

L2012-06: Judicial Radical Surgery in Kenya: Beyond Independence and Accountability

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Abstract

A 1989 World Bank Development Report recognized anticorruption and good governance as prerequisites for Sub-Saharan economic development. Kenya's democratic transition entailed inter alia economic liberalization and the rule of law. However, retention of the welfare-reducing Constitution perpetuated social injustice. In 2003, constrained by an absent "rule of law culture" and negative economic growth, the new Kenyan government chose incremental judicial reforms over comprehensive constitutional reforms. It assumed that retaining the "second best" Westminster Constitution while prioritizing construction of infrastructure, would necessarily result in "second best" overall social welfare. It was wrong. Nevertheless, the new Chief Justice implemented unprecedented "radical judicial surgery" recommending that half the purportedly-corrupt judiciary should be removed by Presidential tribunals of inquiry. Furthermore, newly-appointed High Court judges endorsed the "radical surgery." However, declining public confidence in the judicial reform process culminated in refusal by the opposition party to petition the hotly-disputed 2007 presidential election results, alleging biased courts. Widespread post-election violence further decreased overall social welfare, as indicated by the country's subsequent promulgation of a new Constitution. Ultimately, the High Court declared the "radical surgery" illegal. Given inconsistent and novel approaches to vetting of judicial professionalism, it is useful to learn lessons from previous and from comparative experiences in transitional contexts to critically determine the extent to which various scrutinizing procedures are predicated on political expediency, human rights principles or a combination of both. By applying "the general theorem of second best," this paper shall attempt to measure the impact of Kenya's radical judicial reform strategy on the independence and accountability of judicial officials, and on overall social welfare.

Key words: *Judiciary, reform, welfare, law, corruption, "second best"*