

**JOINT CIVIL SOCIETY STATEMENT ON THE LANDMARK BUILDING BRIDGES INITIATIVE JUDGEMENT AND UNWARRANTED ATTACKS ON THE JUDICIARY:**

**Date: 20<sup>th</sup> May 2021.**

On 13th May, the Constitutional and Human Rights Division of the High Court of Kenya handed down its judgment in David Ndii and Others v Attorney General and Others (the BBI Judgment). Through this landmark decision, the Judiciary boldly upheld and affirmed the sovereignty of the people and the supremacy of the Constitution, while reclaiming its independence. The court stated that the action by the President to initiate, support and lead the BBI process amounted to abuse of office and a violation of Chapter Six of the Constitution of Kenya on Leadership and Integrity. While this was yet again another fundamental moment for Constitutionalism in Kenya, the political class have continued to express their displeasure with the decision; with Members of County Assembly, Parliament and Senate calling it judicial activism.

Therefore, we, representatives from the institutions hereunder;

Recognizing

1. The independence of the Judiciary and sanctity of the Rule of Law;
2. Cognizant of the sacrifices of those Kenyans on whose labour, love and life we rewarded ourselves with the current Constitution; and
3. In exercise of our sovereignty as provided in Article 1 of the Constitution which provides that the sovereign power of the people shall be vested in the Executive, Legislature and the Judiciary.
4. That separation of powers in arms of government aims to safeguard against arbitrary and capricious governance and the abuse of power.

Wish to pronounce ourselves to the following issues:

**a) Respect for the Judiciary and the Judges**

We have noted with great concern, that in the recent past, the political class have continued to persistently undermine Judicial Independence through disobedience of court orders, derogatory public statements, budget cuts, refusal to appoint judges, targeted attacks against specific judges

through social media platforms, smear campaigns and unsuccessful prosecutions. This state of affairs has gained high traction since the judgement last week.

In 2017, the Supreme Court through a majority decision annulled the election of Uhuru Kenyatta as president of the Republic of Kenya in a petition that was brought by former Prime Minister Raila Odinga and his running mate Kalonzo Musyoka. While such a decision was a defining moment for the rule of law and fidelity to the Constitution in Kenya, the entire Judiciary was subjected to targeted attacks by the political class who not only called them WAKORA, but also promised to revisit. This threat has since been realized and is evident from the Executive's persistent disobedience of court orders, the refusal to appoint 40 judges who were recommended by the Judicial Service Commission and massive budget cuts that have all been aimed at weakening the Judiciary.

We reiterate and assert that the constitutional provisions on judicial authority and independence expressly dictate that in exercise of judicial authority, the judiciary shall not be subject to the control or direction of any person or authority. The Executive and Parliament must be reminded that the constitutional guarantees of judicial independence are non-derogable and are recognized by international and regional standards and norms. We shall continue to defend judicial independence and will continue to speak out against personal attacks of judicial officers. Threats of violence when Judgements do not favor the executive, are as unfortunate as they are unhelpful in a country governed by the rule of law.

**We therefore demand that:**

- 1. The Executive and the Legislature respects judicial independence and decisions issued by Courts of Law.**
- 2. The President expedites the appointment of the 40 Court of Appeal and High Court judges whose appointment has been pending for almost two years.**

**b) Attacks on Civil Society:**

We are concerned with the continued attacks on individual human rights defenders, whistleblowers, journalists and organizations working to advance the rule of law in Kenya. Since the heavily contested 2017 general elections and during the drafting of the BBI and public

participations process, there have been several attempts to discredit their work online and in public gatherings. Since the Jubilee administration came into power in 2013, there has been a consistent policy to suppress and systematically attack Civil Society Organizations and other voices of dissent with a view to undermining their legitimacy and efficacy around their advocacy on key human rights and governance issues. This also saw the Judiciary and Civil Society being derogatively profiled as the Evil Society. More recently, the Defenders Coalition and Rtd Chief Justice Willy Mutunga were openly attacked by Lawyer Paul Mwangi, on a leading national television channel. All Kenyans have a right as individual citizens or as citizen groups to go to Court to seek enforcement of rights, defend the Constitution and to uphold Judicial Independence.

**We therefore demand that:**

1. That Paul Mwangi should immediately retract this statement and officially apologize to the Defenders Coalition and The Rtd Chief Justice Dr Willy Mutunga.
2. We also call on Political class to exercise restraint and cease personalized attacks on activists, civil society and Kenyans of good will for exercising their constitutional rights.

**c) Use of Public Resources in the BBI Process**

The court ruled that the action by the President to initiate, support and lead the BBI process amounted to abuse of office and a violation of Chapter Six of the Constitution of Kenya on Leadership and Integrity. Despite the numerous and overwhelming concerns on the legality, feasibility and sincerity of the Constitutional Amendment Bill 2020 process, the promoters and political leaders including the Executive, have continuously utilized taxpayers' money to support the highly controversial process.

The Parliamentary Budget Office (PBO) in a report, [‘Evading recessionary pressure under a mounting debt burden’](#) stated that we are unable to meet our debt servicing obligations and this continues to raise public expenditure amidst low and underperforming tax collection. The determination by the court on the BBI process patently infers that public resources were utilized to support an illegality.

**As such, fully aware of a notice of appeal filed on the matter, nonetheless demand the following:**

- 1. The President, all public institutions, and officers both at National and County level, in public interest, cease and desist from using public resources (including the deployment of public officers and other civil servants) on the BBI process.**
- 2. The Auditor General immediately and expeditiously conducts an audit of all public resources, monetary and non-monetary resources, that have been utilized in the BBI process from its inception to date (including the sources) and, prepare and publish a report that will be accessible to the public.**
- 3. The President should be held personally liable for funds expended on this process, having being adjudged as illegal and unconstitutional.**

**d) Centrality of Public Participation and Access to Information**

Article 10 (2) (a) provides that the ‘national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.’ Courtesy of that provision, the Constitution moved in to grant the pathway to the realization of Article 1 (1) which provides that ‘(A)ll sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution’.

Yet, its implementation remains one of the most frustrated provisions. It has almost entirely remained an exercise in formality undertaken to rubber stamp predetermined positions and preferences. Its implementation is more tokenistic than it is meaningful. Its realization in the meaningful sense has been largely confined to the zone of ‘illusion and aspiration’. This was evident during the BBI process, where citizens were not provided with adequate information and time to interrogate the process.

In the judgement, the High Court observed that in ‘the absence of meaningful public participation and sensitization of the people prior to the collection of signatures in support of the Constitution of Kenya Amendment Bill, the exercise of signature collection in support of the amendment bill was constitutionally flawed.’

For meaningful public participation, the High Court aptly captured the direct nexus with access to information. It noted that for the public to engage and participate meaningfully, information on the subject matter must be provided: ‘(F) or meaningful public participation to be realized, citizens

must be given information they require to make decisions that affect them.’ The Constitution via Article 35 does secure the right for every citizen to access information held by the State. In 2016, Parliament moved a step further by enacting the Access to Information Act, 2016, intended to refine the implementation of Article 35. It is concerning though that passage of regulations to grant full implementation of the Act has stalled.

**Based on the foregoing, we make the following demands:**

- 1. Parliament enacts a Public Participation legislation to bindingly define and refine the parameters qualifying public participation as pointed out by the High Court in its recent judgement**
- 2. A swift move be made to put in place Access to Information Regulations to secure sharing of information with the public by way of implementation of Article 35 of the Constitution and Access to Information Act, 2016**
- 3. All future initiatives requiring public participation should adhere to the laws of Kenya, established jurisprudence and best practices.**
- 4. The Constitutional Commissions should reclaim their space weakened in the past two years through capture by the State to an extent that they did not have substantive input to the Building Bridges Initiative.**

**Signed by:**

1. Kenya Human Rights Commission
2. Defenders Coalition
3. Transparency International Kenya
4. Independent Medico- Legal Unit
5. The Kenyan Section of the International Commission of Jurists
6. INUKA Kenya Ni Sisi!
7. CRECO
8. Haki Africa
9. Social Justice Centres Working Group
10. CRAWN Trust
11. MUHURI
12. Katiba Institute
13. Kongamano La Mageuzi
14. Linda Katiba Movement
15. Kenya Tuitakayo Movement.
16. FIDA-Kenya