



Memorandum

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Recruitment of Chief Justice and President of the Supreme Court of Kenya

This memorandum entails submissions of The Youth Congress on the recruitment of the third Chief Justice since the promulgation of the Constitution of Kenya 2010. The memorandum offers recommendations to ensure recruitment of a Chief Justice responsive to the needs and concerns of the Kenyan youth.

The Youth Congress is a youth serving Non-Governmental Organization founded in 2007 to provide young people in Kenya with a platform to articulate their issues, explore opportunities for youth participation and leadership to effectively address their interest and concerns and engage young people in social, economic and political processes. The Youth Congress has 47 County Youth Leagues that bring together over 500 youth groups and organizations, with about 100,000 members.

The Youth Congress vouches for a process that will produce a Chief Justice who will ensure efficient, effective and transparent administration of justice. Chief Justice is the ultimate guardian of the law and must be appointed in a manner that engenders public confidence. Only a Chief Justice that is a product of fair appointment processes can apply the law fairly, rationally, predictably, consistently, and impartially.

General comments & recommendations

- 1.** The 2010 Constitution of Kenya brought about extensive reforms to judicial appointments. The JSC was expanded and given more powers, and the appointment process became more open and transparent. Today, the Kenyan judicial appointments process is one of the most advanced in Africa. Unlike most countries, Kenya has detailed operation procedures and guidelines for the JSC when dealing with judicial appointments. The First Schedule of the Judicial Service Act of 2011 provides step-by-step details of how the JSC should seek and recommend candidates for judicial appointment.
- 2.** Transparency in Judicial Selections and Appointments is crucial to ensuring public confidence in the judicial selection and appointment process, and thus ultimately to the legitimacy of that process. Using transparent and open processes for appointment helps protect judges from undue external influences that may be exerted by the other branches of government or from interest groups. Likewise, transparency helps ensure the selection of candidates that meet the basic international standards for qualifications, including high professional standing and the necessary legal skills and experience. It facilitates greater judicial independence and enhances public confidence.
- 3.** The selection and appointment of the Chief Justice should be clear, merit-based and objective, transparent to the public, and satisfy requirements for legal qualifications. It is also important for the process to be open to the input of civil society groups, including youth formations, so that they may provide opinions on the merits of the candidates. Noteworthy, greater involvement by civil society in the judicial appointment process also enhances public confidence in the judiciary.
- 4.** Meaningful public participation in the recruitment of Chief Justice, Judges and Judicial reforms is critically important. Drafters of the constitution had in mind an approach where people would provide input in decisions affecting their lives. It was conceived this would also provide them with checks and oversight on what different levels and arms of governments were doing. It improves decision-making and service delivery as the needs and interests of all stakeholders are considered.
- 5.** Effective judicial system is important in addressing some of the socio-economic and political problems facing young people in Kenya. Also, a functioning judiciary is essential for development and nurturing of Kenya's nascent democracy. It is becoming increasingly clear that public engagement in institutional reforms is the only way to ensure sustainable reforms. Public confidence is essential to enhance effective operations of the judiciary. Similarly public trust is necessary to administer justice and enforce judgments.
- 6.** Civil society has an important role in safeguarding and expanding Kenya's democracy. In this case, Youth Advocacy/Serving Organisations are key in the realization of a responsive Judiciary. Collaboration and engagement with Youth Advocacy Organisations is important in enhancing effective Judiciary.
- 7.** For a long time now, the Kenya Judiciary has been experiencing various problems that have resulted from and into inefficiency, incompetence and corruption. Chronic problems that have infiltrated into the Kenya Judiciary include, lengthy case delays and backlog; limited access by the public; lack of adequate facilities; allegations of corrupt practices; cumbersome laws and procedures; questionable recruitment and promotional procedures; general lack of training; weak or non-existence of sanctions for unethical behaviour and inequitable budget. The inefficiency, incompetence and corruption in the Judiciary has resulted into loss of public confidence in the institution.
- 8.** The Chief Justice should steer judicial reforms including competence of staff especially the judges, independence of the Judiciary, corruption and modernization of the courts. For example, some anti-graft campaigners say that the courts remain staunch allies of those accused of corruption. Without comprehensive judicial reforms, justice will remain elusive.
- 9.** Kenya is a youthful country. Kenyans aged between 15 and 34 years form about 36 per cent of the total population. Those below age 34 constitute about 80 percent of the population. The youth are an essential component of our nation's development and a key driver in the realization of good governance and development in Kenya.

- 10.** The country enacted a very progressive constitution in August 2010. Youth, by their huge numbers, overwhelmingly endorsed the document in a historic referendum that year. This was a clear explanation that the new constitution was seen as a new dawn in promoting dignity and fundamental human rights of all Kenyans including the youth. In order to realize the aspirations envisioned under the Constitution, the State is supposed to create an enabling environment and formulate effective policies that will support the implementation and sustainability of youth initiatives.
- 11.** Articles 10 and 27 call for inclusivity, non-discrimination, equality and freedom from discrimination on the basis of age. In addition, Article 55 obligates the State to take measures, including affirmative action programmes, to ensure that the youth: access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment are protected from harmful cultural practices and exploitation; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure; among others. The Judiciary is expected to play a fundamental role in giving further effect to article 10, 27 and 55 of the Constitution to promote inclusion, development and enjoyment of rights.
- 12.** Chief Justice is key in administration of justice. It is worrying that 75 per cent of prisoners are aged between 18 and 35 years with majority of them being poor and petty offenders. This is a pointer to a bigger problem that Kenya needs to deal with by continuously engaging the youth.
- 13.** A robust mechanism for monitoring and an elaborate system for reporting are key to ensuring a responsive judiciary to the needs and concerns of the youth. The Chief Justice should be obligated to report on steps they are taking to promote access to justice for the youth.
- 14.** Chief Justice and the Judiciary need to become more adapt at using new technologies that can bring more young people into their space and enable them become more active in judicial processes and reforms.
- 15.** Engagement with the youth should be maintained as a critical element for the Judiciary. More needs to be done to create an enabling environment that would enhance participation and representation of youth in judicial processes including JSC.
- 16.** Youth seek a judicial system that promotes the rule of law and protects young people's civil, political, social and economic rights. In varying degree, young people approve of the ongoing judicial reforms. Young people, however, feel that the process is not moving as fast as they had anticipated. To enhance young people's trust in the judiciary and the ongoing judicial process, it is important to ensure their effective engagement. The Judiciary needs to give greater emphasis to the role of youth in its endeavors for judicial reforms.
- 17.** Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy, which he claims to be entitled to in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.



Specific Recommendations

- 1.** Judicial Service Commission must adhere to the provisions of the constitution and Judicial Service Act of 2011 that provides step-by-step details of how the JSC should seek and recommend candidates for judicial appointment. Equally important JSC should consider gender and other essential elements during the recommendation process.
- 2.** The selection of Chief Justice must be transparent and open – Interviews should be held in public, and members of the public including youth representatives should be permitted to attend and observe the interviews.
- 3.** Selection of the Chief Justice must ensure meaningful public participation. Civil society including youth serving organisations should be engaged in the selection. In particular, civil society and youth organisations should be enabled to participate through making submissions on candidates to the JSC and attending and observing the public interviews.
- 4.** The persons that Judicial Service Commission recommends for the position of Chief Justice must be appropriately qualified, fit and proper, and committed to build a judiciary that is independent, protects the constitution and uphold rights, and “apply the law impartially and without fear, favour, or prejudice.
- 5.** Recognizing that young people are a major human resource for development and key agents for social change, economic growth and innovation, is youth a key priority are of your agenda and the next Chief Justice must have a clear plan of bringing youth energies, talent, leadership and voices into partnerships and programs into the judicial processes and institution.
- 6.** Judicial and legal reforms cannot be successful without the full support and involvement of the public. Candidates for the position of Chief Justice must demonstrate that they plan to include citizens including the youth to go beyond being spectators in judicial reform process and institution, to ensure sustainability in the transformation of the judiciary.
- 7.** Candidates for position of Chief Justice must show commitment to safeguard the rights of the youth, to do all that is possible to ensure that access to justice is such a reality - improve and the rights to access justice and due process. Access to justice is more than access to courts in order to enable claims and the rights and obligations they engage to be adjudicated. It is the means through which the courts uphold and articulate the law and ensure that laws and constitution remain living instruments of any democracy. In this case the Judiciary with the leadership of the Chief Justice must ensure access to effective access.
- 8.** The Chief Justice working with the Judicial Service Commission must put in place an elaborate framework for engagement with the public including youth. National Gender and Equality Commission in collaboration with all stakeholders including Youth Serving Organisations should develop guidelines for how to get the Judiciary as an institution to ensure representation of special interest groups including the youth.
- 9.** JSC should put in place a clear public participation framework especially with the youth, to enhance areas of collaboration between the youth and the judiciary, which has been lacking. Engagement occurs when people are part of something; when they can and do take part. If the Judiciary is to properly engage the public, the society, they need to be part of society and society in its breadth and diversity must be part of the Judiciary.
- 10.** Judiciary should set up a caucus between the judiciary and the youth to accelerate judicial reforms. In particular, to introduce the role of Kenya youth in judicial reforms and administration of justice. The Chief Justice Caucus with the Youth should be part of the dialogue initiative and ongoing efforts to improve judicial capability and to strengthen links between the judiciary and the citizens.