSC they are basically civil servant employees in need of strict supervision.[6]

5.1.3 Acting/Contract judges

The appointment of judges on a contract basis or in acting capacity defies international best practice on the tenure of judges. The UN basic principles on the Independence of the Judiciary notes that; " the terms of office of the judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law".[7]There is widespread agreement that the institution of the contract/acting judges, not provided for by the Constitution is corrosive and undermines Judicial Independence.[8] Following the 2003 purge of the Judiciary after the release of the "Integrity and Anti-Corruption Committee of the Judiciary" (usually referred to as the Ringera report) the president in appointed 11 judges in an acting capacity, followed by 11 other judges in December.[9] Though the judges were later confirmed, it is nevertheless worrisome because even for the short period that they served as acting judges, the lack of independence is sufficient to result to miscarriage of justice.

5.1.4 Financial/budget autonomy[10]

The Judiciary just like other arms of government requires adequate money to discharge its functions adequately.[11]As one of the 3 branches of the Government, the Judiciary receives its resources from the national budget. It is worth mentioning that inadequate resources may render the judiciary vulnerable to corruption, which would in turn result to a weakening of its independence and impartiality. The lack of participation of the judiciary in the elaboration of the budget is another factor that could undermine the independence and impartiality of the judiciary.[12]

---

[6] *Ibid*, note 5 page 330.
[7] See principle 11 and 12 of the 1985 UN Basic Principles on the Independence of the Judiciary.
[8] *Ibid*, note 5, page 332.
[9] Kenya Gazette Notices Nos 7280 and 7282, October 2003, Volume CV.
[10] UN Basic Principles, principle 7.
[11] See also, the Latimer House guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (1998), the Latimer House Principles on the Accountability of the Relationship between the Three Branches of Government (2003). Others include the European Charter on the Statute for the Judges, DAJ/DOC(98) 23 and Beijing Principles on Judicial Independence of the Judiciary
[12] ICJ Practitioners guide Series No. 1, 2004, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Page 33.

5.1.5 Promotions/criteria for distributing benefits/transfers

Principle 13 of the UN basic principles provides that, "promotion of judges, wherever a system exists, should be based on objective factors, in particular ability, integrity and experience." There have been examples where the promotion of judges and magistrates as well as the allocation of benefits such as good houses and cars has been based on how regime friendly a judge is and whether he is willing to toe the line. Conversely, judges who have insisted on the rule of law and application of decisions, even in controversial cases based on law and fact, have received reprisals in form of speedy transfers to courts in marginalized parts of the country. As the situations stands now, the system of promotions, distribution of benefits and transfers is still subject to abuse and thus an impediment to access to justice.

5.1.6 Frequent Transfers of judges and magistrates

Transfers of judges and magistrates, whether motivated by political expediency or not, have far reaching repercussions on the speedy conclusion of cases and the administration of justice and thus warrant special mention. In most cases, the transfer of a judge or magistrate has the effect of stalling various cases, especially those where the hearing had begun. In murder cases especially, the transfer of a judge or magistrate results to the case being restarted to enable the new judicial officer to hear the witnesses. This results to an endless process of litigation and is a denial of justice. Before transfers are effected, it is only in the interest of justice that due regard be made to the negative effect the transfer is likely to have on administration of justice. Causing a retrial of a case as a result of an unnecessary transfer is a blatant disregard for human rights and human suffering and the access to justice.

5.1.7 Threats, physical or threat of use of force or actual use of force

This mostly come in the form of court invasions. Over the years, there have been cases where parties and their supporters have stormed the courts with their supporters to protest against the arrest of charges. This form of interference impairs judicial independence. Sufficient physical security should be offered to judicial officers to ensure that justice is denied because a judicial officer was intimidated.[13]

5.1.8 Executive interference

Over the years, we have seen cases where the decisions made have raised controversy on whether the decision was supported by law and judicial precedent or by political expediency.[14] A common case of executive interference with the operation of the judiciary and one that obviously denies access to justice is the blatant disregard of court orders by especially the executive arm of the government. In a situation where a court order is not worth the piece of paper it is written on, then we cannot speak of access to justice, but only a return to the rule of the jungle, where might equal right.

---

[13] *Supra* note 5, page 333.

[14] Kibaki vs. Moi and the Kipng'eny arap Ng'eny cases are just 2 examples of cases where the decisions made were highly viewed as political. Recently, Abu Chiaba Mohamed vs. Mohammed Bwana Bakari, CACA No. 238 of 2003, in an application to the high court on whether substituted service is proper service in an election petition where the respondent could not be traced within the requisite period, the Court of Appeal distinguished the case of Kibaki vs. Moi, but were shy to overturn their earlier decision, they stated that in the case of Kibaki, no effort was made to serve the president in person, but in the election petition before them, the petitioner had made due diligence to serve the respondent, the applicant had proved that the respondent was avoiding personal service.

5.2 Human Resource Question

In the discussion of access to justice, human resource issues in judicial service are central. In a situation where the manpower employed in the administration of justice lack the requisite credentials or are not adequately remunerated, or are ill motivated, access to justice cannot be successfully achieved. Below is an examination of the human resource issues that have worked to sabotage access to justice in Kenya.

5.2.1 Remuneration of judicial staff

Judicial officer in this context will include the judges, magistrates, registry staff and prosecutors. Of these key players in the justice system, it is only the judges who are well remunerated. The issue of remuneration is closely linked to the issue of individual independence. A judicial officer who is poorly remunerated is susceptible to control and corruption.

5.2.2 Freedom of Association

The UN basic principles provides that in accordance with the Universal Declaration of Human Rights, the judicial officers, just like all other citizens, are entitled to freedom of expression, belief, association and assembly provided that in the exercise of those freedoms, they shall conduct themselves in a manner that preserves the dignity of their office and the impartiality and independence of the judiciary.[15]Article 19 and 22 of the ICCPR provides for the freedom of association which judges and magistrates are also entitled to, judges are free to form associations that represent their interests, promote their professional training and protect their judicial independence.[16] It is instructive that the UN Basic principles look at the right to assemble and form associations as a way of strengthening judicial independence as opposed to undermining it. In Kenya, we have taken the latter interpretation of that right. Recently, in March 2004, the Chief Justice publicly threatened to ban Kenya Magistrates and Judges Association (KMJA) for acting as a trade union,[17]

5.2.3 The limited number of judicial officers compared to the workload

The government of Kenya has on various instances stated that at the moment, we have a larger number of judicial officers than we have ever had in the history of this country. Nevertheless, the fact that there is back log of cases should give the government more impetus to hire more judicial officers to ensure speedy trial. The record of delay in accessing justice in this country is dismal. It is not unusual to find cases that have been going on for the last 15 years. A look at the practical situation will show that the workload at the courts is more than the judicial officers are able to handle.

5.2.4 Lack of support staff i.e. research assistants, adequate support staff

This is another reason for the endless delays in the hearing of the cases. A writer in observing the *modus operandi* of the East African courts observed that the judges have to take down the proceedings word for word, as well as do their own research, he concludes, "judges act as their own

[15] Principle 8 and 9 of the UN Basic principles.

[16] Principle 9 of the UN Basic principles, see also, Article 4.13 of the Bangalore Principle, Article 12 of the Universal Charter of a Judge, Article 4 of the Principles and guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

[17] Daily Nation, June 12, 2004, "CJ threatens to ban judges association" by Jillo Kadida; see also, Standard, June 12, 2004, "CJ threatens to ban judges' union."

secretaries and research assistants."[18] The writer observed this situation back in 1986, today, 20 years later, the judges still act as their own researchers and secretaries. It has been suggested that we should adopt the American practice where a young lawyer clerks for the judge, in Kenya, the young lawyers awaiting admission to the bar (and the wait could be as long as 2 years) or even the pupils could serve this role adequately. However, there is a lot of reluctance to aid access of justice. Of late, some judges have been getting young lawyers to act as their assistants, but they have to pay them out of their own pockets.

5.2.5 Poor working environment

This is particularly the case for judges and magistrates who hear cases in their chambers. This setting does not afford the judge a comfortable working environment. In cases with many parties, the court room is usually packed beyond its capacity. The fact that the judges/magistrates chambers are not big enough to allow all the interested parties to attend the hearings is a denial of justice, a denial of the right to a public trial. Judges and magistrates should be able to hear cases in the court rooms and retreat to their quiet chambers to be able to write judgements in peace and quiet.

5.2.6 Arbitrary transfers

This issue was highlighted earlier under independence of the judiciary where transfers were approached as a way of interfering with the judge's independence. As a human resource issue, it is unsettling and can greatly interfere with the speed and efficiency with which the judge, magistrate dispatches his or her duties if he or she is transferred every so often. It is even more unsettling when the officer knows that the transfer was retribution for failure to conform to pressure from whatever source.

5.2.7 Lack of a structured / institutionalised continuing professional education for judicial officers

In the present set up, professional training is undertaken through ad hoc seminars and workshops with no requirements that the officers must attend some or all of them. In addition, training must be conducted on proper case management skills, research skills and optimal use of IT ion the judicial process.

5.3. Court Structure

The manner in which the courts are structured raises various issues about whether the court set up, the geographical distribution and the procedures avail the right forum for redress to aggrieved persons and also whether the courts in their present state enable access to justice or defeat it altogether.

There are various shortcomings relating to the structure of the courts that need to be addressed to bolster access to justice. These include:-

[18] Abraham Kiapi "*Prolegomena on Judicial Independence in Kenya, Uganda and Tanzania,*" The Independence of the Judiciary and the Legal Profession in English Speaking Africa; A Report of seminars held in Lusaka(10th– 14th November 1986) and Banjul(6th – 10th April 1987) convened by the Centre for the Independence of Judges and Lawyers, African Bar Association and ICJ.

5.3.1 Inadequate or poorly constructed court rooms

Some of the court rooms are too small, especially some of the courts designated as criminal courts. The court rooms cannot fit everyone and get stuffy. Further, it is not unusual for parties to miss sitting spaces and to stand throughout the hearing. It is not only tiring for the person, but the set up does not afford conducive environment for administration of justice. Besides, after the court rooms fill to capacity, it is not unusual for persons coming for mentions to fail to hear their matters being mentioned. The court rooms also don't have a public address system and at times the low tones in which the proceedings are conducted means that even an accused person who is in attendance can miss out on their mention. It is thus necessary that court rooms be bigger in size that public address systems are provided to enable proper communication. Facilities such as fans, air conditioning and well aerated court rooms should not be considered a luxury. In fact, stuffy conditions which consumers of justice are subjected to raise serious health and hygiene issues that need to be addressed.

5.3.2 Manual recording of court proceedings/Lack of stenographers

The manual recording of proceedings by way of hand is not only slow and cumbersome to the judge or magistrate, but it also has the effect of having scanty proceedings which brings difficulties during the process of appeal.[19] Computerised recording of proceedings would speedup the hearings and leave the judge with time to concentrate on legal questions being canvassed in the case. Besides, computerized recording of court proceedings would aid the process of appeal. Persons who want to appeal would be able to do so within time or with very little delay since the proceedings are already typed. To my mind, speedy justice is a pivotal part of the process of access to justice.

5.3.3 Geographical location of the courts/proximity to the consumers of justice

In some areas of the country, access to justice cannot be realized because there is no proximity to the courts. This is especially so in the marginalized districts of the country where even the basic needs are difficult to come by. Thus, it is not unusual to find parties to access failing to attend a hearing because they did not have the money to attend the hearing. Given a choice between attending a hearing and buying food, justice will be considered a secondary need. Proposals have been made about mobile courts that can be used in areas of the country where the long distances to the court rooms have denied access to justice, but these proposals are yet to be realized.

5.3.4 Complexity of the court procedures

In a country where a high proportion of the population is unemployed and majority live in poverty, human rights violations are commonplace. The sad irony is that in a country where there is no legal aid system in place, the court processes are such that laymen can hardly institute cases successfully due to the complex court procedures. Besides, even the judicial officers are unwilling or circumstances do not allow them to assist such persons. The procedure for pauper briefs is an equally complex one and even those seeking to apply it hardly know of the existence of the same. For accused persons who represent themselves, understanding the orders or rulings made is a tall order, and the court does not take the time to explain to them in a language that they understand. The costly and inaccessible procedures make access to justice is preserve of the rich.

[19] *Supra* note 20

5.3.5 Lack of Recognised community justice systems

The fact that informal systems of dispute settlement in this country have not been upheld has only served to exacerbate the plight of the poor. If the informal systems of dispute settlement were functional, then the poor would have an alternative form of redress. However, these are no longer functional or even encouraged. An aggrieved person has only two options, go to court or abandon their claim altogether. The systems are not recognised under the law.

5.3.6 Inefficiencies at the court registries

As earlier mentioned, the court registries still operate manually. A computerization programme is long overdue. Some of the frustrations of dealing with the court registries have been mentioned. It is usual for files to go missing from the registry or for matters that were fixed to be heard on a certain date to be omitted from the daily cause list. The cause lists that are produced most of the time are too ambitious, and usually contain more matters than the judge/magistrate can handle in one day. What follows are usually adjournments and taking out of matters. This poor management of the court diary and poor planning on the part of the registry is one of the greatest challenges to access to justice in Kenya. The courts have not assessed the amount of inconvenience, costs and time wasted in adjournments and taking out of matters. In some of the cases, witnesses and even advocates travel from far fore the hearing, but are not heard as scheduled. This only serves to increase the costs of litigation, and to buttress my earlier submission, that in Kenya, access to justice is a preserve of the rich. The amount of time (man hours) lost, unnecessary costs occasioned and the frustrations occasioned in our courts in a quest for justice are monumental and unjustifiable. Some of the time could be saved if only the registries were better managed. In some cases, the magistrates and judges may not be sitting; parties are only informed after hours of waiting.

5.3.7 Web presence and publicity/lack of an appropriate media strategy

The communication machinery at the courts is totally dysfunctional – A website or the notice boards could be better utilized to address some of these simple concerns.

5.3.8 Inadequate research facilities

The court libraries in their present state fall far short of what is expected of a Court library, which is expected to be the most up to date depository of the law in any country. The situation is even more desperate as we move to the rural courts and the marginalized parts of the country. As earlier mentioned, over reliance on the parties to supply the judge/magistrate with judicial authorities compromises the independence of the judicial officer. These libraries need to be computerized and also provide for internet facilities to allow access to the electronic law reports. It would save the judicial officers a lot of time and trouble if they could use search engines to aid in their research, since as mentioned earlier, they have no research assistants.

5.3.9 Inaccessibility of the appeal process

The appeal process is not only lengthy but expensive. Only those with resources, in terms of time, money and highly qualified legal counsel can endure the process of appeal. The whole process is painstakingly slow and frustrating. Right from the onset, the process of getting typed proceedings and certifying the same is lengthy and costly, preparing the records of appeal is not only a delicate process but also expensive owing to the number of copies that need to be made. The striking out of records of appeal for want of one document or the other is also quite common. Though one may file a fresh/ another application, this process is only open to those with the resources to do it.

5.3.10 Lack of free legal aid facilities for those who cannot afford a legal counsel/pauper brief system

This issue has been tackled earlier, only those accused of a capital offence have a right to a legal counsel. The other accused persons have to prosecute the cases themselves or look for a Non Governmental Organisation (NGO) to handle the case. NGOs that offer free legal aid in Kenya are few with most of those that exist deal with specialized cases such as children's matters or matters of gender violence [20]

5.3.11 Lack of a paralegal support network/legislative underpinning

In the absence of a legal aid scheme in the country, paralegals can play an important role in advising unrepresented persons. It would also save the courts the trouble of assisting such persons with issues of procedure. Such persons can be those who have a diploma in law or other relevant qualification that enables them to carryout such a role. However, this is not an option that the government has considered as an alternative for people who cannot afford legal aid. The government should work with NGOs that have paralegal programmes in place to aid unrepresented persons to access justice.

6. INTERVENTIONS
6. A PHASE 1

6.1 Baseline Survey on Access to Justice

A survey will be done to evaluate the extent to which courts are open and accessible to the public. Consistent with Learned Hand's view, the people's ability to gain access to and to make use of the judiciary to settle their disputes is integral to their willingness to fight for its independence. For this reason, the one true long-term guarantee for judicial independence is the people's confidence that the judiciary is accessible to them and that it is serviceable to their needs. Ensuring people's access to the court's mobilizes their interest in the operations of the judiciary, its management, its financing, its independence from the government and its autonomy from malign influences such as corruption.

For this reason, the IRI and ICJ Kenya propose to pursue a five-track survey on access to the judiciary:

i. the financial cost of accessing and using the judiciary in the country;
ii. the technical difficulty of gaining access given the procedures that exist and
iii. the extent to which the country has fulfilled its obligations under human rights conventions that it provide effective remedies.
iv. survey on the national budgetary allocation to the judiciary vis a vis the judicial needs.
v. we will lobby for the establishment of a complaints commission for the public who have complaints against the judicial officers and a standing committee to address grievances.

6.2 Visit by Advisory Panel of Commonwealth Judicial Experts

Justification

This will be relevant, in addition to regular public discourse as it will facilitate the pooling of expert opinion and expertise in reforms with regard to the Judiciary. The main objective will be to properly empower and locate the judiciary within the new scheme of things.

The Panel would be commissioned on the following premises: -

a) The need to draw from comparative experiences of other Commonwealth countries, especially those in a similar station as Somaliland, that have recently completed or are currently transitioning through conflict.
b) The need to draw from comparative experiences of other mature Commonwealth democracies and economies, which have relatively advanced experiences in judicial reforms and judicial management, including judicial case management and employment of information and communication technologies.
c) The need to distil an environment in which to procure the considered views of a number of key stakeholders in the judicial arm of government; this includes members of the Judiciary, the organized Practicing Bar, Civil Society Organizations (CSOs) working in the judicial arena; and representation from some among the key consumers of judicial services such as the business fraternity.

Objectives

This short project will thus endeavour to procure the views of the above listed stakeholders, compare and enrich them with relevant Commonwealth experiences and ultimately make concise and precise proposals and recommendations. A corollary benefit of the project will be to build the capacity of stakeholders in the Justice sector to be an effective lobby for judicial reform and judicial activism.

Themes

The above exercise will be carried out with due observance of the following broad themes: -

- Independence of the Judiciary- Of concern will be both the structural/institutional independence of the judiciary as an arm of government, as well as the independence of individual members of the Bench.

- Efficiency of the Judiciary- Of concern will be all the various issues and challenges that impact upon the timely and qualitative discharge of judicial duties.

- Accountability of the Judiciary- Discourse will revolve around how the judiciary is resourced, from the state coffers, and how sufficient and efficient is the amount and the process. Further discourse will examine questions of integrity and alleged systems of corruption and patronage.

- Access to Justice- Discourse will look at the role and track record of the Judiciary, vis-à-vis the question of access to justice, especially by the marginalized, under-privileged and under-resourced

individuals and communities. This will incorporate discourse on the role and mandate of the Judiciary, if any, in the quest for poverty reduction and socio economic development.
- Transitional Issues- This will involve a series of "what to do" proposals to facilitate smooth, principled transition from the current to a post-constitutional dispensation.

Activities

The Project's activities will be as follows.

a) Setting up office and inaugural session

IRI and ICJ(K) will convene the Panel and 'set up office' for it in a conveniently located City hotel that will provide both residential accommodation for the panelists as well as a meeting room(s)/ seminar facilities, a mini-office with full-time secretarial staff and communications facilities.

This may take one to two days in which time members of the Panel will also acclimatize and, if necessary, receive an initial pace setting session.

b) Consultations and Site visits

The Panel will hold consultations, fashioned as round-table discussions with clearly identified stakeholders.

IRI and ICJ (K) will provide the secretarial and logistical services of identifying and contacting the said stakeholders, arranging the Panel's itinerary and keeping records of all its meetings. When called upon, we will also carry out research, procure information or texts and carry out any related activities.

It is envisaged that the Panel may wish to undertake a number of site visits in order to better understand and conceptualize their subject mission and mandate. IRI and ICJ (K) will also arrange and assist in this, and accompany the panelists' entourage.

c) Preliminary Report and Validation Seminar

It is envisaged that, after the series of consultations and visits, the Panel shall retire to deliberate and produce a **Preliminary Report and Summary of Draft Proposals and Recommendations.** This will be disseminated to a Validation Seminar consisting of representatives of the stakeholders consulted and any other identified persons.

IRI and ICJ (K) will assist in production of the Report and associated research and secretariat tasks as well as logistical preparations and convention of the Seminar.

d) Final Report and Conclusion of Assignment

The Panel will incorporate the deliberations and reflections gathered from the Validation Seminar into a **Final Report and Summary of Proposals and Recommendations**, which it shall formally hand over.

It is envisaged that the Panel would require spending approximately 10 days in the country in order to hold consultations and carry out the review and also to report on its findings and make its proposals.

Outputs and Impact

Immediate Results

1. Concise yet comprehensive proposals which will include:-

a) On the specific institutional structure of the judicial arm of government in a new constitutional text.
b) Corollary proposals and recommendations of a legislative, policy and/ or administrative nature to ensure a further efficacious working of the Judiciary, both currently and in a post conflict dispensation.
c) 'What to do' provisions or proposals on how to transit from the current to a post-conflict dispensation.

2. Proposals and recommendations to the Judiciary on 'what to do' and comparative international best practices on steps to take to ensure an independent, efficient, accountable and socially responsive Judiciary, especially in relation to access to justice and its role in poverty eradication and social emancipation. These include practical issues on the adoption of case management, alternative dispute resolution and information technology.
3. Production of useful information on the Judiciary aimed at informing and stimulating debate on judicial reform. A direct corollary benefit of the project will be to build the capacity of all stakeholders to be an effective lobby for judicial reform and judicial activism.
4. Publication of a comprehensive report; a comprehensive compendium for the legal service provision sector and other interested stakeholders[21]; and simplified leaflets (a popular version) that will inform and stimulate wide and principled public discourse on the judicial arm of government before, during and after comprehensive reform. These publications, and the discourse around them, will then contribute to a better understanding of the issues by the various stakeholders indicated above.

Long-term

The expected end-product of this exercise is to help the country to achieve the long-term goal of laying down structures, that will ensure and enhance achievement of an independent, accountable, efficient, accessible and socially responsive Judiciary. It will also enhance the long-term capacity of stakeholders to engage in principled debate on judicial reform and judicial activism.

6.3 Symposium for the Judiciary

Justification

The symposium is intended to isolate contentious principal issues emergent in the Judiciary. By isolating these issues, the activity will focus on multi-strategic solutions, document them and through the partnership with other key stakeholders and submit the proposals to the government as far as Judicial Reforms are concerned.

The proposed symposium aims at bringing together stakeholders from various sectors to critically analyze and propose the way forward for the Judiciary so that a fair and acceptable mechanism is adopted in the clean-up within the Judiciary.

Objective

The proposed symposium will critically analyze the developments in the Judiciary and will culminate into a comprehensive report that will ensure sustainability of the independence of the Judiciary and smooth administration of justice for the interim period between now and the enactment of the new constitution.

Implementation

There will be an initial planning and brainstorming meeting by invited civil society interest and pressure groups to lay a foundation for the symposium. This will be a one-day meeting, which will draw out the contentious issues and construct principle statements. IRI and ICJ Kenya will offer

technical expertise to the whole process owing to its vast experience in lobbying for the judicial reform.

An all inclusive two day symposium will then be held to substantially discuss the contentious issues. It will draw participation from the civil society, law academics, practitioners and other stakeholders.

The views and recommendations made will be documented to lobby the government. The symposium report shall also act as a guide in dealing with the Judiciary.

Outputs and Impact

One of the immediate results will be the enumeration of concise yet comprehensive recommendations and views on the Independence of the Judiciary and its operations.

In the long term, the expected end-product of the project is to help in the achievement of the long-term goal of laying down structures in the Judiciary that will ensure and enhance achievement of an independent, accountable, efficient, accessible and socially responsive Judiciary free from internal and external interference thus enhancing access to justice for all.

6.B PHASE II

6.4 Annual Stakeholders' Conference

IRI and ICJ Kenya recognize that a broad-based coalition that includes allies from both inside and outside the judiciary is essential. NGOs can play a special role as the voice of the people. Judges are natural allies whose ownership and commitment will be necessary to effective implementation of reforms. Conversely, if the judiciary is not brought into the process, or judges are made to feel attacked by reform campaigns, they can become effective opponents. An successful strategy will also build support within the political structure through alliances, as well as put pressure on it.

This activity is intended to bring together judges, magistrates, the business community, representatives of political parties, practicing advocates, legal scholars and representatives of civil society to critically assess the status of the judiciary with a view to consolidating strategies and lessons learnt for future judicial reforms. This activity will further build the links between governmental institutions and civil society by occasioning useful interact and dialogue and produce concise briefing papers for advocacy initiatives which will be shared and disseminated to all.. Some of the issues to be addressed include:

- a review of the extent to which the country has fulfilled its obligations under human rights conventions that it provide effective remedies.
- The level of access to justice in the country
- Deliberations on fundamental policy and legislative reforms in the judiciary

6.5 Design a series of public awareness activities to highlight the dimensions of judicial reform

"Liberty," Justice Learned Hand said, "lives in the hearts of men and if it dies no constitution can save it." We believe that the best guarantor of judicial independence is a population that believes in the Rule of Law.

6.8.1 Production of Easy Reference Materials

The IRI and ICJ Kenya will produce easy reference materials (IEC) on the independence and accountability of the Judiciary. Some of the information to be disseminated to the public includes the provisions of the Constitution as well as other legislation governing criminal and civil procedure which enhances access to the courts and therefore justice. The material will be in form of information kits, pamphlets, posters and brochures. The primary target of the material to be produced under this program will be the general public. As regards the secondary target comprising civil society organisations, legislators and policy makers, we propose to produce a series of concise Briefing Papers on each of the aspects of judicial reform that will have been researched.

These materials will be made available in a form that can be consumed by the media and will be run in the print media as supplements. These papers will form the core materials for workshops.

6.8.2 Public Lectures

IRI and ICJ Kenya will also hold a series of public lectures to discuss current issues touching on access to justice and judicial reforms. The lectures will be held in the various geographical areas of the country.

6.8.3 Sustained Media and Communication Campaigns

Media support may be difficult to attract if owners have contrary vested interests, but enlisting some media champions of the reforms is important particularly inincreasing public awareness on the importance of Judicial Reforms.. Publicizing favorable polls can also help the cause. Overall, reform campaigns must be both strategic and sustained, IRI and ICJ Kenya will provide an expert staff dedicated virtually full-time to the efforts by regularly writing articles and providing policy briefs which inform the media on the issue of Judicial Reform..

6.6 Capacity building for Judicial Officers, State Counsels and Practitioners on International Human Rights Standards

The Judiciary will benefit greatly from a clear training and capacity building policy. Lack of consistent training of judicial officers means that judicial officers have not kept pace with the development of the law. This has resulted in weak accountability through judicial reasoning since many judicial officers end up making decisions not based on law. Such decisions have deprived many Kenyans of their rights by truncating the meaning of rights. Indeed most of the decisions have been poorly elaborated and reasoned. It is hoped that constant training of judges and magistrates on developments in the law and international human rights standards will result in insightful jurisprudence emanating from the Kenyan courts.

Objectives

Through education and training, the Judiciary will be striving to enhance the ability of judges to deal with the volume of cases more expeditiously, surely and equitably. This calls the channelling of resources and energies toward the fulfilment of four primary objectives:

- To refine the formal training activities for new judges and experienced judges with new assignments;
- To strengthen and expand continuing education programs for all judges;
- To develop programs which address the distinct educational needs of judges who work in highly specialized areas of the law;
- To provide training opportunities which improve public access to and knowledge of the judicial system

Activities
These objectives can be met through the following activities:

a) Orientation Program will be designed to facilitate the transition of newly-appointed judges from bar to bench and to provide comprehensive training in the State's judicial practices and procedures. The Program has been expanded to ten days to assist experienced judges with new assignments in their transition from one judicial assignment to another. The Program includes an advisor judge component and access to voluminous materials including an audio-video cassette library.

b) Judicial Seminars which will provide judges with a wide range of academic programs to keep abreast of developments in the law and judicial administration. Some of these forums would focus on HIV/AIDS, women and minorities' issues such as gender bias, minorities and the courts, sensitivity training and cultural awareness, and sexual harassment. In addition, they will provide judges and key court support staff the opportunity to increase expertise in special areas of the law, to benefit from the knowledge of experts in particular areas of the law and law-related disciplines, and to contribute to the knowledge of their peers through participatory workshops.

6. C PHASE III

6.7 Performance Based Management System

This will involve the development of indicators for monitoring judicial reforms to be used by policy makers. Due to the fact that judicial reforms in Kenya have been ad hoc, it is very difficult to measure them or even prospect on the course of future reforms. In this regard, the ICJ Kenya will develop clear indicators based on international standards for measuring the level of judicial reforms in Kenya. This will assist policy makers to assess progress in reforms within the judiciary and make reforms consistent and comprehensive.

6.8 Securing the Independence of the Judiciary

6.4.1 Institutional Independence

The institutional independence of the judiciary is often but not always guaranteed by the Constitution or other laws with special constitutional status. Its elements are:-

i. The autonomy and independence of the judiciary from the executive and legislature
ii. Administrative independence and financial autonomy.
iii. Adequacy of resources
iv. An independent judicial council or service commission
v. Independence and autonomy to make decisions on all matters relating to itself.
vi. Jurisdictional independence coupled with exclusive authority to determine if matters are within its competence.
vii. Effective enforcement of judgments
viii. The right and duty to ensure fair trial and give reasoned decisions which includes best practices on fair trial such as:
    - Non-discrimination
    - Reasoned judgments
    - Sufficient facilities for trial
    - Speedy trial
    - Public judgments
    - Public hearings
    - Access to courts
    - Impartial trials

ix. Accountability and transparency principles.
x. An independent bar and corps of prosecutors.
xi. Independence from other special/administrative tribunals

6.4.2 Personal Independence

Personal independence refers to the ability of an individual judge to make decisions without fear of reprisals. The elements that secure this independence are:-

i. The process of appointments and promotions.
ii. The robustness of tenure provisions and how effectively these are honoured.
iii. Immunity from suit for anything done in good faith in the course of duty.
iv. Enabling environment for the performance of the judicial function including research support; management of workload and electronic recording.
v. Physical and personal security.
vi. Financial security and welfare including but not limited to salaries, terms of services.
vii. Opportunity to specialize and train and thus have professional growth.
viii. Personal freedoms to express oneself, associate, pursue own faith and assemble.
ix. Integrity

6.9 <u>Separation of judicial functions</u>

It is now axiomatic that functions should be separated; the judicial from the executive and both from the legislative. If functions are fused in one branch, powers are prone to abuse. The judicial branch is particularly vulnerable since it controls neither money nor the means of coercion. A number of requirements need to be in place for the judiciary be truly independent. **Linda Van de Vijver**[22] has identified fourteen (14) the following requirements:

i. The constitution must guarantee judicial independence.
ii. Judicial functions must be vested exclusively in the judiciary.[23]
iii. Minimum qualifications must be laid down for prospective judges so that the bench may command respect and trust.
iv. The appointment process must inspire public confidence and, ideally, it should be public and transparent.
v. The composition of Judicial Service Commission and the procedures it uses to administer judicial matters must be seen to be fair, meritocratic, and, non-partisan.
vi. Tenure of office should be secure: without security of tenure, a judge is vulnerable to both pressure from within the judiciary and from the executive and the legislature.
vii. Remuneration of judges should be adequate and determined by an independent body. Though there evidence suggests that an open process of appointments is a more effective anti-corruption tool than increased salaries, nonetheless judicial officer should not be rendered vulnerable by poor remuneration.
viii. Mechanisms for training and continuing legal education should be put in place. The capacity, commitment and attitudes of judges can be developed or reinforced through training programmes, access to legal materials and the formation of judges' associations.
ix. The process of evaluation, discipline and promotion can support independence, professionalism and security of tenure. The process must be transparent (for example, the criteria and opportunities for promotion should be published) and objective. Moreover, the

[22] Linda Van de Vijver(ed),The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions, Siber Ink,CapeTown,2006.

[23] Best Practice Guides such as UN's Basic Principles on the Independence of the Judiciary requires judicial power to be vested in the Judiciary by the Constitution. The States Judicial Power in Kenya is not vested in the Judiciary creating a weak foundation for judicial authority.

executive and legislative branches should have limited influence and public comment should be invited.

x. So long as judges are performing their duties in good faith, they should be immune from criminal and civil suits.

xi. An effective Codes of Ethics should be in place. Ideally, the code of ethics should be drafted by the judicial council or Commission or judges' association, with input from lawyers and civil society. Key issues to consider include how the code fits into existing legal framework, mechanisms for interpreting the code and mechanisms for enforcement of the code. Once drafted, the codes should be publicized within and outside the judiciary.

xii. Judges should disclose their incomes and assets in order to discourage corruption, conflicts of interest and abuse of office.

xiii. There should be an appropriate system of court management and administration. Specifically, issues of size and control of budget are critical. (They affect staffing, facilities and general efficiency). Constrained budgets lead to poor working conditions and poor access to basic legal materials. The overall effect is to erode judicial effectiveness: proceedings may be poorly recorded, the appeal process may become slow and ponderous and overall transparency and accountability are undermined.

6.10 Securing the Financial and Budgetary Autonomy of the Judiciary

Financial autonomy of the Judiciary will provide a key pillar of judicial independence. At no time will the Judiciary ever be at the mercy of the other two organs of Government. Financial autonomy of the Judiciary will buttress its independence.

Financial and budgetary autonomy will accord the Judiciary the wherewithal it needs to be independent. Independence in resources implies access to resources to enable the work of the Judiciary. Where the Judiciary lacks financial and budgetary autonomy the financing of crucial judicial activities is not guaranteed. There are two best practice approaches to securing Judiciary's autonomy over its finances:

1. The first one entails providing resources to a judicial council or judicial service commission which is then charged with the overall administrative responsibility of the courts.
2. The second is a direct vote or charge to the Consolidated Fund to the Judiciary which then sets its own priorities and departmental budgets.

6.6.1 International Best Practice on Judicial Funding

The Principle of judicial funding to protect its independence is well accepted and codified internationally. The United Nations Basic Principles on the Independence of the Judiciary[24] provide as follows on the issue:-

Adequate Resources – It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.

The Latimer House Guidelines for the Commonwealth, 1998 provide for judicial funding in preserving judicial independence as follows:-

Funding

[24] Adopted at the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders on 26th August – 6th September 1985at Milan (A/CONF.121/22/Rev.1). The principles were also endorsed by the U.N. General Assembly in resolution 40/32 of 29 November 1985and resolution 40/146of 13th December 1985

ii. Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or the withholding of funding should not be used as a means of exercising improper control over the judiciary.
iii. Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.
iv. As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

Project Output

- A best practices code on judicial independence, interpretation of the code of conduct, decisional autonomy(application of international standards), removal procedure and accountability of judges
- A report on Kenya's performance in fulfilling the international human rights standards on Judicial independence, accountability and access to justice

Activities

(i) Carry out a Comparative Study

Review the law and practices in a range of countries relating to Judicial Independence and Accountability. The countries to be considered will be divided into two. First, we will consider judicial practice in transitional countries in comparable circumstances with Kenya. Secondly, we will consider practice in a number of mature democracies. The purpose of this review is to find out how particular issues relating to judicial independence are actually operationalized. The code will have best practices on judicial independence, the interpretation of the judicial code of conduct, guidelines on rules of procedure for tribunals investigating judges and best practices in application of international human rights standards.

ii) Review international conventions, declarations and global conference papers

This will be to assess whether there is an emerging or already sedimented international opinion about each of the dimensions of judicial independence. Apart from proposing the adoption of the international standards, the review will be seeking to establish the following;

a) which of these conventions the country is a party to
b) What declarations it has signed on to and
c) which of these conferences it has participated in
d) Whether these conventions and practices offer a coherent set of principles that could be used in formulating a best practice guide for the country

6.11 Publications on Enhancing Access to Justice

Goal

The goal of the project is promoting the application of the rule of law in Kenya with a view to affecting the growth and sustainability of legal and judicial systems and processes.

The above goal is closely linked with the mission of ICJ Kenya which is the promotion and protection of rule of law, human rights and democracy.

Project Objectives

(i) Advocacy through publishing reports on the status of the rule of law in Kenya. The standard used will be predictability and fundamental fairness of the legal system.

(ii) Advocacy through giving recognition to lawyers who have distinguished themselves in promoting the rule of law.

Activities

6.10.1 The Jurist Magazine

The Jurist magazine will be a biannual magazine to monitor and document human rights and governance issues in the country. The magazine will distinguish itself by being the only magazine that articulates contemporary issues touching on governance and human rights. As a human rights magazine, the Jurist will provide scholars, lawyers and human rights activists a unique forum to articulate human rights and governance issues from their own perspective and in their own words. This will have the effect of encouraging quality and in depth debate and discussion around current affair issues the likes of which may not be experienced by the mainstream media which is chiefly motivated by commercial concerns.

6.10.2 Constitutional Digest

This publication will enable all stakeholders to keep abreast of jurisprudence taking into account that the Judiciary is increasingly being approached by litigants to deal with an increasingly array of complex issues, some of which are of a Constitutional nature as citizens experience greater social and political awareness. The documentation of these constitutional litigation cases will provide a valuable advocacy tool.

IRI and ICJ Kenya are proposing to correct this situation by publishing a biannual Constitutional Digest that will provide a valuable critique of constitutional cases and their potential impact on the rule of law and human rights. ICJ Kenya believes strongly that the Constitutional Court is one of the fundamental institutions for the protection of human rights. In this regard more focus is needed on this institution. The Constitutional Digest intends to provide this focus and will be edited by a senior lawyer and will focus entirely on cases before the constitutional cases.

6.10.3 Justice Watch

The publication will be based on the fact that informed and authoritative commentaries on the Judiciary can be used to advocate for change and raise public awareness about the need for reform.

IRI and ICJ Kenya are proposing to establish a biannual Justice Watch Digest that will specifically profile issues pertaining to the judiciary with a view to bringing more accountability to this institution. Of the three arms of government, the Judiciary has been slowest in institutionalising accountability and transparency. The publication will be the only one of its kind endeavouring to periodically put the judiciary under scrutiny and probe into issues which lie at the core of the institution's ability to be effective, efficient and accountable.

a) Project Outputs

The project's outputs will include:

(i) Rule of Law Report
(ii) Jurist Magazine
(iii) Constitutional Digest Publication
(iv) Justice Watch Publication

7. MONITORING AND EVALUATION & RESOURCE SHARING

7.1 Monitoring and Evaluation

IRI and ICJ Kenya will prepare an action plan to facilitate the monitoring of progress in the project as well as assessing capacity gaps and other challenges thus addressing arising issues in a timely manner. Indicators will be developed which will address the quality of draft legislation, technical issues covered in reports, quality of publications, specific and critical recommendations identified and their adoption and utilisation by the relevant Government departments and the judiciary in particular, extent of publicity and coverage, numbers and geographical and institutional diversity of stakeholders involved and level of participation, evaluation and feedback forms, quality of judicial judgements, nature and quality of research, level of awareness and increased debate around judicial reform issues.

The following monitoring and evaluation mechanisms will be applied to the programme:

1. The Executive committee will meet twice a year to conduct a strategic assessment of the programme, review progress in the implementation and approve work plans and the budget for the next six months.
2. There will be periodic (ideally annual) activity and financial reports submitted. Financial reports will be subject to audit by independent external auditors.
3. As part of the design of activities, country networks and other stakeholders will be asked to build into their own activities such additional monitoring and evaluation tools as will be necessary and relevant.
4. A formative evaluation of the programme will be conducted in the third year and a summative evaluation will be conducted in the fifth year of the programme. Both evaluations will be based on the country governance profiles adopted as the baseline for the programme. Both evaluations will be external and participatory.

7.2 Resource Sharing

The following information sharing mechanisms are proposed:

1. The ICJ- Kenya and IRI website will be developed further, and all expert training materials, workshop reports, ongoing work, case reports and opinions will be uploaded.
2. Publications as listed else where will be developed and disseminated widely.
3. The media is one of the stakeholders for the programme and will be involved in dissemination.
4. The secretariat will develop communications and networking functions and this will be a forum for sharing of good practices tools.

8. COMPETENCIES TOWARDS IMPLEMENTATION

The ICJ Kenya through its judiciary programme has in the past engaged the judiciary in conducting perceptions indexes[25] and working with the media in advocating for judicial reforms. The programme has also in the past concentrated more on administrative reforms in the judiciary. Increasingly, the ICJ Kenya has shifted its focus to advocacy for fundamental policy and legal reforms issues based on internationally accepted standards and Conventions that Kenya is a party to. Since the problems facing the judiciary have a direct bearing on the right to access justice, the activities have sought to enhance access to justice for the poor and the marginalised groups.

[25] These are publications that provide public perceptions about the state of the judiciary and administration of justice and are used to identify intervention areas for reform.

No other programmatic project in Kenya has taken such a directly relevant, exclusive and highly specialised focus on comprehensive judicial reforms through advocacy, research, publications, capacity building as a wholesome programme. The ICJ Kenya has curved for itself a niche in policy advocacy work in various issues including judicial reforms and freedom of information and is a credible and respected organisation both by non state actors and the government. Being a membership organisation for jurists, the ICJ Kenya occupies a high profile in advocating for policy and legal reforms and indeed a number of its members occupy strategic positions in government.

In addition, the ICJ staffs that will be charged with this project have the requisite skills and have been carrying out similar policy and legal reforms advocacy for the past three years and as such have gained a lot of experience in the process. Therefore in terms of capacity, ICJ provides the best partner as an agency through which judicial reforms can be pursued.

9. PROGRAMME MANAGEMENT ARRANGEMENTS.

ICJ-Kenya is responsible to DFID for the proper planning, implementation, follow up and reporting of the programme. The Programmes chief reporting officer will be ICJ- Kenya executive director, and the following structures have been put in place.

9.1 Executive Committee (EXCO)

An Executive Committee will be responsible for oversight functions and ensure compliance with programme plans and reporting procedures. This EXCO shall comprise the following:

i. ICJ-KENYA Chairperson (EXCO chair)
ii. ICJ-KENYA Executive Director
iii. One representative per country
iv. The programme Manager and Programme officers (EX officio members)

The EXCO shall meet at least twice in each year. Its functions will include overseeing six-month plan of activity, appointing thematic group leaders, approving regional contact points, and approving experts.

9.2 Programme Management Team (PMT)

The PMT will be an executing arm concerned with effecting the plan of activities. It will comprise the programme manager and 3 programme officers each responsible for a theme. A programme co-ordinator for each country will be appointed and will sit on the PMT. The PMT will work and coordinate its activities through monthly meetings, which may be conducted by teleconference.

10. INTERNAL FINANCIAL ADMINISTRATIVE ARRANGEMENTS

ICJ- Kenya will also contract an administrative assistant and a finance officer who will devote 50% of their time in administering the grant.

Internally, any payments of the programme funds will have to be approved by the Programme manager, the Finance officer, and the executive director. The Treasurer of ICJ- Kenya who is non-executive will also be involved in authorizing payments. Further an external financial audit will be carried out annually.

11. CROSS CUTTING ISSUES

In selecting the participants in all its training workshops, advocacy strategy and litigation, the programme will ensure participation of marginalized groups. The programme is also set on an equal opportunity forum, and as such where there are cross cutting issues such as environment and gender, this will be mainstreamed in its activities. The programme in designing its activities will ensure that they push for the laying out of minimum standards for all public sectors, including the need to ensure that agreed priority cross-cutting issues such as age, diversity, environment, gender, HIV/AIDS and human rights are effectively addressed in all sectors.

12. EXIT STRATEGY

It will be explained to all local partners that one of the objectives of participating in this programme is to create sufficient internal capacity for the partners to continue working independently beyond the period covered by the programme. Accordingly partners will have to be prepared to undertake independent fundraising activities for their own sustainability long before this programme winds up. It is expected that the exposure gained as a result of participation in this programme will make it easier for local partners to undertake own fundraising for subsequent activities. In addition ICJ-Kenya will, as it has always done, actively pursue alternative funding mechanisms even as this programme is implemented.

13. RISK ASSESSMENT

(1) The main risk of the programme is political stability in the region during the period that the programme targets past experience has demonstrated that the region is subject to extreme instability resulting from political developments. Unfortunately this type of risk is largely unforeseeable and essentially difficult to forestall. The essence of this programme is a response to the possibility of these types of risk occurring.

(2) The risk of political interference with the work of CSO's. This can take the form of politically instigated regulatory backlash or outright criminal conduct by government agents against CSO's. In varying degrees of seriousness this is an ever-present risk on the Africa continent. Working with local CSO's will assist in mitigating the risk.

(3) Civil Society organizations are the subject of institutional politics, which can destabilize the implementation of the programme. This risk will be mitigated by the choice of only the most stable CSO's as local partners. To the greatest extent possible legally binding contracts will be entered into with local partners to mitigate such instability.

(4) The risk of perception and the demand of accountability by the CSO's and citizens may create friction with the government. This might lead to a reversal of gains already established.

14. ANNEXTURES

14.1 Administrative Structure of ICJ Kenya

The ICJ (K) is managed under a modern Constitution by a governing Council of seven members elected for two-year terms during an Annual General Meeting. The Council comprises of the Chairperson, Vice-Chairperson, Secretary, Treasurer and three members; the office bearers can serve for a maximum of two terms. The principal role of the Council is to provide overall policy and general supervision and a strategic framework within which the ICJ (K) Secretariat executes programmes/projects.

List of Council/Board Members

Name	Position	Profession	Years of Service on the Council
Mr. Wilfred Nderitu	Chairman	Advocate	9
Ms. Mukami Muthee-Mwangi	Vice Chair	Advocate	5
Mr. Albert Kamunde	Secretary	Advocate	4
Mr. John Gikonyo	Treasurer	Advocate	3
Mr. .Ken Nyaundi	Member	Advocate	3
Mr. Jack Muriuki	Member	Advocate	1
Ms. Felistas Njoroge	Member	Advocate	1

ICJ (K) has an entrenched, written and published Internal Structures, Policies and Procedures Manual, which contain policies, procedures and guidelines on financial, personnel and general administration. The Council recruits senior staff, the primary consideration for recruitment and promotion being merit. It is an equal opportunity employer and believes firmly in affirmative action. All ICJ (K) policies and procedures shall be gender sensitive[26]. Thus its Secretariat staff consists of highly professional people, among the best in the market.

Diversity of Personnel

Position	Male	Female	Total
Board Members -Elected	5	2	7
- Ex-officio (Executive Director)	1		1
Professional Staff	4	7	11
Support Staff	3	1	4
Interns		1	1

* There are few female members on the board because of the low number of female members. ICJ Kenya has since embarked on encouraging and recruiting more female members.

[26] Drawn from Articles 1.1 and 1.2 of the ICJ (K) Internal Structures, Policies and Procedures Manual