Judicial Accountability in the New Constitutional Order

Edited by

Jill Cottrell Ghai

JUDICIARY WATCH

JUDICIAL ACCOUNTABILITY IN THE NEW CONSTITUTIONAL ORDER

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International Commission of Jurists
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JUDICIAL ACCOUNTABILITY IN
THE NEW CONSTITUTIONAL ORDER

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The Kenyan Section of the International Commission of Jurists (ICJ Kenya) has the mandate to develop, strengthen and protect the principles of the rule of law, and to develop, maintain, and strengthen the independence of the judiciary and the legal profession. ICJ recalls the recommendations of the Advisory Panel of Eminent Commonwealth Judicial Experts established in May 2002 by the Constitution of Kenya Review Commission to advise on constitutional reforms regarding the Kenyan Judiciary. These included providing in the Constitution for the vesting of authority in the Judiciary, alongside provisions on the Executive and Parliament, to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya. We are proud to fortify this position further with this publication.

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Judicial accountability is crucial in a democracy, ensuring that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them, and the wider public, can have confidence that their cases will be decided fairly and in accordance with the law. We trust that you will find this publication a useful resource contributing to the central role of the Judiciary in the governance of the Republic of Kenya.

Samwel Mohochi,
Executive Director
International Commission of Jurists, Kenyan Section

FOREWORD

Dr Willy Mutunga[1]

I have said elsewhere that, when I took on the post I relinquished in June 2016—

> I found an institution that was designed to fail. It was an institution so frail in its structures, so socially uprooted in its mannerisms and culture, so thin on resources, so low on its self-confidence, so segmented in its human resource formation, so unprofessionalised in its administrative cadre, so overwhelmed by the Executive that it still puzzles me to date how we maintained a modicum of operations.

It was a judiciary that had been traumatised by its history, that had included a period of one-party national rule during which even a fig-leaf of independence had been cut away by the formal abrogation of judicial tenure. Even after the legal form of tenure had been restored, in 1990, under great international pressure, as Makau Mutua has written,

> …the damage had already been done. Once tenure is abolished there is no guarantee that it will not happen again. The chill introduced by such blatant disregard for a basic constitutional principle by the executive underlined the subordinate status of the courts in Kenya.

During that period of no security of tenure (which formally lasted only two years but in practical terms had long pre-dated the change in the Constitution that made it legal) there was only one important type of accountability: to the executive. The judicial culture was that it was there to serve the powers that be. The lack of any other sort of accountability had other impacts. If a judge was secure, if he (there were very few

[1] Chief Justice and President of the Supreme Court of Kenya, Republic of Kenya, June 2011-June 2016.

she's indeed) did State House's bidding, why bother to be honest in any other respect? Many Kenyans will remember a certain t-shirt in the early 2000s: "Why hire a lawyer when you can buy a judge?"

If what really mattered was loyalty in a certain direction why even bother to be competent? And if you were competent and honest, why would you want to join a profession that had so little self-respect, and so little respect or trust from the public?

The 2010 Constitution gave the country a chance, in this respect as in so many others. It insists in clear terms that the judiciary is independent, not only by use of rhetoric but by clear provisions to protect the judiciary from executive or legislative interference. It goes further to try to cure that chill that Mutua refers to by providing that the independence of the judiciary can only be affected by a constitutional amendment if the people approve it in a referendum. Of course the people might approve it—referendums have approved equally damaging constitutional amendments in some countries. But if the people are not convinced that this matters enough to vote against such a change, then we really are lost. Because the ultimate guardian of all our liberties must be the people, as important as the judiciary is designed to be under the Constitution.

The Constitution gave us a chance to start, if not with a completely clean slate, with one that was wiped clean of some of the most egregious mistakes of the past. The vetting process cleaned away some of the human relics of the past. And new people were prepared to come onto the bench, committed to the values of the Constitution, and to the values of the judiciary.

For the first time for many years, accountability of the judiciary, and of the individuals within it, could be thought about and focussed on.

One chapter you will not find in this book is "The Accountability of the Judiciary to the President". Judges will tell you that there is no longer a hotline from State House to the Bench. In fact, the main channel for accountability is within the judiciary itself. In fact, if you read the Constitution you will not find much about accountability of especially the "higher" judiciary, in the High Courts, Court of Appeal and Supreme Court. In this respect the Constitution is fairly conservative. Of course, an important means ensuring a competent, and independent, judiciary is the appointment process. If the right people are appointed, the argument goes, you do not need to worry about them. This is of course an over-simplification. No appointment system is fool-proof. No individual is incapable of backsliding. It was largely for the judiciary itself to work out how best to ensure that its senior members are doing the job, and doing it honestly, competently and with commitment. The Judiciary has

comprehensively done this by implementing the disciplinary dictates of the Constitution. It has set up elaborate policies, secured in validated judicial policy documents, to guide the accountability and transparency of judicial work by its judicial officers and staff. Such policy documents as the Code of Conduct, Performance Management, Sexual Harassment, Daily Data Collection Returns of cases heard, among others make the internal judicial accountability and transparency robust. The implementation of these policies, though facing resistance, is a train that has left the station without a hope of being derailed. Through the Office of the Judiciary Ombudsperson there is a great space for public participation to ensure judicial accountability and transparency.

But the judiciary is not insulated from outside accountability. The Constitution does not give any immunity from criminal prosecution. And the judiciary does have to answer for its custody of public funds, and for its use of its powers, if not so much for the content of its judgments (the last is largely an internal matter). It is true that there has been some disagreement with both the Legislature and the Executive over how far there is accountability of the judiciary to other branches of government. There is an emerging jurisprudence on the Separation of Powers doctrine coupled with practical application of the constitutional decrees of dialogue, consultation, and collaboration of the arms of government without subverting the robust independence of each. Though embryonic the nurturing of dialogue, consultation, and collaboration going forward will depend on the leadership of the three heads of the arms of government. It is possible that the leadership will either nurture the independence and collaboration of the three arms within the vision of the Constitution, or they will create the supremacy of one of the arms over the other two.

I believe that the judiciary in Kenya has improved. Everything is not perfect. I have gone on record as saying that we might need another vetting process, when faced with evidence of continued, or revised, corruption among the judges.

Mechanisms of accountability, to itself, to other public bodies and ultimately to the people are essential to ensure that the judiciary does play the very important role assigned to it in the Constitution.

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Jill Cottrell Ghai was educated at the London School of Economics and Yale University. She has taught law in several universities over a career beginning in 1965: Ife (now Obafemi Awolowo) and Ahmadu Bello Universities in Nigeria, Warwick University and University of Hong Kong. She has extensive experience in advising on constitutions, including in East Timor, Nepal and Iraq, Somalia and the Maldives. Jill is the author/co-author of numerous articles, conference papers and books, more recent ones being related to constitution-making and human rights. She now is in what is laughably called "retirement". In other words she is very busy, working with Katiba Institute—an NGO committed to the implementation of the Constitution.

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CHAPTER ONE

RETHINKING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY UNDER A TRANSFORMATIVE CONSTITUTION: KENYA POST-2010

Anita Nyanjong and Ochiel J Dudley

Introduction

The aim of this article is to examine the place of judicial independence and accountability under the current Constitution. The paper begins by setting out the theoretical framework for judicial independence and accountability in constitutional theory. There is a focus on why both judicial independence and judicial accountability are even more important values in a legal system built on a transformative constitutional base. The tension between judicial independence and accountability is explored. Subsequently, the chapter discusses judicial accountability as a step towards the development and sustenance of a culture of justification. Comparative lessons are drawn from the experiences of other jurisdictions in dealing with the question of judicial accountability. The paper concludes by addressing some emerging challenges to attaining the delicate balance between judicial independence and accountability so far.

Theoretical Framework for Judicial Independence

Judicial independence involves judges acting independently of the government of the day and free from external pressure from any source.[1] A more refined conception is that judicial independence is concerned both with the institutional and individual autonomy of judges as well as the actual capacity of the judiciary to render independent decisions.[2] The idea of judicial independence is traceable to the liberal democratic ideals including the separation of powers espoused by Aristotle, Locke and Montesquieu.

Aristotle in *Politics* contended that every constitution had three distinct elements: deliberative, magisterial, and judicial.[3] Locke on the other hand argued that, for the protection of liberties and for the sake of efficiency, legislative and executive functions ought to be placed in different hands.[4] Bolingbroke, building on the theme of limited powers and balanced powers within a constitution opined that 'the safety of the whole depends on the balance of the parts'.[5]

It is however Montesquieu who is most credited, in his book *De L'Esprit des Lois* (Spirit of the Laws), with enunciating the principle of separation of powers.6 Essentially, Montesquieu argues that one agency of government should not exercise a function suited to another branch (or indeed all the three powers of the Government) and that separation of the judicial element has an important role in the prevention of illegal oppression. Classifying the functions of government he stated: *'In every government there are three sorts of power: that of making laws, that of executing public affairs and that of adjudicating on crimes or individual causes'*. In Montesquieu's view there is a threat to liberty where powers are united in the same person or body. This is especially the case where judicial power is not separated from the legislative and executive power. Montesquieu also canvasses the idea of checks and balances by which the branches of government can legitimately influence or

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1 Ruth Mackenzie, Kate Malleson, Penny Martin and Phillipe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010); see also M Kiwinda Mbondenyi and J Osogo Ambani, *Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa, 2012).

2 Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001) 1.

3 Mason Hammond, City-state and World State in Greek and Roman Political Theory Until Augustus (Biblo and Taanen, 1951) 22.

4 John Locke, *Two Treatises of Government* (ed P Laslett, 1960).

5 Henry Saint-John Bolingbroke, *Remarks on the History of England* (Tourneisen, 1791) 28 https://books.google.com/books?id=RKdgAAAAcAAJ, accessed 10 October 2016.

6 Baron Montesquieu, *De L'Espirit des Lois* (1748).

impose a number of restrictions on the actions of the other branches.[7] It is however understood that a complete separation of powers is undesirable and would grind down the operations of government.[8] Therefore, what is sought is not a mechanical and complete separation of powers but a system of checks and balances.

Nwabueze notes that the necessity for government also creates the problem of how to limit the arbitrariness inherent in governments and to ensure that their powers are used for the greater benefit of society.[9] The foregoing concept of non-concentration of power in a single source and limiting arbitrariness of political powers is a major part of Western liberal political theory.[10] Of paramount importance to constitutionalism and the doctrine of separation of powers is the need to ensure that the exercise of governmental power for the promotion of societal values is subject to limits and does not in itself destroy those values.[11]

Judicial independence also relates to the idea of the rule of law which requires, equality of all parties before the law irrespective of their status, protection of fundamental rights and freedoms, and the absence of arbitrary power by government.[12] At a minimum, rule of law encapsulates the idea that both 'government officials and citizens are bound by and abide by the law'.[13] This description by the United Nations better captures the essence of the rule of law:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

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7 See Colin R Munro, *Studies in Constitutional Law* (Reed Elsevier, 1999) 301.

8 Monica Twesiime Kirya, 'The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges' in Frederick W Jjuuko, *The Independence of the Judiciary and the Rule of Law* (Kampala: Kituo Cha Katiba, 2005).

9 B O Nwabueze, *Constitutionalism in the Emergent States* (Fairleigh Dickinson University Press, 1973) 1.

10 Martin Diamond,*' The Separation of Powers and the Mixed Regime'* (1978) 8 *Publius: The Journal of Federalism* 33-43, 37.

11 Colin R Munro, above, 295.

12 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) at 110-115.

13 Brian A Tamanaha 'The History and Elements of the Rule of Law' [2012] *Singapore Journal of Legal Studies* 232–247.

> decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[14]

The element of independent adjudication underlies judicial independence and implies that any disputes over the legality of acts of government must be settled by judges who are wholly independent of the executive.[15] It is therefore commonly assumed that a judiciary with some degree of independence is significant for the protection of liberal values including private property rights, individual liberty and the sustenance of democratic governance itself.[16] Where there is no independence, the judiciary is prone to be manipulated and barred from effectively scrutinizing illegal or arbitrary exercise of power by state organs while the corollary is that where judicial independence exists, courts are better suited to act as powerful agents of constitutionalism.[17]

It is to this end that the Constitution of Kenya 2010 under Article 1 creates a judiciary that is separate from the executive and the legislature in a tripartite governmental structure following the Montesquieuan model of separation of powers.[18] However, a discussion assuming a tripartite structure is incomplete and out of touch with Kenya's current constitutional reality, because the 2010 Constitution also establishes independent commissions and offices.[19] Such institutions operate alongside the traditional trilogy and their role is seen as strengthening the democratic systems of government.[20]

It has been argued that these independent bodies christened 'integrity branch', 'constitutional watchdogs' or the 'democracy branch' are necessitated by the inadequacy of the traditional separation of powers scheme.[21] Indeed, Article 249 (1) mandates the constitutional watchdogs to protect the sovereignty of the people, to secure the pursuit of democratic values and principles by all state organs and to promote constitutionalism. Their mandate and existence therefore introduce another

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14 United Nations Secretary-General,'*The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-Genera*l' (United Nations, 2004) 4 accessed https://www.un.org/ruleoflaw/files/2004%20report.pdf, last accessed 5th October 2016.

15 HWR Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 10thdn. 2009), 15.

16 Stephen B. Burbank, 'What Do We Mean by 'Judicial Independence'?' (2003) 64 *Ohio State Law Journa*l 323-339.

17 Christopher M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605-626, 606.

18 Article (1)(3).

19 Article 249.

20 Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007).

21 Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633.

level of checks and balances that impacts judicial independence in ways not envisioned by the traditional view espoused by Montesquieu.

Kenya is a state party to, and is consequently bound by, a number of treaties which guarantee the right to a hearing before competent, independent and impartial tribunals.[22] Similarly, the Constitution guarantees every person the right to have any legal dispute determined in a fair and public hearing before an independent and impartial court, tribunal or body.[23] Article 160(1) provides that, in the exercise of judicial authority, the judiciary is subject only to the Constitution and the law and is not subject to the control or direction of any person or authority. Be that as it may, quite apart from the traditional liberal ideas of separation of powers, transformative constitutionalism provides yet another basis for judicial independence in Kenya. The 2010 Constitution is seen as a transformative charter of governance, underscoring the need for the judiciary to be independent. A transformative constitution has been defined as one that 'embodies a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' with the aim of 'inducing large-scale social change through nonviolent political processes grounded in law'.[24]

Article 259 requires the Constitution to be interpreted in a manner that promotes its purposes values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. Accordingly, the theory of a holistic interpretation of the Constitution mainstreamed by the Supreme Court demands an interpretive approach that takes into account, alongside a consideration of the text and other provisions in on judicial independence and accountability such elements as Kenya's historical, economic, social, cultural, and political context.[25]

In the colonial days the judiciary was both de *facto* and de *jure* an instrument for the perpetuation of colonial power designed to administer a colonized population

22 See for instance Article 14 International Covenant on Civil and Political Rights, 1976; Article 18 International Convention on the Protection of the Rights of a Migrant Workers and Members of their Families, 1990; Article 37 Convention on the Rights of the Child, 1989.

23 Article 50(1).

24 Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights*146–157.

25 *In the Matter of the Kenya National Commission on Human Rights* [2014] eKLR at 26.

with limited rights.[26] As opposed to an instrument for the administration of justice the judiciary was therefore an integral part of the executive mainly interested in the maintenance of law and order as an upholder of colonial rule.[27]

Moreover, the judiciary in post-colonial Kenya like most African states was but a handmaiden of the dictatorial regime and was thus incapable of operating effectively as the guardian of the constitution, bulwark against human rights violations or neutral arbiter of the rule of law.[28] Many post-independence constitutions retained colonial mind-sets in the set-up of systems of governance including in the establishment of the post-colonial state whose 'essence, character, and modus operandi' never changed.[29] Further, even in the presence of written constitutions, post-colonial governance was largely marked by a failure of the constitution to check the exercise of power or entrench itself as the *grundnorm* of the legal system and touchstone for accountability in the exercise of the function of governance.[30]

The absence of sufficient constitutional assurances of an independent judiciary and the resulting lack of confidence in the Kenyan judiciary was one of the catalysts for the 2007-2008 post-election violence.[31] A constitution that fulfils liberal goals including ensuring judicial independence therefore has the potential to serve as a renewed expression of national unity for a nation-state like Kenya with a heterogeneous population.[32]

The state of Kenya's judiciary in the pre-2010 era was aptly captured by the recurring theme of judicial reforms in the dialogue held during the constitution

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[26] Winluck Wahiu, 'Independence and Accountability of the Judiciary in Kenya' in Frederick W Jjuuko,(above) 108; see also Makau Mutua,'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96-118, 97.

[27] Yash Vyas, 'The Independence of the Judiciary in a Third World Perspective' (1992) 11 *Third World Legal Studies* 127.

[28] Charles Manga Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301, http://lawdigitalcommons.bc.edu/twlj/vol25/iss2/2.

[29] See for instance Yash Pal Ghai, 'Constitutions and Governance in Africa: A Prolegomenon' in Sammy Adelman and Abdul Paliwala (eds), *Law and Crisis in the Third World* (Hans Zell Publishers London, 1993) 51-75; also Pita OgabaAgbese and George Klay Kieh, 'Introduction: Democratizing States and State Reconstitution in Africa' in Pita OgabaAgbese and George Klay Kieh (eds), *Reconstituting the State in Africa* (Palgrave Macmillan, 2007) 3, 10.

[30] HWO Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Issah G Shivji (ed), *State and Constitutionalism: An African. Debate on Democracy* (Sapes Trust, *1991).*

[31] *Report of the Commission of Inquiry into Post Election Violence* 2008 (Government Printer, Nairobi) 16.

[32] Mark Tushnet, 'Constitution-Making: An Introduction' (1984) 31 *Texas Law Review* 1982.

making process. The Constitution of Kenya Review Commission in its final report also noted that:

> The judiciary rivals politicians and the police for the most criticised sector of the Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence.[33]

Additionally, the Committee of Experts was repeatedly urged that, because of well documented factual and historical issues, there had to be a change in the makeup and functioning of the judiciary. [34] Indeed, in *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy*,[35] the Supreme Court recalled the way the judiciary, in the run-up to the promulgation of the current Constitution on 27th August, 2010, was widely distrusted by the public.

Similarly, in *Re the Matter of the Interim Independent Electoral Commission*,[36] the Supreme Court recalled that the provision for independent commissions and offices in the Constitution was incorporated as an antidote to the all-powerful presidency that had since Independence emasculated other arms of government as it trespassed upon the fundamental rights and freedoms of the individual. These bodies, alongside the judicial branch, were established as the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation and were meant to serve as the 'people's watchdogs' and needed to operate without improper influences, fear or favour—the true purpose of the 'independence clause'.[37]

Du Plessis' perception of memorial constitutionalism views the constitution both as '*memory*… coming to terms with a notorious past, and *promise*, along the way towards a … transformed future'.[38] Accordingly judicial independence must be viewed in the light of Kenya's past experience with an emasculated judiciary and also in view of the desire reflected in the preamble for government based on human rights and the rule of law. The constitution therefore signals an end to a past marked with

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33 Constitution of Kenya Review Commission, *The People's Choice: The Short Report of the Constitution of Kenya Review Commission (Short Version)* (September, 2002) 52.

34 *Committee of Experts* on *Constitutional* Review, *Final Report of the Committee of Experts on Constitutional Review* (2010).

35 [2014] eKLR.

36 [2011] eKLR.

37 Ibid.

38 Lourens du Plessis, 'Affirmation and Celebration of the Religious Other' (2008) 8 *South African Journal on Human Rights* 376 - 408.

inadequate judicial independence and accountability and heralds a new era where both values underpin the execution of the judicial mandate.

The making of the Kenyan Constitution is seen as a 'story of ordinary citizens striving and succeeding to overthrow the existing social order and defining a new social, economic, cultural, and political order for themselves'.[39] Within this scheme, the transformative, post-liberal, and horizontal application of Kenya's 2010 Constitution is a matter that the Supreme Court appreciated in *Communications Commission of Kenya v Royal Media Services.*[40] The apex court held that, whereas the old Constitution had been seen as legitimizing an unacceptable and unsustainable status quo, the Kenyan people had through the 2010 Constitution 'reconstituted or reconfigured' the state 'from its former vertical, imperial, authoritative, non-accountable content' to an 'accountable, horizontal, decentralized, democratized' and 'responsive' state, including the judiciary.[41]

Since constitution making does not end at promulgation but continues with its interpretation, application and implementation, the kind of transformation envisaged by the Constitution cannot be achieved in the absence of an independent judiciary.[42] Secondly, a transformative constitution cannot ensure 'progress towards a society based on human dignity, equality, and freedom with a system that rigs a transformative constitutional super structure onto a common and customary law base'.[43] Third, constitutional interpretation is central to constitutional adjudication because courts are faced with conflicting claims both for continuity and for progressive interpretation. [44]

As a result, quite apart from the liberal democratic ideals common to all modern constitutions, the post-liberal transformative and orientation of Kenya's 2010 Constitution supplies another theoretical and, in fact, practical underpinning of the need for an independent judiciary. Without an independent and accountable judiciary the principles, purposes and values of the Constitution would not be met and there would be a slide back to authoritarianism.

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39 Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' University of Fort Hare Inaugural Distinguished Lecture Series (October 16, 2014).

40 Petition No. 14 of 2014 [2013] eKLR.

41 Ibid at 368.

42 Ibid.

43 Karl E Klare and Dennis M Davis, **'**Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights*, 403; see also Catherine Albertyn and Dennis Davis, 'Legal Realism, Transformation and the Legacy of Dugard' (2010) 26 *South African Journal on Human Rights* 188.

44 Joseph Raz, 'On the Authority and Interpretation of Constitutions' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 2005).

Indeed, the significance of the responsibility for constitutional interpretation for the development and sustenance of a constitutional order has been recognized.[45] Samuel Issacharoff notes that the role of an independent judiciary as the centrepiece of efforts towards rule of law compliance and assurance of democracy is even more significant in post-authoritarian states.[46] Such consolidation of the rule of law enables transitional regimes to make a break from the past and also 'cautions state actors against exceeding the boundaries of the legal system for self-interested political gains'.[47]

To this end, the Preamble to Kenya's 2010 Constitution reflects the aspiration of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.[48] The existence of the values side by side indicates that Kenyans expect to live under the rule of law within a democratic state that respects fundamental rights as opposed to a conception of the rule of law as a matter of law enforcement in an authoritarian regime. Judicial independence therefore emerges as a crucial means to this end. The question that arises is whether judicial independence is an absolute term or if it might be necessary to limit it for the purpose of ensuring accountability of the judiciary.

The Tension between Judicial Independence and Accountability

There is no settled meaning of judicial accountability though it is possible to understand the concept as implying the necessity for the judiciary to justify or explain its behaviour or conduct.[49] The significance of this concept of judicial accountability is discussed in the next section. This section concentrates on the relationship between the two values of judicial accountability and independence.

As discussed earlier, judicial independence implies both the autonomy of judiciary and its willingness to render independent decisions. Granted, the institutional and individual independence of the judiciary will enable it to adjudicate

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45 See Sotirios A. Barber, 'Notes on Constitutional Maintenance' in Sotirios A. Barber and Robert P. George, *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton University Press, 2001) 162.

46 Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961.

47 Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* pp. 605-626.

48 Preamble.

49 Stefan Voigt, 'The Economic Effects of Judicial Accountability: Cross Country Evidence' (2008) 25 *European Journal of Economics* 95-123, 97.

disputes between litigants that appear before them impartially and thus grants legitimacy to the judicial role.[50]

However, judicial independence cannot be understood to mean a *carte blanche* to act arbitrarily. In fact, having secured a minimum standard of judicial independence under a new constitution, focus should then shift to whether that independence is being used in a manner that meets its purposes. That is where the quests for judicial independence and judicial accountability converge.

Whereas judicial independence focuses on the freedom and ability to decide, judicial accountability is concerned with the ways in which that freedom is actually used. Judicial accountability is therefore the flipside of judicial independence. Accountability not only conveys information about the judiciary's functioning, objectives, interests, and fundamental values it seeks to uphold, but also sets out the methods and techniques for ensuring members of the judiciary act consistently with those values.[51]

Measures towards judicial accountability can be split into three broad but interlinked categories: political, decisional and behavioural.[52] The first layer of political accountability consists of measures such as selection and tenure, inter-branch relations and conditions of service.[53] Political accountability in Kenya is secured both by the Constitution, which provides extensively for the relationship between the judiciary and the other branches of government, and by the Judicial Service Act, 2011, which requires the Chief Justice to make an annual report to the nation on the state of the judiciary and the administration of justice.[54] The report is to be sent to each house of parliament for debate and adoption.[55] The annual state of the judiciary report can be a point for dialogue between the judiciary and the public on one hand and between the judiciary and parliament on the other hand.

Decisional accountability, which includes appellate review and academic criticism of judicial outcomes, concerns the way judges are held accountable for their

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50 Roger M Asterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011).

51 Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 25-43.

52 Wendell L. Griffen, 'Comment: Judicial Accountability and Discipline' (2007) *Law and Contemporary Problems* 75-77.

53 Ibid.

54 Section 5(2)(b).

55 Ibid.

rulings and decisions.[56] Lastly, behavioural accountability involves the subjection of judicial conduct to disciplinary proceedings.[57]

Voigt proposes that, since independence is concerned with freedom from pressure from the state while accountability is about fidelity to the law, the two values are complementary and there should be no discord between them.[58] However, judicial accountability and judicial independence have been seen as values which are constantly clashing and intension with each other.[59] Peter Russell opines that judicial independence should in fact defer to judicial accountability in cases of conflict.[60] Other commentators have asserted that judicial independence and accountability must be given equal weight and consideration because they are two sides of the same coin.[61]

What is clear though is that the judiciary must be accountable because an extremely autonomous judiciary becomes void of accountability and runs the risk of becoming a power above the law which is an undesirable outcome.[62] Indeed such an eventuality would make nonsense of the liberal goals secured by judicial independence. Mechanisms of achieving judicial accountability however differ from one to the next legal system with the result that what works for one may lead to an absurdity in the next. For instance, in the United States judges may be held accountable through elections, confirmation hearings and citizen recall, processes which might not work as well for the Kenyan legal system. There are similarly concerns about the impact of election of judges on the enforcement of rights and freedoms and the right to an independent and impartial tribunal. [63]

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56 Griffen, above, n 52.

57 Ibid.

58 Stefan Voigt, 'Why States Create Independent Tribunals: A Theory of Constrained Independence' in Stefan Voigt, Max Albert and Dieter Schmidtchen (eds), *International Conflict Resolution* (Mohr Siebeck, 2006) 279.

59 Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 25-43.

60 Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001) 1.

61 More Atul Lalasaheb, *An Appraisal of the Judicial System in India: A Critical Study on Judicial Independence vis a vis Judicial Accountability* (Laxmi Book Publication, 2015) xvi.

62 Siri Gloppen, Roberto Gargarella and Elin Skaar, 'Introduction' in Siri Gloppen, Roberto Gargarella and Elin Skaar ,*Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass Publishers, 2004) 5.

63 International Commission of Jurists, *Independence and Accountability of Judges Lawyers and Prosecutors* (International Commission of Jurists, 2007) 48.

At the bare minimum, there are some common ways by which accountability can be achieved including through public hearing in appropriate cases, media freedom to report on judicial proceedings, critique by academic commentators, and the potential for reversal on appeal.[64] This approach is favoured by minimalists who feel that the judiciary can hold itself accountable and that any more measures beyond these could interfere with judicial independence.[65] In Australia, judges are viewed as accountable to the law which governs their conduct in the performance of the judicial office, retirement and removal and also through judicial review of decisions made by subordinate courts including on allegations of actual or imputed bias.[66] Judicial accountability is further enforceable through the requirement for reasons which then form the basis for appeals and serve as a corrective mechanism for arbitrary exercise of power.[67]

In Kenya, all of these approaches are applicable since, under the Constitution, hearings and trials are held in public[68] and the decisions of all courts except the Supreme Court are reversible on appeal.[69] The media can only excluded from trials where the exclusion is necessary for the protection of witnesses or vulnerable persons as well as public morality and order and national security in a free and democratic society with proper respect for the rights of the individual.[70]

At the same time, the High Court has supervisory jurisdiction over, and can call in and quash the decisions of, any subordinate courts including through judicial review to ensure fair administration of justice.[71] Any of the established grounds for judicial review under Article 47 and the Fair Administrative Action Act, 2015 would be applicable to supervision of subordinate courts by the High Court or courts of equal status. These accountability mechanisms are further underpinned by the provisions of Chapter Six of the Constitution on leadership and integrity which not only require honesty in the execution of public duties, but also demand declaration of conflicts of interest as well as accountability to the public for decisions and actions.[72]

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64 Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 25-43, 28.

65 Ibid.

66 Michael Kirby 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 41.

67 Ibid.

68 Article 50(1), (2)(d).

69 Article 163(7).

70 Article 50(8).

71 Article 166(6).

72 Article 73; see also the Public Officers Ethics Act, 2003; Leadership and Integrity Act, 2012; Judicial Officers Code of Conduct and Ethics, 2016.

Judicial accountability can also be enforced as is the case with some jurisdictions within the United States of America, by adopting performance measuring systems that seek to inform court administrators, the public and other stakeholders about the performance of the courts.[73] In Kenya, the National Council for Law Reporting has the capacity, for instance, to collate and analyse data on the number of decisions delivered and sent by individual judges as well as by court stations, status and location. Such measures must however take into account the different workloads of different judges, court types and locations.

Judicial Accountability and the Culture of Justification

Corder notes that the difficulty in reconciling judicial independence with accountability in post-authoritarian states has much to do with the complicity of the judiciary in the unjust past.[74] It has also been stated that part of the transitional justice process can include measures to hold the judiciary accountable for its role of the judiciary in the perpetuation of the authoritarian past.[75] The vetting process that was meant to determine the suitability of previously appointed judges to continue serving under the current Constitution should be seen within this context.[76] To begin with, whereas the retired Constitution emphasized the sovereignty of the State, the current Constitution emphasizes the sovereignty of the people themselves. It traces all sovereign power to the people of Kenya and indicates that the people might exercise that power directly or through their democratically elected representatives. Some of that power is delegated to state organs like the judiciary which must accordingly act in the name of and for the common good of the people.[77]

The emphasis on popular sovereignty as the locus of all power exercised by state organs like the judiciary shows a redrawing of the terms of the social contract between the people and the judiciary. Indeed, Article 159 of the Constitution confirms the view that judicial authority exercisable by the courts and tribunals is derived from the people. The term 'judicial authority' is expansive and extends to the power vested in the judiciary to determine what the law is and its application in the resolution of

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73 Richard Y. Schauffler, 'Judicial Accountability in the US State Courts Measuring Court Performance' (2007) 3 *Utrecht Law Review* 112.

74 Hugh Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa' in Peter H Russell and David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001) 194.

75 Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge 2010).

76 Vetting of Judges and Magistrates Act.

77 Article 1.

disputes.[78] Notably, judicial authority has been abused in the past because prior to the 2010 Constitution the judiciary was largely patronised by the executive arm of government leading to a loss of independence and the inability to deliver justice.[79] The judiciary similarly acted as a rubber stamp for presidential decisions in spite of the impact of those decisions on the lives of the citizenry.[80] As a result, whereas Kenya's judiciary was in the past used by both the colonial government and successive post-colonial governments to enforce state power and authoritarianism, the Constitution now establishes a culture of justification in which every exercise of judicial authority is expected to be justified.[81]

All state action must henceforth be justified on the basis, among other provisions, of Article 10 which binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions to respect national, founding, values and principles. These include: good governance, integrity, transparency and accountability.

'Good governance' has been defined as the manner in which power is exercised in the management of a country's economic and social resources for development' or rather 'sound development management'.[82] Good governance is therefore epitomized by among other characteristics predictable, open and transparent policy making processes, accountability for its actions, and a strong civil society participating in public affairs.[83] Participation is linked with democratic processes in the belief that a judiciary that involves the public in its policy making processes is better placed to take good decisions which in turn enjoy better public support.[84]

The United Nations Development Fund (UNDP) has defined 'good governance' as the existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations while mediating their differences.[85] The UNDP definition was

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78 I. M Rautenbach and E F J Malherbe, *Constitutional Law* (Butterworths, 1997).

79 See Henry Amadi, 'Persistence and Change of Neo-patrimonialism in Post-Independence Kenya' (German Institute of Global and Area Studies, 2009).

80 Stephen Mutula, Wilson K Muna and Geoffrey P Koma, 'Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency' (2013) 38 *The Journal of Social, Political and Economic Studies* 263.

81 Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

82 World Bank, *Governance and Development Report* (1992) 1.

83 Ibid.

84 Ibid.

85 UNDP, Governance for Sustainable Human Development: A UNDP Policy Document (UNDP, 1997).

recently adopted by the East African Court of Justice in *Baranzira Raphael v Attorney-General, Republic of Burundi*[86] a case from Burundi concerning the independence of the judiciary in the appointment of judges.

The court recognized that 'good governance' is underpinned in Article 6(d) as one of the fundamental principles governing the achievement of the objectives of the Community. Article 6(d) of the Treaty for the Establishment of the East African Community requires State parties to observe *inter alia* good governance which includes adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, and human and people's rights in accordance with the African Charter on Human and Peoples' Rights.

Article 2(6) of the Constitution recognizes any treaty ratified by Kenya as part of the laws of Kenya. Therefore though 'good governance' as a national value and principle of governance under Article 10 of the Constitution is yet to be defined, the decision in *Baranzira Raphael* which defines good governance to include accountability, and transparency can provide a relevant guideline for the interpretation of the meaning of good governance.

As these definitions would indicate, good governance must therefore be concerned with among others, the promotion of accountability for economic and financial performance of the judiciary including through public participation in decision-making processes. Good governance is not only participatory, transparent, accountable and equitable, but also promotes the rule of law and effectively makes the best use of resources.[87] The culture of justification requires the judiciary to conform all its action to the Constitution and to constitutionally valid statutes.

The proper meaning of the independence clause in Article 249 has been the subject of determination by the Supreme Court. In *Re the Matter of the Interim Independent Electoral Commission*[88] the court asserted that the independence clause is not a *carte blanche* for the independent institutions to act as they wish, but is a safeguard against undue interference with such institutions by other persons, or other institutions of government. According to the court, such a provision was incorporated in the Constitution as an antidote to an all-powerful presidency.[89] The independence clause in Article 249 is akin to Article 160(1), which insists on the independence of

86 Reference No. 15 of 2014.

87 Surendra Munshi , Biju Paul Abraham and Soma Chaudhuri, *The Intelligent Person's Guide to Good Governance* (Sage Publications, 2009)10.

88 [2011] eKLR.

89 Ibid.

the judiciary. So we can apply the approach in this case to the judiciary, so the judiciary, too, must configure its actions within the four corners of the Constitution and remain accountable to the people of Kenya. It is only by being accountable that the judiciary can attain legitimacy in the public eye.[90]

In *Judicial Service Commission v Speaker of the National Assembly*[91] it was unsuccessfully argued that the JSC as an independent commission was not subject to the 'oversight' mandate, direction or control of the National Assembly and its committees when discharging its mandate lawfully. The court held that the constitutional provisions for parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully structured oversight towards the achievement of a better quality of life for the people of Kenya.[92] The court cautioned that parliament's constitutional powers of oversight did not amount to a right to subjugate, micromanage, control or direct the JSC. Similarly, it was noted that oversight connotes the constitutional imperative of the enhancement of constitutional democracy and the rule of law through upholding and protecting the financial and administrative independence of constitutional commissions.[93]

Similarly, concerning the recruitment process for the second Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court under the current Constitution, the actions of the JSC were challenged as having been undertaken *ultra vires* the Constitution and statute, unprocedurally and unreasonably in *Trusted Society of Human Rights Alliance v Judicial Service Commission*.[94] The petitioners contended that the independence and discretion of the JSC has to be exercised within the four corners of the Constitution and the law. However, the JSC maintained that it had the sole mandate of recommending to the president persons for appointment as judges of the superior courts.[95] The court however held that the independence clause does not equate to a *carte blanche* for the JSC to act or conduct itself on whim but that the independence was, by design, configured for the execution of its mandate and performance of its functions as prescribed in the Constitution and the law. The court

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90 Wim Voermans, 'Judicial Transparency Furthering Public Accountability for New Judiciaries' (2007) 3 *Utrecht Law Review* 148–159.

91 [2014] eKLR.

92 Ibid.

93 Ibid.

94 [2016] eKLR.

95 Ibid.

further held that the Constitution was intended to instil a culture of justification 'in which every exercise of power is expected to be justified'.[96]

The emerging point is that in the Hohfeldian scheme of jural opposites, the judiciary's privilege of independence gives rise to a duty of accountability to the people of Kenya.[97] The duty of accountability arises from the fact that the judiciary is but a delegate of the people of Kenya exercising donated sovereign power.

Accountability may be enforced through oversight exercised by the other two branches of government. Some have previously taken the view that, because judicial accountability entails responsibility to the people on whose behalf it exercises the judicial power; it is consequently not accountable to any other institution of the government.[98] This idea is, however out of touch with current constitutional reality.

First, the separation of powers does not envisage a complete or mechanical separation of powers but a system of checks and balances. Secondly, under Article 1 of the Constitution the people can exercise their sovereign power including of demanding accountability of the judiciary, through any of the state organs. This arguably includes the formal appointive role of the president in appointment of the Chief Justice and Deputy Chief Justice and the subsequent approval by parliament in addition to other oversight functions of parliament. Similarly, the constitutional commissions and independent offices including the Auditor General also have a role to play in ensuring judicial accountability. Indeed, the express purposes of the Chapter Fifteen commissions is to protect the sovereignty of the people of Kenya, secure observance of democratic values and principles by all state organs and promote constitutionalism.[99] At the same time, judicial accountability is owed by the courts and the judiciary as an institution, both because individual judicial independence exists primarily for the benefit of institutional independence and because appropriate intra-branch accountability is essential for maintaining appropriate inter-branch accountability.[100]

The challenge is to ensure that the quest for judicial accountability does not lead to unnecessary loss of judicial independence or undue interference with the judiciary such as was the case in point in *Judicial Service Commission v Speaker of*

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96 Ibid at 245.

97 Wesley Hohfeld,'Fundamental Legal Conceptions as Applied in Judicial Reasoning"(1917) 26 *Yale Law Journal* 710.

98 Evans Gicheru,'Independence of the Judiciary: Accountability and Contempt of Court' (2007) 1 *Kenya Law Review* 1-18, 6.

99 Article 249.

100 Stephen B Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations' (2007) 95 *Georgetown Law Journal* 909.

the National Assembly.[101] Parliament had recommended the removal of JSC commissioners for sending the Chief Registrar of the Judiciary on compulsory leave as part of disciplinary process against her. On challenge in court, it was held that the constitutional provisions for parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully structured oversight for accountable governance and that parliament's constitutional powers of oversight did not amount to a right to micromanage or control the JSC. [102]

For this reason, it is important to remember that while accountability is mostly concerned with the way the judicial system works, it can also extend to the way judges decide individual cases.[103] Scrutiny of individual decisions should however be reserved for the cases where a judge has acted contrary to the Constitution or other rule of conduct and not in every case where the decision might be unpopular or lead to unpleasant outcomes. This is more so where the case has political implications because judicial independence, as discussed earlier, is about freedom to decide cases impartially without influence from any quarters including the executive. In any case, the Constitution shields members of the judiciary from liability in any action or suit for good faith acts or omissions in the lawful performance of judicial functions.[104]

Accordingly, judicial accountability should serve to moderate and repair abuse of decisional independence and prevent decisions unchecked by law and the prospect or reality of appellate review.[105] In addition, judicial accountability should be directed to conduct that amounts to misuse of judicial independence and therefore directly interferes with the ability of the of courts to achieve impartial, effective and expeditious administration of justice.[106]

Emerging Challenges to Judicial Independence and Accountability in Kenya

There are subtle manifestations of threats to judicial independence in Kenya today. Whereas there exist legal safeguards against that threat, political pressure is increasing. One area in which there have been challenges of accountability is in the

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101 [2014] eKLR.

102 Ibid.

103 Stephen B Burbank and Barry Friedman, 'Reconsidering Judicial Independence' in Stephen B Burbank and Barry Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002)

104 Article 160(5).

105 Stephen B Burbank at 912.

106 Ibid.

process of recruitment of judges. If any government is perceived to appoint deferential judges or friendly judges to the bench, trust in the judiciary is damaged whether or not those judges are in fact biased in their rulings.[107] Accordingly, the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers, in relation to appointment and promotion of judges, have repeatedly recommended the use of bodies that are independent from the executive, plural and composed mainly of judges and members of the legal profession, and that apply transparent procedures.[108]

The Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles requires transparent, public and well known processes and qualifications for appointment of judges.[109] The reality on the ground has however been different. For instance, the challenge to the recruitment process in the *Trusted Society of Human Rights Alliance* case[110] was mounted on the grounds *inter alia* that the JSC had adopted an opaque and non-accountable process of pre-interview short listing by which it had knocked out even candidates who met the minimum constitutional and statutory qualifications.

Also, there is always the danger that judicial service commissions can be circumvented or packed and become politically biased.[111] For instance while the president has power under Article 171(h) to appoint one woman and one man to represent the public, there is no statutory procedure requiring advertisement or consideration of merit in such appointments. The truth is that this provision was introduced into drafts for a parliamentary system with a president with few personal powers (including perhaps this one); it is less suitable for a presidential system,

Article 232(1) (g) provides that merit is to be considered subject to the need for representation of Kenya's diverse communities and affording adequate and equal opportunities for men and women, members of all ethnic groups and persons with disabilities. Besides, Article 250(2) envisages that each member of a constitutional

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107 Siri Gloppen,'Courts, Corruption and Judicial Independence' in Tina Søreide and Aled Williams eds, *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing, 2014) 71.

108 Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, 'Report to the Human Rights Council', UN Doc. A/HRC/11/41 (2009).

109 *Commonwealth of Nations Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium of Best Practices* (Commonwealth of Nations, 2015) http://thecommonwealth.org/media/press-release/commonwealth-announces-principles-judicial-appointments-tenure-and-removal, accessed 10th May 2016.

110 Above.

111 Ibid.

commission is to be identified and recommended for appointment in a manner prescribed by national legislation.

But, unfortunately the present occupants of the seats in the JSC reserved for the public are appointed to those seats on the basis of unknown criteria or qualifications and without any advertisement, competitive interviews or input from the public. Section 15 of the Judicial Service Act, 2011 is potentially unconstitutional in so far as it sustains the culture of secretive appointments and fails to provide for a competitive process of appointment of the president's nominees to the Commission. Such a situation is unsustainable and engenders a lack of transparency or accountability in the process of appointing persons to the very body charged with overseeing judicial independence.

In comparison, South Africa the president's nominees are appointed after consultation with the leaders of all the parties in the National Assembly.[112] It is therefore expected that the president's nominees in South Africa represent the interests of the political class represented in the National Assembly and whose input must go into their appointment.

Under the current Constitution, the courts have held that all appointments to public positions must be open to the public and such positions must be advertised since the era of handpicking persons and appointing them as public officers has been buried with the retired Constitution and has no place in the current constitutional dispensation.[113] Further, public appointments require evidence of a competitive process that enables public participation in the process or shows the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the current occupants of those positions.[114]

There have been further attempts to enact a law regulating the number of persons the president can appoint thus giving him greater latitude in the appointment of the Chief Justice. On 1st December 2015, the National Assembly passed a miscellaneous amendment Act including an amendment to Section 30(3) of the Judicial Service Act, 2011, requiring the Judicial Service Commission, in recommending persons for appointment as Chief Justice and Deputy Chief Justice to submit three names for each office and giving the president discretion to appoint one of the three.[115] In *Law Society of Kenya v Attorney-General*[116] the amendment was

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112 Section (1)(j) of the Constitution of South Africa, 1996.

113 *Republic v Anti-Counterfeit Agency Ex parte Moses Maina Maturu* [2016] eKLR.

114 *David Kariuki Muigua v Attorney-General* [2012] eKLR at 12.

115 Statute Law (Miscellaneous Amendment) Bill, 2015.

116 [2016] eKLR.

impugned on the basis that the procedure proposed in the amendment would be in blatant violation of Article 166(1) (a) of the Constitution. The court held that the amendments were in fact unconstitutional and took away the discretion of the JSC in the appointment process.

Allegations of gross misconduct by judges can signify a lack of behavioural accountability and may form the basis of removal from office. A tribunal was in this regard formed to investigate the conduct of a former Deputy Chief Justice who was alleged to have harassed a security guard.[117] The Judge recommended her dismissal but she resigned after its report but before the President had acted on it. Corruption within the judiciary is yet another challenge to judicial accountability. So far, two other tribunals have been formed under the Constitution to investigate the conduct of two different judges on charges relating to corruption.[118] One judge retired by operation of law as a result of the majority decision of the Supreme Court on the retirement age of judges delivered before the tribunal could complete its work.[119] In the other case, the tribunal has recommended that the judge be removed from office.[120] On the other hand, **c**orruption and perceptions of corruption, within the judiciary not only undermine the courts' credibility as corruption fighters but also erodes trust in the courts' impartiality. Corruption also harms the broader rule of law function that the judiciary is entrusted with in democratic systems.[121]

Conclusion

The interrelated concepts of judicial independence and accountability work together to ensure democratic values. The concepts require not only that judicial appointments

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117 Gazette Notice No. 2057 of 24th February, 2012 Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court of Kenya Lady Justice Nancy Makokha Baraza (Government Printer, 2012).

118 See: Gazette Notice No 1084 of 23rd February, 2016 Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Justice Philip Kiptoo Tunoi, Judge of the Supreme Court of Kenya' (Government Printer, 2016); See also Gazette Notice No. 8279 of 19th June, 2013 Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of The High Court of Kenya (Government Printer, 2013) .

119 See majority decisions in *Justice Kalpana H Rawal v Judicial Service Commission* [2016] eKLR ; see also Samuel Karanja 'Tribunal Ends Sh200m Bribery Probe Against Judge Tunoi' (*Daily Nation*, Nairobi, Monday 27th June 2016) http://www.nation.co.ke/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html, accessed 9th October, 2016.

120 *Report and Recommendation into the Conduct of Hon Mr Justice Joseph Mbalu Mutava, Judge of The High Court of Kenya* (Government Printer, 2016).

121 Siri Gloppen,'Courts, Corruption and Judicial Independence' in Tina Søreide and Aled Williams, eds, *Corruption. Grabbing and Development: Real World Challenges* (Edward Elgar Publishing, 2014) 71.

are made on the basis of clearly defined criteria and publicly declared processes, but also that the judiciary is accountable to the Constitution and to the law. Lack of accountability and real independence in the appointment process is likely to undermine public confidence in the judicial system and erode the importance of the judiciary as one of the three pillars upon which a responsible government relies. At the same time there must be accountability for judicial conduct as a way of ensuring that the judiciary not only upholds but is seen to uphold the rule of law honestly, independently and impartially. The challenge remains ensuring judicial accountability in ways that do not necessarily impinge on judicial independence.

CHAPTER TWO

AN OVERVIEW OF THE KENYAN JUDICIARY

Jill Cottrell Ghai

The Judiciary Today

The system that exists now is very much based on the English model (minus the lay justice element—see below). At the apex of the system is the Supreme Court, established in 2011 on the basis of the Constitution.[1] This was the first time Kenya had a court of that name since the old 'Supreme Court'[2] was renamed the High Court after Kenya became a republic in 1964.

The creation of the new Supreme Court means that there is the possibility of two appeals even for a case beginning in the High Court: first to the Court of Appeal and then to the Supreme Court. The motive for creating the Supreme Court in the Constitution was to add a new court, hopefully not to be entirely staffed by judges from the existing courts, to raise the standards of the courts generally, particularly in terms of integrity (for reasons discussed later). The strategy was based on that in South Africa where the Constitutional Court was a new court at the top of the system staffed by highly competent and committed people. There competence and integrity

1 Supreme Court Act No. 7 of 2011, Cap. 9A of Laws of Kenya.

2 It comprised the High Court, and was not of course supreme since there were two levels of appeal above it. The English nomenclature stems from the reforms of the 1870s when for a short while the House of Lords as a court ceased to exist, so the Supreme Court really was supreme. In 2009 the name was transferred to the new final court of appeal.

were not the issue but a sense that too many judges had been implicated in the apartheid era system.

The Supreme Court has an establishment of seven judges, and the quorum is five. At the time of writing the court cannot be quorate, due to the retirement of the Chief Justice, Mutunga, and two judges who reached the retirement age of 70. However, the vacancies will be filled by the time this book is published.

The Supreme Court is mainly an appeal court—hearing appeals from the Court of Appeal. If the case is about the Constitution, the person who lost in the Court of Appeal has a right to appeal to the Supreme Court. In other cases, the Supreme Court must give permission for the appeal and can only do so if a matter of general public importance is involved,[3] or if otherwise 'a substantial miscarriage of justice may have occurred or may occur'.[4]

Some cases may go straight to the Supreme Court. These are a presidential election petition and a case asking for an advisory opinion.[5] The second can arise even if there is no actual current dispute, and would usually involve a request for an interpretation of the Constitution. Only a state organ can ask for such an opinion. So far the Attorney-General, the electoral commission, the Senate, the National Land Commission, the National Gender and Equality Commission are among the organs that have sought opinions. And an advisory opinion must be in a matter concerning county government, though the Supreme Court has taken a fairly broad view of this requirement.[6]

Below the Supreme Court is the Court of Appeal, filled mostly by promotion from the High Court. It now comprises 24 judges (the legal maximum being 30).[7] A significant increase in the numbers has been a feature of the post-Constitution period. Of the 24, eight are women; in the pre-Constitution days there was no more than one woman on that bench. And the court now has permanent benches in six towns: Nairobi, Mombasa, Nyeri, Kisumu, Nakuru and Eldoret.

The High Court hears the first stage of major cases. It is what is usually called a court of first instance of unlimited jurisdiction, able to hear any civil or criminal case. In Kenya there is a slight qualification (see below). The High Court also hears

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3 Supreme Court Act ss. 15 and 16.

4 S. 16(2)(b).

5 Articles 140 and 163(6) respectively.

6 E.g. in the 'two-third gender in Parliament rule' case where 'The gender composition of both the National Assembly and Senate, if it could touch on the constitutionality of these organs, is an issue bearing impact on county government' (majority in *Reference Number 2 of 2012*, para. 20.

7 Figures are taken from the Judiciary website www.judiciary.go.ke.

appeals from the magistrate courts, and from a few other decision making bodies, under Acts of Parliament.[8] For example it can hear an appeal from a decision of the Commission on Administrative Justice (the Ombudsman) about access to information under the Access to Information Act 2016, s. 23(3). It also has judicial review jurisdiction: hearing applications for decisions of various public bodies, or even some private bodies with functions affecting rights, to be set aside. The main ground would now be for violation of some provision of the Administrative Justice Act, which was passed to flesh out the detail of the right to fair administrative action under Article 47 of the Constitution. The boundary between the work of the Judicial Review Division and the Constitutional Division became somewhat blurred, especially since that Act was passed, and the divisions were recently merged.

The High Court has jurisdiction specifically assigned to hear cases for violation of the Bill of Rights and any other case on the Constitution.[9] Also specially mentioned are cases about the powers of levels of government.[10] It deals with parliamentary election petitions, and those about election of governors.[11]

The Court also has various other divisions for administrative convenience: Family, Commercial and Admiralty and Criminal.

The number of judges has been greatly increased in the last few years and the judiciary website lists 83 judges of whom 34 are women (a remarkable 41%). There are far more High Court stations around the country now, including in areas distant from Nairobi that formerly had to rely on visiting judges, such as Garissa in the North East.

Qualifications for judges in these 'superior courts' are broader than in the past. It is no longer required that a person have practiced or sat on a lower bench. Post-qualification experience as an academic or in another legal capacity will suffice.[12] For the Supreme Court that experience must total at least 15 years, and for the Court of Appeal and High Court at last 10. Although generally under the Constitution a state officer (a category that includes judges) must be Kenyan citizens, this does not apply to the judiciary. However, the experience is supposed to have been obtained in a common law, Commonwealth country. Promotion from magistrate to High Court is

8 There is a list of various tribunals and where appeals lie in Annex 5 of: *Final Report of the Task Force on Judicial Reforms* (Chairman: The Hon. Mr. Justice William Ouko) (Nairobi: Government Printer, 2010).

9 Article 165 (3)(b) and (d).

10 Article 165)3)(d)(iii).

11 Elections Act s. 75(1).

12 Article 166.

common; it is not the case—unlike England—that the norm is to be appointed to the High Court from the practising profession.

One arguable change from past possibility concerns part time judges or acting judges. Under the old Constitution the possibility of being an acting judges was contemplated,[13] as was 'acting up' in a higher rank.[14] The statute law includes provision for Commissioners of Assize, who must be qualified to be judges of the High Court, but appointed on a temporary basis to hear cases.[15] The practice seems to date back to the Mau Mau emergency period. Apparently no-one has held such an appointment for some time, but in 2012 in the National Assembly an MP argued for the appointment of such commissioners to ease the backlog. The Attorney-General replied that the JSC had had discussions with the Chief Justice on the topic and appointments were likely in the near future.[16] There are some traditional justifications for this sort of practice. A South African practitioner says,

> It is a practical necessity that acting judges be appointed to fill in when permanent judges are temporarily unavailable to hear cases due to illness, long leave, other assignments or personal circumstances. Acting appointments are also a useful method of screening prospective candidates for permanent appointments.[17]

But arguably any sort of High Court level appointment that allows non-renewal for poor performance—which might be read to mean politically unacceptable performance—assessed by any other process would violate the Constitution.[18] To be a judge one has to go through a taxing process. To be removed another special and demanding process must be employed. To allow people to be appointed to carry out the judicial task without the first process, or cease to sit without the second, would be a violation of the Constitution.

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13 S. 35(1)(f)

14 S. 46(4).

15 Commissioners of Assize Act.

16 *National Assembly Official Report* (Hansard), March 1 2012, p. 6. Apparently the CJ tweeted about the possibility in 2011. Note: Kenyan Hansard may be available online via the parliament website: www.Parliament.go.ke, in an html version at http://info.mzalendo.com/hansard/. and on Google books – go to http://www.kenyalaw.org/kl/index.php?id=852.

17 Johan Trengove, 'The prevalence of acting judges in the High Court – is it consistent with an independent judiciary?' http://www.sabar.co.za/law-journals/2007/december/2007-december-vol020-no3-pp37-39.pdf.

18 For another discussion of a similar issue see Berry Hsu, 'Judicial Independence under the Basic Law?'(2004) 34 (2) *Hong Kong Law Journal* 279-302 https://hub.hku.hk/bitstream/10722/81798/1/content.pdf.

The 'equal status' courts

A natural progression would at this point usually go to lower courts. But in Kenya we encounter a peculiarity. There are two courts, required by the Constitution to be established by Parliament, describe as 'courts with the status of the High Court'. They are to hear employment and labour relations disputes and environmental and land cases. This rather odd arrangement is a legacy of the Committee of Experts. In its final report, that body said,

> [I]t [the CoE] did not support the PSC's recommendation that the specialised courts on employment and land and the environment be removed and replaced with a broad grant of authority of Parliament to establish 'other courts' with 'such jurisdiction, functions and status' as Parliament may determine. First, such provisions would give Parliament a blank cheque to establish courts whose level and jurisdiction might supplant the superior courts established in the Constitution.
>
> Further, this would not signal establishment of specialized courts on employment and land/environment, and would not solve the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. Thus, the CoE reinstated the provision allowing Parliament to establish, by legislation, employment and land/environment courts with a status equivalent to the High Court as had been provided for in the earlier drafts.[19]

This decision has not eliminated uncertainties about jurisdiction, though it has now been held clearly that the two 'equal status' courts do have exclusive jurisdiction in their particular fields, and that they can if necessary in such a case deal with issues of the Constitution.[20] The Court of Appeal said,

> And in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file 'mixed grill' causes in any court they fancy. This will only delay dispensation of justice.

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19 *Final Report of the Committee of Experts* Section 8.11.3. available at https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf.

20 *Daniel N Mugendi v Kenyatta University and 3 others* [2013] eKLR http://kenyalaw.org/caselaw/cases/view/94446/.

> In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.

But a much more difficult issue arose out of the efforts of the Chief Justice to clear court backlogs. He assigned judges from the 'equal status' courts to hear criminal appeals from magistrate courts. Challenges to the outcome of these appeals have been successful. In one case the Court of Appeal said,

> Angote, J. having been appointed as a judge of the ELC can only perform the functions and duties of the ELC and cannot purport to discharge the functions and duties of the High Court because that is not the office or the court to which he was appointed. We are therefore unable to accept the argument advanced by Mr Monda that once a judge has been appointed as a judge of the High Court, ELRC or ELC that judge is available for deployment to any of those three courts by the Chief Justice. We say so because one cannot be appointed a judge at large as, Waweru, J. ably demonstrated in his dissent in the case of *Benson Ndwiga Njue and 108 others v Central Glass Industries Ltd* (2014) eKLR, nor can a Judge be appointed without portfolio. A judge is appointed to a particular court and given that appointment and subsequent swearing in to that court, that judge can only perform the duties of that court.[21]

Of these two equal status courts, the Employment and Labour Relations Court has twelve judges (five women) and the Land and Environment Court fifteen judges (four women). They sit in the same centres as High Court judges, though informal evidence suggests that the relations between the High Court and other judges are not necessarily close.

Moving to magistrates. The situation remains complex. In 2014 the Judiciary gave figures of 430 magistrates actually sitting in court (a number of others were holding registrar and other administrative positions). They were sitting in about 10 locations.

Under the Magistrates Courts Act there are three main grades of magistrate: Resident (within which there are senior resident magistrates), Principal (within which there are senior principal magistrates) and Chief (in ascending order). In civil cases each of the five grades has a maximum financial jurisdiction (from KShs5 million to

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[21] *Karisa Chengo, Jefferson Kalama Kengha and Kitsao Charo Ngati v Republic* [2015] eKLR http://kenyalaw.org/caselaw/cases/view/108895/.

KShs20 million). In addition they have jurisdiction in criminal cases, under the Criminal Procedure Code and under customary law in personal matters. Almost all criminal cases are heard by magistrates except for murder. Even robbery with violence, a capital offence, is tried by magistrates.

They also have some jurisdiction to hear cases concerned with employment and labour relations and environment and land. Magistrates may be assigned to special courts such as the anti-corruption court, children's court and traffic court.

Under the Constitution the magistrates courts do not have jurisdiction to hear human rights claims, though they may entertain human rights issues as incidental to the cases they try. A new provision in the Magistrates Courts Act is well-nigh incomprehensible, and seems to add nothing to the courts' powers.[22]

Finally, the 2014 figures showed 36 kadhis, also of different grades, sitting in 29 places, including at least two refugee camps. The Kadhi Courts hear cases involving Islamic personal law—marriage and family matters, and succession. Some kadhis are qualified lawyers but most are not. In practice most of the cases are brought by women.

The most recent addition to the court system has been the small claims court.[23] Under the Small Claims Court Act, 2016, the Chief Justice is able to set up small claims courts, and is supposed to ensure that a court will be available for every sub-county (constituency) and in the future for smaller areas. The courts will deal only with civil cases, and even these are strictly limited. Cases that can go to the courts may arise from a contract of sale or for providing a service, or from tort. Land cases are not included. Cases based upon human rights violations will not usually be covered.

Some Background to the Current System

Unlike some West African countries, the legal system of Kenya does not include a system of customary courts, though customary law, in relation to personal matters such as marriage, divorce and succession, as well as in relation to land to some extent, is recognised by statute, the Constitution and the courts. Those customary law issues are dealt with in the 'regular' courts, though it is clear that in practical terms many

[22] S. 8 says that a magistrate's court may hear applications for redress of violation of a right but only for rights to freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude. And then the courts are still unable to deal with claims for compensation.

[23] Proposed in 2010 by the Ouko Report.

disputes are resolved by tribunals with more local legitimacy. And, again, in reality, some local, customary procedures may creep into even the criminal courts.

At an earlier stage in Kenya's history customary courts did exist. During the colonial period, the courts for Africans were hardly characterised by that mantra of modern constitutionalism: the separation of powers. They were supervised by the administrative provincial administration—originally native administration—comprising colonial civil servants. The courts for non-Africans, however, were under the supervision of the Supreme Court, to which appeals went. The African courts dealt not only with civil but with criminal cases.[24]

This system was gradually changed, first to give supervisory functions to African court registrars. Then those courts became part of the judicial system rather than the administrative. In 1967, after independence, the Magistrates' Courts Act ended the dual system of courts. It set up several types and grades of magistrates courts. Certain courts had jurisdiction in customary law, others only in the 'received law' (as the imposed English law has sometimes been called). Controversially, some magistrates could be administrators, depending on a decision by the Judicial Service Commission as to which administrators were suitable to hold such a position. Appeals went sometimes to a superior magistrates court, but eventually a case could get to the High Court, though perhaps only on a matter of law.

The only type of official court that does not correspond to a very English model is the Kadhi Courts. These originated in the coastal area, which had been under the rule of the Sultan of Zanzibar, became a British Protectorate, and finally part of independent Kenya in 1963.[25] The Sultan always insisted that his former subjects retain the right to be governed by Shari'a and go to Islamic courts. Eventually kadhi courts were also established in other parts of the country with Muslim residents. The Kadhis' Courts Act of 1967 reflected the existence of other courts, formally establishing four courts in the coastal region and two elsewhere. They did not have exclusive jurisdiction over matters of Muslim personal law. The High Court could also hear such cases—and did not have to apply Muslim law.

The customary law courts of course were not staffed by lawyers, and nor were all magistrates courts. But otherwise use of lay people was somewhat limited. Kenya

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[24] This is based mainly on YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present* (Oxford University Press, 1970) (reprinted with introduction by Y Ghai in 2001) pp. 129-138 and pp. 357-374. See also Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27 *Journal of African Law* pp. 42-61.

[25] Ghai and McAuslan 131, 365.

had a jury system—but only for the settler population (and only the Europeans among them).

There was no system of lay justices: individuals who, until now in England, hear minor criminal cases, and certain other matters like liquor licence applications, but do not require any legal qualification. Justices of the Peace were appointed under a 1910 Ordinance, with powers to administer oaths (there being few lawyers in many places who could act as commissioners for oaths as most lawyers do these days). They could also arrest, and issue arrest warrants. Certainly by the time of independence they could not try anyone.[26] They also performed the function of prison visitors under the Prisons Act.

For a considerable time, criminal trials in the High Court required the presence of assessors. These were community members appointed to assist the judge to understand the local situation.[27]

All these features were done away with eventually, trial by jury in 1963 (after that assessors were used for all High Court trials). Justices of the Peace were abolished in 1983 and assessors in 2007.[28]

There was a lay element in industrial courts also. These came into existence in 1964 and had the not uncommon tripartite structure: a judicial president with the power to appoint two assessors: one from the trade unions and one from the employers' federation. Assessors disappeared from this court system in 2011.

During the colonial period the legal system in East Africa was complex. For many years the final court of appeal for Kenya (as for many colonies) was the Judicial Committee of the Privy Council, sitting in London. Appeals were abolished in each country after independence, in conjunction with the shift from being a dominion (still recognising the Queen as head of state[29]) to being a republic.

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[26] The version after the amendments in LN236 of 1964, which were merely technical following independence, is available on Kenyalaw.co.ke under repealed statutes. Earlier amendments do not seem to have changed the substance of the Ordinance (later Act), so it seems right to conclude that AG Muli was wrong to say, when moving the Bill to repeal the Act that JPs could try cases (arrest, adjudicate a dispute and render justice himself – Second Reading of the Justices of the Peace (Repeal) Bill, Hansard, Oct. 18-December 1 1983 p. 19.

[27] There is an account of the role of assessors in Momanyi Bwonwong'a, *Procedures in Criminal Law in Kenya* (Nairobi: East African Educational Publishers, 2994) pp. 235-

[28] Intriguingly—indeed worryingly—an appeal from a trial by Judge with assessors came before the Court of Appeal as recently as 2013. The assessors had been present only for the prosecution case. The CA ordered a retrial (*Brian Kariuki v Republic* [2013] eKLR http://kenyalaw.org/caselaw/cases/view/92555/).

[29] During that period the head of state was the Governor-General, representing the queen; the GG had very little independent possibilities of action, as he (all were men) had to act on the advice of the government.

During the colonial period, there was another transnational court: the Court of Appeal for Eastern Africa (covering not only Kenya, Uganda and Tanganyika, but also Zanzibar, Seychelles, and Aden, and at certain periods Somaliland, Nyasaland (now Malawi) and St Helena). The Court was not a creation of the East African Community (Mark 1), but it was taken over, as it were, by the Community and wound up when the Community was dissolved in 1977. From then on, Kenya had only one appeal from the High Courts. Appeals ended with the Court of Appeal until it set up a new Supreme Court under the 2010 Constitution, restoring the possibility of two appeals.

However much the British may pride themselves on the achievements of the common law, the administration of justice in colonies, especially one like Kenya with a settler population, fell far below that legal system's supposed virtues. Not only was the separation of powers conspicuous by its absence, especially when it came to the system for natives, but the very existence of separate judicial systems for different groups was a denial of equality and rule of law. The use of jury trial for Europeans (only) was a particularly important example, often leading to acquittals of the guilty by their peers (equals) namely other Europeans.[30] When it came to the Mau Mau period, the severity of the treatment of individuals and communities, the use of detention without trial, the absence of remedies, the biased nature of the legal system, extending to rigging of the outcome, did nothing to instil in Kenyans any faith in a system of justice.[31]

Some of the authors in this book touch on the issue of colonial law and its inappropriateness for Kenya (e.g. Franceschi).

Post-colonial System and its Decay

Things were not very much better after independence. By the time Kenya embarked on a formal process of making a new constitution the judiciary was a fairly discredited institution. The entertaining book by a former Chief Justice leaves an impression of a judiciary riddled with incompetence, self-indulgence, nepotism, lack of professionalism, subservience to the executive and corruption.[32] This is of course

[30] See, for example, Y P Ghai and J P W B McAuslan, Chapter IV esp. p. 169.

[31] On the period see, for example, Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London: Jonathan Cape, 2005).

[32] Abdul Majid Cockar, *Doings, Non-doings, and Mis-doings by Kenya Chief Justices, 1963-1998* (Nairobi: Zand Graphics, 2012).

over-stated, but the situation was fairly dire. The judiciary was also under-resourced.[33]

Various amendments over the years whittled down the democratic credentials of the Constitution, including the creation of a de jure one-party state in 1982. In the Constitution of Kenya (Amendment) Act No. 4 of 1988 the independence of the higher judiciary was done away with, but the provisions were essentially restored in 1990. However, the independence of the judiciary had ceased to be a reality some years before 1988. An Africa Watch publication in 1991 said, 'At the heart of the human right crisis in Kenya is the lack of an independent judiciary. Courts are used to dispose of political opponents and critics. On a broader basis, the court have also become a weapon for the powerful and wealthy to settle personal vendetta and local disputes'.[34] Of the restoration of judicial independence in 1990 it wrote that 'legal critics described it as cosmetic'.[35,36]

Other authors also trace some aspects of the decline of the judiciary during this period, including Franceschi.

Out of the Abyss—Eventually

Consciousness of the low reputation of the judiciary led to a number of initiatives for improvement. A committee appointed by the then Chief Justice and chaired by a Court of Appeal Judge, Richard Kwach, on the Administration of Justice in 1998, concluded that both petty and grand corruption existed in the judiciary. The corruption took the 'form of inducing court officials to lose or misplace case files, delay trials, judgements and rulings. Then there is the actual payment of money to judges and magistrates to influence their decisions'.[37] It made a number of recommendations to stop corruption, including vetting of candidates, a Code of Ethics, declaration by members of the judiciary of assets on appointment and

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33 See Chege Waitara, 'Judiciary: Return to Public Confidence' in Curtis Njue Murungi, *Judiciary Watch Report Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (Nairobi: International Commission of Jurists – Kenya and Konrad Adenauer Stiftung, 201) 241-265, 259-60.pp.

34 *Kenya: Taking Liberties* (New York: Africa Watch, 1991) p. 145.

35 P. 155.

36 This paragraph is taken from Linette du Toit, Maxwel Miyawa, Yash Ghai and Jill Cottrell Ghai, 'Constitutional Reforms and Judicial Appointments in Kenya', forthcoming in Hugh Corder and Jan Van Zyl Smit (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Cape Town: Siber Ink).

37 *Report of the Committee on the Administration of Justice* (Chairman: Hon. Mr. Justice R O Kwach) (Nairobi: Government Printer, 1998), pp. 9-12.

thereafter every three years, hearing of all cases in public, and regular transfers from one location to another to 'reduce undue familiarity'.[38] Other issues identified included drunkenness and sexual harassment of women magistrates.[39] Luis Franceschi in this book summarises the work of various commissions over the years, especially in relation to codes of ethics.

The constitution review process began two years later or so. Conscious of the low esteem of the judiciary, but determined to make the judiciary a central plank in the mechanism to sustain the new constitution, the chair, Yash Pal Ghai, decided to follow up the Kwach report with one for the constitution drafting process, particularly because Kwach had had little or no impact. The International Commission of Jurists Kenya invited a panel mainly of judges, from four Commonwealth countries. The members were shocked by what they heard.[40] They wrote,

> While many of Kenya's judges continue to fulfil their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed. …
>
> The maintenance of judicial independence and impartiality is the very reason why judges are given such a privileged position in society. It is why they have security of tenure in office. It is why they are given guarantees of financial independence. It is why they are treated with deference and respect in their courtrooms.
>
> Where corruption occurs in the Judiciary, it is the worst form of abuse of public trust since honesty, integrity and fairness are the features that entice citizens to such recourse in the courts, only to be ambushed.
>
> It is our view that the twin goals of accountability and independence can best be achieved by exposing the judicial structure to public view. At present, there are crucial aspects of the Kenyan judicial structure that are hidden from public view. Secrecy breeds suspicion and distrust. It is the Advisory Panel's view that several reforms are

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38 Ibid at p. 11. See also Richard E Messick, 'Uncorking the bottlenecks: Using political economy analysis to address court delay' ((Bergen: Chr. Michelsen Institute (U4 Brief 2015:10)) (citing Moog, Robert S. 1997, 'Whose Interests Are Supreme? Organizational Politics in the Civil Courts in India' (Ann Arbor, MI: Association for Asian Studies), available at http://www.u4.no/publications/uncorking-the-bottlenecks-using-political-economy-analysis-to-address-court-delay/. Note: this paragraph is also taken from du Toit et al. above.

39 See 'Kenyan courts damned by report' http://news.bbc.co.uk/2/hi/africa/213838.stm.

40 *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* Published by the International Commission of Jurists, Kenya in 2002. The report is available in html format at http://www.commonlii.org/ke/other/KECKRC/2002/8.html. The members were Justices George Kanyeihamba (Uganda), Yvonne Mokgoro (South Africa), Damian Lubuva (Tanzania) and Robert Sharpe (Canada) and Professor Ed Ratushny (Canada).

> required to make the institution of the Judiciary more accountable to the public. We have concluded that more transparent processes are called for and we make several recommendations in that regard in relation to appeals, the appointment of judges, the conduct and removal of judges and the Judicial Service Commission.[41]

Following this advice, the different constitutional drafts over the next few years included various measures to strengthen the judiciary and its independence (see below). One important measure—recommended by the Commonwealth panel—was to 'vet' all existing judges and remove them if they failed tests of integrity and/or competence.

Meanwhile there was an interesting development. There was a general election and the protégé of the outgoing President Moi failed to be elected. The new government instituted a process which was widely believed to be designed to remove some judges the government did not like and replacing them with those it considered reliable (from its perspective), inevitably a choice with its roots in ethnic politics.[42] There was no statutory basis for the process, though the Commonwealth panel and the draft constitution seem to have been the inspiration. Two authors commented '[the judiciary's] status was worsened by the reorganisation and pruning that occurred immediately when the Kibaki clique arrived in state house'.[43] They continued,

> Examples of these contests include the forced removal of Chief Justice Bernard Chunga, a non-Kikuyu, and the so-called radical surgery that culminated in the removal of twenty-three senior High Court and Court of Appeal judges (non-Kikuyus) and eighty-five Magistrates on charges of corruption, without due process.[44]

Ironically, one of the judges removed was Richard Kwach.

The constitution making process resumed in 2009, and the document adopted in 2010 is very much in the tradition of the earlier drafts. Before making a few points

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41 At about the same time the International Commission of Jurists-Kenya produced a report (*Strengthening Judicial Reforms in Kenya Vol. II The Role of the Judiciary in a Patronage System* (2002) that points to major perceptions of corruption, and some efforts at improvement.

42 There is an account of this process, commonly known as the 'radical surgery' in the report of an International Commission of Jurists expert mission (chaired by Justice Kanyeihamba, who had chaired Kenya's own Panel of Commonwealth Experts): Kenya: Judicial Independence, Corruption and Reform (April 2005). It is very critical of the process. See http://www.icj.org/high-level-mission-calls-for-comprehensive-reform-of-judiciary/.

43 Laurence Juma and Chuks Okpaluba, Judicial Intervention in Kenya's Constitutional Review Process, (2012) 11 *Wash. U. Global Stud. L. Rev*. 287 at p. 304, http://openscholarship.wustl.edu/law_globalstudies/vol11/iss2/2.

44 Ibid., fn 102 on that page.

about that, however, it is worth noting that yet another report—the Ouko Report—on the judiciary was published in 2010—just before the constitution was adopted.[45]

The Report identified issues affecting judicial independence and accountability including 'unethical conduct on the part of some judicial officers and staff', 'lack of operational autonomy and independence' and 'lack of effective complaints and disciplinary mechanisms to deal with misbehaviour by Judges'.[46]

Its long list of recommendations included more financial autonomy for the Judiciary, and a minimum of 2.5% of the national budget to be allocated to the Judiciary. Various measures in connection with discipline were proposed, including permanent procedures and regulations for dealing with complaints and enforcing discipline against judges, other judicial officers and staff, the JSC to be 'empowered to deal with disciplinary cases against Judges where the misconduct or misbehavior [sic] in question does not warrant removal.' There should be an 'autonomous court administration structure' with its own established legislative framework. Additionally they recommended a performance management system, an anti-corruption strategy, a code of conduct and ethics, an Inspectorate Unit, a peer review mechanism, a sexual harassment policy, a transparent transfer policy, including the requirement that judicial officers must finalise pending or part-heard matters before moving. Other suggestions were a National Council on the Administration of Justice to 'address interagency issues and coordinate cohesive, efficient and effective administration of justice', and a judicial reform strategy to carry out the Report's recommendations.[47]

Some of these suggestions were perhaps coming late to be included in the Constitution, while others were already reflected in the current, and even previous, drafts. Some touched on particularly difficult issues such as how to discipline the judiciary short of removal. Unfortunately the Report does not really confront this perennial dilemma.

The Constitutional Provisions

The Constitution gives to the courts a central role in the protection and implementation of the Constitution itself. It is given specific powers to declare legislation unconstitutional, for example. In fact it may grant 'appropriate relief'—a broad expression.

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45 See above.

46 P. 2.

47 Pp. xxxiii – vi.

The effectiveness of courts as enforcers of the Constitution is enhanced by the expanded concept of standing—who may bring a case. The right is not restricted to those who have actually suffered a violation of rights, but includes:

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.[48]

The significance of this for the role of the people in accountability is commented on in Ghai (Chapter 7).

Focussing particularly on issues of independence, the Constitution includes a clear statement of institutional independence: that 'the Judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'.[49]

The independence of individual members of the judiciary is protected by common provisions about security of tenure, the prohibition of abolition of a post in the higher courts while there is any occupant of the post, and of any reduction of salaries and benefit of anyone in post, or even after retirement (the latter seems less relevant to protecting the independence of mind of judges, except perhaps those on the verge of retirement). The Constitution has slightly unusual provisions on judicial immunity from suit (discussed in Ghai's chapter).[50] The Constitution's provisions on independence are discussed in several of the chapters in this book.

Other provisions of the Constitution, and related legislation, apply to the judiciary. The values of the Constitution (including patriotism, national unity, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability) apply to the judiciary.[51]

Integrity is insisted upon, though with no precise definitions. And, as state officers, judges and magistrates are subject to Chapter Six of the Constitution that includes the following:

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48 Article 22 in relation to human rights and Article 258 more generally.

49 Art. 160(1).

50 160 (5).

51 Article 10.

> 73(2) The guiding principles of leadership and integrity include—
>
> (a) selection on the basis of personal integrity, competence and suitability, …;
>
> (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices…

Legislation to implement the Constitution, including on declaration of wealth applies.[52] Every public officer must submit every two years submit to the responsible Commission 'a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years'.[53] This does not require public declaration and it appears that the envelopes submitted by the judiciary are simply stored away.[54] The declarations by magistrates were considered by the Vetting Board, but this use has been almost unique.[55] The Chief Justice posted his declaration on Twitter in 2016, but has not been followed by his colleagues.[56]

Appointments and Removals

Appointment of judges is formally by the president, but in reality by the Judicial Service Commission. The work of the JSC is examined by Ochieng (Chapter 3). In the case of the Chief Justice and Deputy Chief Justice, the National Assembly must approve. The attempt to give the president some choice in the matter, by legislation that was declared unconstitutional by the High Court, is described by Nyanjong and Dudley, Chapter 1 in this volume.

By most countries' standards the appointments process is very open. Vacancies are advertised and lists of applicants, and short list, are published. Interviews are televised for Supreme Court judges at least. But the public felt that the exercise was still not open enough and asked for information about criteria used, and succeeded in

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52 E.g. Public Officer Ethics Act, 2003 – which drew on the first draft of a new Constitution to some extent.

53 S. 2(1). This applies to the judiciary, as is clear from the provision 'The Judicial Service Commission is the responsible Commission for judges, magistrates and the public officers in respect of which it exercises disciplinary control'— s. 3(4).

54 Personal information. For the form to be used by judges see http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Wealth%20Declaration%20form.pdf.

55 See Transparency International http://www.tikenya.org/index.php/blog/267-asset-declaration-the-neglected-cornerstone-in-anti-corruption.

56 'Judges under pressure to also declare wealth' http://www.nation.co.ke/news/Judges-under-pressure-to-also-declare-wealth/1056-3150696-upqymsz/index.html.

getting a court order that the JSC had used improper criteria, in a case discussed by Ochieng and by Gathii in this volume.

For dismissal of High Court judges the Constitution moved away from the model of involving the legislature, except to the extent that the Speaker of the National Assembly chairs a tribunal for the removal of the Chief Justice.[57] The JSC has the first responsibility and if it decides that the allegations disclose conduct that would merit removal, it recommends to the president to appoint a tribunal. The president must comply, as he must also if the tribunal recommends removal after its investigation.

The grounds for removal are:

(a) inability to perform the functions of office arising from mental or physical incapacity;
(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
(c) bankruptcy;
(d) incompetence; or
(e) gross misconduct or misbehaviour.[58]

The first Deputy Chief Justice was found to have engaged in gross misconduct when 'She went away and came back with a pistol and brandished it at the unfortunate woman who was just performing her duty.'[59] The 'gross misconduct or misbehaviour' criteria were analysed briefly by the tribunal on Justice Joseph Mutava. They concluded that it meant a 'glaringly inexcusable act' or one in violation of the Constitution.[60] The judge was found guilty of having caused a case in which he had an interest to be assigned to him, and having tried to influence another judge in his decision These amounted to breach of the Code of Practice and gross misconduct.

In the case of the Chief Justice, the other members of the tribunal are three superior court judges from common law jurisdictions, an advocate of at least fifteen years standing and two other people with 'experience in public affairs'.[61] To consider

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57 Article 168.

58 Article 168(1).

59 See 'The Nancy Baraza Verdict, Part I: Justice Augostino Ramadhani's Statement at the KICC' http://www.kenyaforum.net/2012/08/09/the-nancy-baraza-verdict-part-i-justice-augostino-ramadhani%E2%80%99s-statement-at-the-kicc/, accessed October 10, 2016.

60 Tribunal to Investigate the Conduct of Hon Mr Justice Joseph Mbalu Mutava Judge of the High Court of Kenya, *Report and Recommendation into the Conduct of Hon Mr Justice Joseph Mbalu Mutava, Judge of The High Court of Kenya* (Government Printer, 2016), para. 31.

61 Article 168(5)(a).

removal of any other superior court judge, the three superior court judges are replaced by a chairperson and three other members 'from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such'.[62] Since the Constitution, steps have been taken in three cases to remove judges, but at the time of writing none has actually been removed. Ochieng particularly discusses these cases.[63]

Magistrates are in a different situation. The Constitution does not give them the same security of tenure or regulate their qualifications or appointment. This may be unfortunate. The only criminal cases that are decided by the High Courts are murder. Or to put it another way, all other cases are heard in the magistrates' court, including corruption. Yet criminal cases are one of the main situations in which the state may have an interest in the outcome, whether its interest is in penalising political opponents or ensuring impunity for supporters. However, though magistrates as not as protected as superior court judges, they are removed not by the executive but by the JSC. This would have to be by a procedure that met the standards for a fair hearing, though grounds are not specified in the Judicial Service Act. The Court of Appeal has held that the JSC is liable to be judicially reviewed for failure to follow correct procedure, in a case in which it quashed (held invalid) the decision of the JSC to dismiss a magistrate eleven years previously, on the ground that the JSC had not followed the right procedure and had not given the magistrate a hearing.[64]

The Judicial Service Act says that the JSC must form a panel to consider removal of a judicial officer (this includes a magistrate). And it sets out the punishments that may be imposed on a judicial officer that fall short of dismissal. These are: stoppage of increment of pay, withholding of increment and deferment of increment and severe reprimand and reprimand.[65] The provisions about increment are less than clear: withholding would seem to be overlapping with either stoppage or deferment.

No equivalent provisions exist in relation to superior court judges, which is presumably why Supreme Court judges have sued when they were reprimanded over their retirement age related 'go-slow' (an affair discussed by Ochieng).

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62 Article 168(b).

63 Second Schedule of the Judicial Service Act sets out procedures.

64 *Stephen S. Pareno v Judicial Service Commission of Kenya* [2014] eKLR Civil Appeal No. 120 of 2004 http://kenyalaw.org/caselaw/cases/view/102664/, accessed 10 October 2016.

65 Para. 19 of Third Schedule.

Retirement

Retirement is not an accountability measure. It is mentioned for the sake of completeness, and because of the importance of the issue in the Kenyan courts recently. Before the Constitution the retirement age for higher court judges was 74—it had been raised successively to keep a previous Chief Justice in office.[66]

Under the new Constitution the age is 70.[67] Judges already in office believed this did not apply to them. But the Court of Appeal (no less than a seven-judge bench) ruled otherwise.[68] The judge wanted to appeal to the Supreme Court. But that court held that it could not sit, because most members must recuse themselves, either because they were party to the decision of the JSC, or because they had expressed themselves publicly (indeed in court) on the subject.[69]

Finance

There are important provisions about finance that are designed to protect, particularly, institutional independence. First, '160 (3) The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.' This is not always well understood. Being a 'charge on' the Consolidated Fund (essentially the government's main bank account at the Central Bank) is explained in the Public Finance Management Act:

> 78. If a national government entity has expenditures that are charged on the Consolidated Fund under the Constitution or an Act of Parliament, the accounting officer has the authority to spend the money in accordance with the purposes specified in legislation without an appropriation.

Judicial (and other state officers') salaries are fixed by the Salaries and Remuneration Commission, and, on that basis can be paid from the Consolidated Fund.

Other expenses, for administration and buildings etc. are now paid out of a new Fund, the Judiciary Fund which is administered by the Chief Registrar. The idea was to make the Judiciary more financially independent. The Registrar prepares annual

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66 Described in Cockar, above p. 85.

67 Article 167(1).

68 *Justice Kalpana H. Rawal v Judicial Service Commission and 3 others* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/122357/.

69 *Lady Justice Kalpana H. Rawal and 2 others v Judicial Service Commission and 6 others* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/123005/.

estimates, and once these are approved by parliament the money becomes a charge on the Consolidated Fund.

The process does not mean the Judiciary gets just what it wants. The Judiciary Fund has been significantly cut by parliament, though it still receives far more than it did before the new Constitution. Financial issues are further discussed by Kameri-Mbote and Muriungi, by Franceschi and by Gathii.

After the Constitution

One of the most notable developments after the Constitution was the 'vetting'. This was proposed by most constitution drafts since 2002, and urged by the Commonwealth Panel that year. The process was very unlike the radical surgery of 2003. It was regulated by statute,[70] and conducted by an independent board that included at any one time two foreigners. The process took over four years, and every judge and magistrate who was in office at the time the Constitution came into force was interviewed.[71]

The board found 44% of the Court of Appeal Judges unsuitable to continue to serve, explaining this high ratio by the fact

> that historically, under the public glare, faith and lack of confidence in the judiciary was attributed mainly to decisions that appeared to lean in favour of government authoritarian repression; and use of the law to enable the government to deprive citizens of justice. This was especially so during the KANU era, when government excesses were heavily supported by the Courts.[72]

Seven of the 44 High Court judges vetted were found unsuitable (a few had successfully asked for a review of the initial decision). These decisions the board explained as due to:

> poor temperament; lack of fairness and impartiality; lack of integrity and impropriety; lack of good judgment; denying citizens access to justice; lack of intellectual capacity and diligence; and poor writing style.[73]

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70 Vetting of Judges and Magistrates Act No. 2 of 2011.

71 For the final account of the process see *Restoring Confidence in the Judiciary Vetting of Judges and Magistrates in Kenya* Final Report of the Board (2016) available at http://www.jmvb.or.ke.

72 P.78.

73 P. 80.

These grounds were set out in the Act. It is notable that bribery was not among the grounds proved.

Perhaps surprisingly, only 14 out of 298 magistrates were found unsuitable. The Board suggests that this is because of lower literacy levels and lack of legal representation among those who appear before these courts, difficulties created by the frequent moving of magistrates, leading to litigants often being unable to identify them, difficulty of establishing corruption, apathy of lawyers, and a more lenient standards applied to magistrates by the board itself.[74]

This is of course was designed as an accountability measure. It is not included in this book in any detailed way because the ICJ has plans for a separate publication on the topic in the near future. It was also planned as a 'one-off' (though Chief Justice Mutunga in a depressed moment suggested a repeat performance might be needed):

> The driver for corruption cannot … be poverty unless it is the poverty of self-respect and honour. Bribe taking is one of the most despicable expressions of self-disrespect that I have ever seen and it must stop. …
>
> The radical surgery and vetting exercises were traumatising experiences for most of the judges, and I am sure no judge would like to go through that experience again.
>
> But if we do not take a personal and professional stand against this vice; handle ourselves with integrity -- if we continue to cover up for and protect colleagues mired in this vice, and allow them to tar everybody else; if we continue engaging in this immoral sport, then I can assure you vetting will be back -- and this time, in a more vicious form than the previous one.[75]

The Transformation Process

The former Chief Justice embarked on a major 'transformation' of the Judiciary. This is described in some detail by Kameri-Mbote and Muriungi.

What followed may have seemed something of an earthquake to many members of the judiciary. 'My Lord/Lady' was officially abandoned in favour of 'Your Honour'; wigs disappeared, many new courts were set up, including in what judges probably thought of as the Outback (to use an Australian phrase) and judges were expected to be based there, not just to visit occasionally; the judiciary grew, with

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74 Pp. 85-6.

75 At the 2015 Judges Conference, see Stop corruption or fresh vetting, severe punishment, awaits you, judges warned http://www.nation.co.ke/oped/Opinion/440808-2824028-l1q7ra/index.html.

many more women; judges went out to meet the people—proceeding through the streets wearing Judiciary t-shirts on 'judicial marches', and at court open days. Large numbers of courts were built, rebuilt or rehabilitated.[76] And the (male) CJ wore an earring!

The system embarked on various initiatives to improve services. It established the National Council on the Administration of Justice,[77] to 'ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system'.[78] This is discussed particularly by Kameri-Mbote and Muriungi. It brings together a wide range of public bodies, plus the Law Society and a few NGOs, concerned with Justice. The NCAJ has very much strengthened the Court Users' Committees, briefly discussed by Ghai, Chapter 7.[79]

Efforts have been made to tackle backlog, first by researching into the extent and causes of backlog.[80] That revealed that 30.66% of the cases over a year old had been pending for over five years. Thirteen cases had been pending in the Nairobi High Court for over 40 years.[81] Of appeals to the Court of Appeal in capital cases 3.82% (53 cases) had been pending for over five years.[82] In magistrates courts, 30% of civil cases were pending for over five years and 23.5% of criminal cases for between two and five years.[83]

In response to this situation the Judiciary had several periods set aside for dealing with old cases, and drafted in judges from the 'equal status' courts, with problematic consequences (see above). And a system of case management has been instituted,[84] and a performance management approach has also been introduced,[85]

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76 The outgoing Chief Justice outlined some of the achievements of the previous five years in his farewell speech to the Judiciary (and the nation, as CJ) available at http://www.judiciary.go.ke/portal/page/speeches.

77 Recommended, it will be recalled, by the Ouko Report.

78 Judicial Service Act 2011 s. 35(1).

79 The NCAJ's Strategic Plan 2012-2016 (available at http://tinyurl.com/hq68w5t) sets out Guidelines for Court Users' Committees from p. 41.

80 See *Judiciary Case Audit and Institutional Capacity Survey* Vol. 1 (2014) http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/National%20Case%20Audit%20Report.pdf.

81 P. 17.

82 P. 23.

83 P. 27.

84 See *Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya* http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/Active%20case%20management%20of%20criminal%20cases%20guidelines.pdf.

both developments discussed by Kameri-Mbote and Muriungi. And the Judiciary is introducing a system of court annexed mediation—not, of course concerned only with reducing backlog.[86]

The Chief Justice was not concerned with administrative matters only, but was committed to the development of what he called 'patriotic and indigenous jurisprudence', [87] meaning 'to develop the law in a way that responds to the needs of the people, and to the national interest'.[88] Improvements in this respect were to be assisted by the provisions of researchers to judges, by much improved and increased programmes at the Judiciary Training Institute,[89] by the appointment of new and committed judges and the revivification of commitment among the previous generations, and by improved standards of advocacy and court documents. Also relevant has been the strengthening of the Kenya Council on Law Reporting.[90]

Conclusion

There have been considerable improvements. Yet in early 2016 the judiciary ranked among the least trusted institutions in the country.[91] This was almost certainly because of cases of alleged corruption among the judiciary, notably of Justice Tunoi—who resigned from the Supreme Court before the tribunal set up to consider his removal could complete its work.

And those with practical experience of the courts still find that many cases drag on for too long, because of judges/magistrates being moved, and adjournment requests from the government especially, and from other lawyers. Case files still get

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85 See *Institutionalising Performance Management and Measurement in the Judiciary* (http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/PMMSC%20Report%20print%20version%2013th%20April%202015.pdf.

86 See Frequently asked Questions on Court Annexed Mediation at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/IEC/FAQ%20BROCHURE%202.pdf and Pilot Project Rules at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/MEDIATION%20PILOT%20PROJECT%20RULES.pdf.

87 'Elements of Progressive Jurisprudence in Kenya: A Reflection' 31st May, 2012 available at http://tinyurl.com/patrioticjur.

88 Ibid.

89 See http://www.judiciary.go.ke/portal/page/judiciary-training-institute; it also has a Facebook page. Programmes for 2016-17 are, at the time of writing, posted online at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Policy%20Documents/CALENDAR.pdf giving an very interesting insight into the work of the JTI and the judiciary programme generally.

90 http://www.kenyalaw.org/.

91 http://www.standardmedia.co.ke/article/2000196323/survey-media-the-most-trusted-institution.

lost. A judge being interviewed for the post of Deputy Chief Justice said that sexual harassment remains a serious issue.[92]

But overall the Kenyan judiciary on 2016 is very different from what it was twenty years ago, or even ten. Many bold decisions have been made, especially on the Constitution. Serious efforts have been made to change entrenched, negative cultures. Accountability of the judiciary is taken seriously. And the judiciary of Kenya is closer to being the judiciary for Kenyans.[93]

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92 'Sexual abuse is widespread in Judiciary: Judge' *Daily Nation*, September 20 2016 http://www.nation.co.ke/news/Judge-admits-to-rampant-sexual-abuse-in-Judiciary/1056-3399746-8wp01jz/ (Justice Martha Koome).

93 Adapting the statement of Upendra Baxi about the Supreme Court of India, in 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Dhavan et al, *Judges and the Judicial Power* (London and Bombay: Sweet and Maxwell and Tripathi, 1985) 289.

CHAPTER THREE

THE COMPOSITION, FUNCTIONS, AND ACCOUNTABILITY OF THE JUDICIAL SERVICE COMMISSION FROM A COMPARATIVE PERSPECTIVE

Walter Khobe Ochieng

Introduction

The enactment of the 2010 Constitution was intended to usher in the grand project of restructuring and re-organization of institutions of governance with a view to upending the authoritarian legacy of Kenya's post-independence governance. The transformation of the judicial system forms part of this broad constitutional agenda for transformation of the state and society.[1] And it seeks to ensure that courts are well placed to play a meaningful role in the pursuit of the broader transformation goals in pursuit of a democratic society.

The Constitution establishes the Judicial Service Commission (the JSC or the Commission), vested with the overarching mandate of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.[2] To achieve this goal, the Constitution envisages the JSC itself as an independent and accountable constitutional commission.

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1 Judges and Magistrates Vetting Board, *Vetting of Judges and Magistrates in Kenya: Final Report* (2016) 16. Available at: http://www.jmvb.or.ke/download/jmvb-final-report/ (accessed 30 September 2016).

2 Article 172(1).

It is the independent functioning and accountability of the JSC that is the concern of this chapter, which evaluates the structure and operation of the JSC from a comparative perspective. The operation of the Kenyan JSC is compared with the experiences of similar institutions in Uganda, Zimbabwe and South Africa. These countries have been selected on the basis that they are developing countries in Africa, applying to a considerable extent the common law, and have recently undertaken constitutional review processes to deal with legacies of authoritarian regimes and inculcate a culture of judicial independence—shared aspirations with the Kenyan judicial reform project. The chapter begins with an analysis of the evolution of the JSC within the historical trajectory of Kenya's transition from an authoritarian state to a constitutional democracy. The structural features in relation to the commission's composition and functions are then evaluated. The next section interrogates the design of the JSC in relation to its accountability. The chapter then concludes by teasing out lessons from the study.

Historical Evolution of the Judicial Service Commission

The central place occupied by an independent JSC in the post-2010 constitutional order can only be appreciated if one interrogates the evolution of this institution in light of Kenya's constitutional history. It has evolved from an executive dominated body during the authoritarian pre-2010 era to the empowered JSC under a constitutional democracy since 2010.

Under Section 184 of the 1963 Independence Constitution, the JSC was composed of: the Chief Justice, as chair, two persons appointed by the Governor - General, acting in accordance with the advice of the Chief Justice, from among the judges of appeal or the puisne judges of the Supreme Court; and two persons appointed by the Governor-General, acting in accordance with the advice of the Chairman of the Public Service Commission, from among the members of the Public Service Commission. The Chief Justice was appointed by the Governor–General, acting in accordance with the advice of the Prime Minister. The Constitution imposed an obligation on the Prime Minister to tender advice on appointment of the Chief Justice to the Governor–General only after consultation with the Presidents of Regional Assemblies and with the concurrence of at least four of them.[3] On appointment of the members of the Public Service Commission, Section 186 (2) of the 1963 Constitution provided that the Governor-General appoint the commissioners, acting in accordance with the advice of the Judicial Service Commission. It is

[3] Section 172 of the 1963 Constitution of Kenya.

arguable that, as conceived at independence, there was a semblance of an attempt to ensure that the JSC was independent.[4]

The Independence Constitution underwent many amendments aimed at strengthening the institution of the Presidency at the expense of other institutions of governance.[5] The 1969 Constitution (repealed Constitution), a consolidation of all previous amendments, provided in section 68 that the JSC would be composed of the Chief Justice, as chair, the Attorney-General, a judge of the Court of Appeal and a judge of the High Court (both appointed by the President), and the chairperson of the Public Service Commission (PSC). All these were presidential appointees, either directly or indirectly, because he appointed the Attorney-General, the Chief Justice, and the Chairman of the PSC to their substantive posts. There was no provision for mandatory input by other stakeholders in the composition of the JSC. The overbearing influence of the President in the JSC created a perception among Kenyans that judges and magistrates lacked real or perceived impartiality to protect them against the tyranny by the government.[6]

Under the repealed Constitution, the functions of the JSC were limited to advising the president on the appointment of judges and disciplinary control over the registrar of the High Court, magistrates, Kadhis and other employees of the Judiciary.[7] This excluded crucial roles usually vested in judicial service commissions including broad governance or policy making roles for the judiciary, disciplinary role

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4 YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present* (Oxford University Press, 1970) 251.

5 The High Court of Kenya in *Njoya and 6 Others v Attorney-General and 3 Others*, Kenya Law Reports, 1 (2004) 298-299 thus observed: 'Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969, by Act. No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution.' See also G Muigai 'Overhaul or amend? A discourse on the future of constitutional change in Kenya' (2006) 4 *East African Journal of Human Rights and Democracy* 10.

6 WO Khobe 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 286-299.

7 See Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (Ouko Report) (2010) 13 Available at: http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf (accessed 2 October 2016).

over judicial officers and judges, performance management and evaluation, and court management in some jurisdictions.[8]

Further constitutional amendments that interfered with the independence of the JSC during this period included the Constitution of Kenya (Amendment) Act No. 14 of 1986, which removed the security of tenure of the offices of the Attorney-General and the Controller and Auditor-General. The Constitution of Kenya (Amendment) Act No. 4 of 1988 removed security of tenure from the Commissioners of the Public Service Commission, the High Court Judges and the Court of Appeal Judges.[9] The import of these and other amendments was the centralization of power in the President.[10]

The vesting of enormous powers in the presidency under the repealed constitution, including removing these officers, granted the President overwhelming influence over the JSC. This state of affairs led to the JSC's lack of legitimacy and thus the body did not meaningfully contribute to the independence of the judiciary. This is the background that informed the quest for judicial reforms during the agitation for a new constitutional order in Kenya.

During the constitutional reform process, various models of how to restructure the JSC and guarantee its independence were proposed. Section 198 of the Constitution of Kenya Review Commission draft Constitution provided for an eighteen member commission. It was to be composed of: a full-time chairperson who was qualified to be appointed a judge of the Supreme Court, appointed by the president and approved by the National Council (second chamber of parliament); a Muslim woman, nominated by the National Muslim Organization; the Attorney-General; one Supreme Court judge elected by judges of the Supreme Court; one Court of Appeal judge elected by the judges of the Court of Appeal; one High Court judge elected by the judges of the High Court; the Chief Kadhi; two magistrates (a man and a woman) elected by magistrates; two advocates nominated by the Law Society of Kenya and two law teachers elected by the faculties of law of public universities (in each pair, one man and one woman); a member nominated by the Council of Legal Education; the chairperson of the Public Service Commission; and three lay members nominated by the Non-Governmental Organization Co-ordination Board.

The draft adopted by the National Constitutional Conference (usually called 'Bomas' for its venue) in 2004 tinkered with this proposal and proposed the

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8 Ouko Report (above) 13.

9 The Constitution of Kenya (Amendment) Act No. 2 of 1990 restored the security of tenure to the judges.

10 B Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American constitutionalism' (2010) 6(1) *The Law Society of Kenya Journal* 24.

establishment of an eight member JSC composed of: a Supreme Court judge elected by the judges of the Supreme Court who would also chair the commission; one Court of Appeal judge elected by judges of the Court of Appeal; one High Court judge elected by judges of the High Court; the Attorney-General; the Chief Kadhi; two advocates nominated by the Law Society of Kenya; and one person nominated by the PSC.

The harmonised draft of the Constitution that was published by the Committee of Experts on Constitutional Review in 2009 largely retained the Bomas Draft model, the only difference being the exclusion of the Chief Kadhi. The revised harmonised draft added one magistrate and a person nominated by the (largely ceremonial) President in what was in that draft a parliamentary system of government, to represent the public. This version formed the basis for political negotiations and consensus in Naivasha in January 2010 by the Parliamentary Select Committee on the Review of the Constitution. The Select Committee was responsible for the proposals for the Chief Justice to chair the JSC, for the PSC to be present through its chair, and the addition of a further member of the public appointed by the President (now, under their model an executive president).The Committee of Experts, finalising the version that was adopted in 2010, felt compelled to accept these changes—but not one that would have had one of the advocate members selected by academics.

The Architecture of the Judicial Service Commission after 2010

The structural features of Judicial Service Commissions should be geared towards ensuring that it is independent and the commissioners possess the requisite competence and expertise.[11] For this, it is good practice to draw at least half the members of the commission from judges and the legal profession. It is also important for the commission to have 'lay' members who offer a civil society perspective on the court system, or contribute expertise in other relevant disciplines such as human resources. However, the mechanism for introducing lay members to the commission should ensure that they do not fall under political control. In addition, gender balance and the representation of minorities on the commission should be ensured.[12]

Further, *the Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth* stipulate that the

[11] J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law) (2015) xvii.

[12] As above.

existence, basic composition and powers of the commission should be entrenched in the Constitution to help secure the commission's independence.[13] As a safeguard of their individual independence, members of the commission should enjoy security of tenure, subject to appropriate term limits.

Composition of the Judicial Service Commission

The creation of independent constitutional commissions and independent offices is part of institutional restructuring associated with democratic transitions.[14] One of the concerns that animated the search for a new constitution in Kenya was how to build more effective mechanisms for accountability. A widespread perception prevailed that under the repealed Constitution, government officials were not subjected to adequate oversight control. Corruption, impunity by state actors and improper use of public resources needed to be curbed. In such circumstances, it has been argued that independent constitutional commissions and offices ought to be established to ensure an open political and administrative system.[15]

The JSC, like other constitutional commissions and independent offices, is a vehicle for delivering values and aspirations of the Kenyan people such as respect for human rights and engendering a culture of accountability in governance and respect for constitutionalism. However, the entrenchment of the JSC in the constitution does not guarantee that it will realise its mission. This speaks to the institutional design of the body.

Without a considerable degree of independence, the JSC can neither discharge its mandate nor contribute to open and democratic governance. If the JSC, like other constitutional commissions and independent offices, is regarded as part of government,[16] it would be difficult for it to act without fear, favour or prejudice and

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13 Principle 5 of the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (2016).

14 A Sajó 'Constitution without the constitutional moment: A view from the new member states' (2005) 3 *International Journal of Constitutional Law* 255.

15 Y Ghai 'A Journey Around Constitutions: Reflecting on contemporary constitutions' (2004) 122(4) *The South African Law Journal* 815.

16 The South African Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*, [2001] ZACC 23; 2001 (3) SA 925; 2001 (9) BCLR 883 endorsed the view that, although Chapter 9 institutions (independent institutions supporting democracy - constitutional commissions in the South African context) are organs of the state, they cannot be said to be departments over which cabinet exercises authority. Their independence refers to independence from the government.

to fulfil its functions effectively.[17] In addition, the JSC needs administrative independence by having sole operational control over its mandate.[18] The appointment procedures of the JSC commissioners must guarantee that patronage is not used to gain influence in the commission, to avoid the possibility of capture of the JSC by political interest groups.

The JSC, like other constitutional commissions and offices, is accorded constitutional protection to enable it to achieve the objectives for its establishment. As the Supreme Court said,[19]

> [59] … the real purpose of the 'independence clause', with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause'.

The Constitution provides that the constitutional commissions and independent offices are subject only to the Constitution and the law, and they are independent and not subject to the direction or control by any person or authority.[20] However,

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17 *Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others,* Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR at paragraphs 169-170. See also P de Vos 'Balancing independence and accountability: The role of Chapter 9 institutions in South Africa's constitutional democracy' in D Chirwa and L Nijzink (eds) *Accountable government in Africa: Perspectives from public law and political studies* (Accountable government in Africa: Perspectives from public law and political studies, 2012) 166.

18 The South African Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC) held that the Department of Home Affairs could not tell the Electoral Commission how to conduct voter education or whom to employ.

19 In *Re The Matter of the Interim Independent Electoral Commission,* Constitutional Application Number 2 of 2011.

20 Article 249(2) of the Constitution; see also the Supreme Court *In the Matter of the National Land Commission, Advisory Opinion Reference 2 of 2014,* [2015] eKLR at paragraph 184 where the court elaborated that the independence of constitutional commissions encompasses four elements: functional

designating a body as independent is one thing; sustaining independence in day-to-day political dealings is another.[21] The mandate of enforcing accountability in the judicial branch of government is a threat to powerful interests that may try to weaken the JSC's power and influence.[22] Therefore, the law and institutional design must separate the JSC from the president and block any room for executive control over its agenda and operations.[23] The mechanisms and processes of appointments must prevent unwarranted political interference in appointments in order to enhance the legitimacy and independence of the commission.[24]

The central role a JSC plays in securing the independence of the judiciary has been underscored by the Supreme Court of India in *Supreme Court Advocates-on-Record Association and Anr. v/s Union of India.*[25] The court struck out a constitutional amendment and a law enacted by parliament seeking to reform the process of judicial appointments to the Supreme Court and High Courts. The amendment attempted to replace the judge-led 'collegium'—a small number of the most senior judges—system of appointment with a National Judicial Appointments Commission with six members: the Chief Justice and two senior judges; the Minister of Justice; and two 'eminent persons' chosen by a committee of the Prime Minister, the Leader of the Opposition and the Chief Justice. It held by a majority that the basic structure of the Indian Constitution required independence of the judiciary, and judicial primacy—a judge-dominated body—in the selection of judges in order to secure the independence of the judiciary. It struck down the constitutional amendment.

The independence of the Kenyan JSC has been affirmed by the High Court. In *Judicial Service Commission v Speaker of The National Assembly and 8 Others*,[26] the question was whether the president was right to set up a tribunal to remove some members of the JSC as recommended by the National Assembly under Article 251(3) of the Constitution. The High Court held that the removal process was invalid since it

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independence, operational independence, financial independence, perception of independence, and collaboration and consultation with other state organs.

21 J Yeh 'Experimenting with independent commissions in a new democracy with a civil law tradition: The case of Taiwan' in S Rose-Ackerman and PL Lindseth, eds., *Comparative Administrative Law* (2010) 262.

22 JM Ackerman 'Understanding independent accountability Agencies' in S Rose-Ackerman and PL Lindseth eds., *Comparative Administrative Law* (2010) 271.

23 PL Strauss 'The place of agencies in government: Separation of powers and the fourth branch' (1984) 84(3) *Columbia Law Review* 594.

24 J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *South African Journal on Human Rights* 588.

25 Writ Petition (Civil) No. 13 of 2015.

26 Petition Number 518 of 2013.

was as a result of a process in parliament that took place in violation of an interim court order, hence making the president's acts based on an invalid act. It emphasized that the JSC was a creature of the constitution, subject only to the constitution and the law and, as provided under Article 249(2), not subject to direction or control by any person or authority and quashed the appointment of members of the tribunal established by the president.

The JSC is composed of eleven commissioners[27] who are mainly stakeholders in the justice sector. The appointment process of the commissioners is an attempt to infuse transparency into the process. The Chief Justice is the chairperson. The other judicial members are: one judge from each of the Supreme Court, the Court of Appeal, and the High Court judge, and one magistrate, each elected by the relevant court or body of magistrates. Other members are the Attorney-General,[28] two advocates, elected by the members of the Law Society, one person nominated by the PSC (currently the chair herself) and two non-lawyer members of the public, appointed by the president with the approval of the National Assembly, in a process that involves public participation.[29] Members, apart from the Chief Justice and the Attorney-General,[30] hold office for a term of five years and are eligible to be nominated for one further term of five years, if still qualified.[31] This elaborate scheme of appointment of members is intended to ensure that the Commission is not beholden to the executive branch.

It is noteworthy that, unlike in other jurisdictions, such as Wales, Scotland, Canada, and South Africa, whose judicial commissions comprise a mix of professionals and active politicians, the Kenyan JSC does not have politicians.[32] This can be argued to be part of the Constitution's project of protecting state institutions from the vagaries of ordinary politics.

There is also an attempt at gender sensitivity in the JSC's composition. The two Law Society representatives must comprise one man and one woman. The same is true of the two lay presidential appointees, and of the pair comprising the High Court judge and a magistrate. These gender quotas do not guarantee compliance with

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27 Article 171(2).

28 The Attorney-General is a presidential appointee serving at the pleasure of the President—Articles 167 of the Constitution.

29 Article 171(2).

30 The Chief Justice holds office for a maximum of ten years or until retiring at seventy years but may retire any time after attaining the age of sixty-five years Article 156.

31 Article 171(4).

32 PLO Lumumba and L Franceschi, *The Constitution of Kenya, 2010: An introductory commentary* (Strathmore University Press, 2014) 503.

the constitutional requirement that no more than two thirds of the members of an elective or appointive state body should be of the same gender.[33] In fact, the commission has achieved compliance only because the chair of the PSC is a woman.

The Constitution imposes a term limit on JSC membership of a maximum of two five year terms other than the *ex officio* members—the Chief Justice and Attorney-General. A term limit serves the function of reducing the likelihood of the JSC being captured by various vested interests, and ensuring that the members do not become jaded, but are able to approach the challenges with continued commitment, and possibly fresh ideas.

In contrast to the eleven member commission in Kenya, section 189 of the Zimbabwe Constitution establishes a thirteen member commission headed by the Chief Justice. The other members are the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by all the judges of the superior courts, the Attorney-General, the Chief Magistrate, the Chairperson of the Civil Service Commission, three legal practitioners of at least seven years' experience nominated by the Law Society of Zimbabwe, a professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities, one person qualified as an auditor or public accountant designated by an association representing accountants and auditors, and one person with at least seven years' experience in human resources management appointed by the president. A commissioner's tenure is limited to a single non-renewable term of six years.

It has been observed by Fombad and Manyatera[34] that one of the noteworthy features of the Zimbabwe JSC is its careful balance between the members of the judiciary and the members of the legal profession. This is an improvement on the Kenyan JSC which is dominated by judicial officers, an arrangement that creates a risk of this group working together to perpetuate the narrow interests of members of the judiciary which may be against the wider public interest. It has been claimed, for example, that the recruitment process of Kenya's second Chief Justice under the 2010 Constitution was bedevilled by the preference of the representatives of judges and magistrates for the position to be occupied by an already serving judge.[35]

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33 Article 27(8).

34 G Manyatera and CM Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution' (2014) *The Comparative and International Law Journal of Southern Africa* 89, 104.

35 G Kegoro 'Factors likely to determine selection of CJ' *Sunday Nation* 31st July 2016 Available at: http://www.nation.co.ke/news/Factors-likely-to-determine-selection-of-CJ/1056-3323554-1bd2py/index.html (accessed 30 September 2016). Contrast the view of the Supreme Court of India above.

The presence of a representative of the legal academy in the Zimbabwean JSC is also an improvement on the Kenyan model. Legal scholars can offer knowledge on legal theory and bring insights into the judicial philosophy of candidates as well as views less coloured by judicial attitudes and biases. It is also noteworthy that the Zimbabwe law specifically provides for inclusion of someone with experience in human resources management. One criticism that has dogged the Kenyan recruitment processes has been the lack of a human resource management perspective.[36] Another contrast between the Kenyan and the Zimbabwean models is that, whereas commissioners hold office for a renewable term of five years in Kenya, the Zimbabwean Commissioners serve for one non-renewable term of six years. Non-renewable terms enhance the independence of the commissioners by protecting them from undue need to please the constituencies that elect them or the nominating body.

Section 178 of the 1996 South African Constitution prescribes the composition of the country's JSC, which includes members of the executive and the legislative branches of government, members of the legal profession and other stakeholders in the justice sector. It has twenty-five members: the Chief Justice, who presides, the President of the Supreme Court of Appeal, one Judge President designated by the Judges President, the Cabinet member responsible for the administration of justice, or an alternate; two practising advocates, two practising attorneys all formally appointed by the President, one teacher of law designated by teachers of law at South African universities, six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly, four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces, four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly. When considering matters relating to a specific High Court, the JSC includes the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.

It is noteworthy that—unlike the Kenyan, Zimbabwean and Ugandan bodies—the South African JSC has representatives from the executive and legislative branches of government. It can be argued that this works against the need to exclude political and partisan interests in the commissions.[37] The other novelty in the South African

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[36] Daily Nation Editorial 'Public job interviews must be professional' Daily Nation 15th September 2016 Available at: http://www.nation.co.ke/oped/Editorial/public-job-interviews-must-be-professional/440804-3382846-qqiu4/index.html (accessed 30 September 2016).

[37] A Gordon and D Bruce *Transformation and the Independence of the Judiciary in South Africa* (Centre for the Study of Violence and Reconciliation, 2007) 50.

JSC, shared with Zimbabwe but absent in the Kenyan scheme, is the presence of a legal academic designated by teachers of law; something similar was suggested by the Constitution of Kenya Review Commission (CKRC), but did not survive the National Constitutional Conference.

Section 146 of the Ugandan Constitution prescribes the composition of the JSC as consisting of the following, appointed by the President with the approval of Parliament, a chairperson and a deputy chairperson who must be qualified to be appointed as justices of the Supreme Court; one person nominated by the PSC, two advocates of not less than fifteen years' standing nominated by the Uganda Law Society, one judge of the Supreme Court nominated by the President in consultation with the judges of the Supreme Court, the Justices of Appeal and judges of the High Court; and two members of the public, not lawyers, nominated by the President. The Attorney-General is an *ex officio* member.

Compared to other countries, the President has a strong say in the composition of the Ugandan JSC though this is checked by the requirement that appointments to the JSC require parliamentary approval. A JSC dominated by political appointees is less likely to make independent judgments on the merits or otherwise of prospective judicial candidates than one with few political appointees, and would tend to dance according to the whims of their political masters.

The JSCs in Kenya, Zimbabwe and South Africa are chaired by the Chief Justice, but in Uganda the chairperson is a person qualified to be appointed a judge of the Supreme Court who must not be the Chief Justice. The Ugandan model arguably enables the JSC to exercise oversight over the judiciary which may not be possible where the leader of the judiciary serves as the chairperson of the commission. A case in point is the attempts by the Mombasa branch of the Law Society of Kenya to commence removal proceedings against retired Chief Justice Willy Mutunga.[38] The society lamented that the JSC failed to act on their petition for removal of the Chief Justice because the commission was chaired by the subject of the petition himself.

Functions of the Judicial Service Commission

The JSC has been vested with constitutional responsibility for promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.[39] The Constitution vests the

[38] M Mwawasi 'Lawyers file petition to remove CJ' *The Star* 3 October 2015 Available at: http://www.the-star.co.ke/news/2015/10/03/lawyers-file-petition-to-remove-cj_c1216693 (accessed 30 September 2016).

[39] Article 172(1) of the Constitution.

commission with the following functions: recommending to the President persons for appointment as judges; reviewing and making recommendations on the conditions of service of judges and judicial officers and the staff of the judiciary; appointment, disciplining and removal of registrars, magistrates and other staff of the judiciary; preparing and implementing programmes for the continuing education and training of judges and judicial officers; and advising the national government on improving the efficiency of the administration of justice.[40] The commission is to be guided the principles of competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary, and the promotion of gender equality.[41]

Article 252 of the Constitution grants the commission the general functions and power to conduct investigations on its own initiative or on a complaint made by a member of the public; the powers necessary for conciliation, mediation and negotiation; to recruit its own staff and powers to issue summons to a witness to assist for the purpose of its investigations.[42]

The role of the President in the appointment of judicial officers of superior courts has been limited to vanishing point to prevent executive interference in the judicial arena. Under the constitution, the President formally appoints the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.[43] The phrase 'in accordance with the recommendation of the JSC' implies that the President is bound to act in accordance with the JSC's views. Asserting this, Muna Ndulo has commented that:[44]

> Many African constitutions provide that the President must appoint 'after consultation with the Judicial Service Commission.' This is the weakest formulation, for the President is not bound by the Commission's views. A stronger approach is one that requires the President to act 'on the advice of' or 'on the recommendation of' the JSC. This is the approach in the new Kenya Constitution adopted in 2010. This approach implies that the appointment by the president is a purely formal function.

In fact, the phrase 'in accordance with' is even stronger than 'on the advice of'.

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40 Article 172(1).

41 Article 172(2).

42 See also Section 11 of the Judicial Service Act, Number 1 of 2011.

43 Article 166(1) (a).

44 M Ndulo 'Judicial Independence: An overview of judicial and executive relations in Africa' Paper Presented at the Second Stellenbosh Annual Seminar on Constitutionalism in Africa (SASCA) 17th-19th, September (2014) 17 (paper on file with the author).

The requirements of recommendation by the JSC and approval by the National Assembly are designed to avoid overriding political considerations in these judicial appointments. With respect to the other judges of the Supreme Court, the Court of Appeal and the High Court, the President appoints them in accordance with the recommendations of the JSC; no parliamentary approval is required.[45] The President cannot circumvent this process.

The High Court has had the occasion to interpret Article 166(1) on the role of the JSC in judicial appointments in *Law Society of Kenya v The Hon Attorney General and another*.[46] The petitioner sought to challenge the inordinate delay by the President of the Republic of Kenya in gazetting the appointment of persons recommended as judges of High Court by the JSC. The JSC had forwarded the names of 25 persons of whom eleven had been formally appointed, sworn in and gazetted. The Attorney-General argued that the appointment of the remaining persons was still being processed and was subject to presidential approval. The petitioner asserted that the President had no role in processing, approving or disapproving the appointment of judges as that role was exclusively for the JSC and once the JSC submits the names to the President then his constitutional duty was to appoint, swear-in and gazette those recommended. The High Court agreed with the petitioner.

In *Law Society of Kenya v Attorney General and National Assembly*[47] the role of the JSC in the appointment of the Chief Justice and the Deputy Chief Justice was subject to judicial scrutiny. The petition was provoked by the enactment of the Statute Law (Miscellaneous Amendment) Act, 2015 which replaced section 30(3) of the Judicial Service Act[48]. The petitioner argued that the new section 30(3), by requiring the Commission to forward three names for each post, contradicted Article 166(1)(a) of the Constitution. Article 166 requires the president to appoint on the recommendation of the JSC, which implies that only one name should be forwarded. The recommendation empowers the Commission to forward one name for each position. The petitioner contended that Article 171 of the Constitution of Kenya established the commission with the sole purpose of removing from the president the power to appoint judges and thus safeguard the independence of the judiciary, and the amendment, it was contended lead to the public perceiving the judiciary as an appendage of the executive.

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45 Article 166(1)(b).

46 Petition No. 313 of 2014.

47 Petition No. 3 of 2016.

48 Number 1 of 2011.

The High Court held that in enacting Article 166 of the Constitution, Kenyans wanted a clear break from the old system in which the appointment of the Chief Justice and by extension judges of the superior courts was in substance a prerogative of the President with the Judicial Service Commission merely playing a formal role. The court further held that the selection process was something exclusively within the mandate of the commission, and neither the executive not the legislature can dictate to the commission on how to carry out its said mandate. The court concluded that the amendment violated the letter and the spirit of Article 166(1) of the Constitution.

Though the JSCs in Zimbabwe and South Africa have a role in appointing judges, their role is different to that of the Kenyan JSC. Section 180 of the Zimbabwe Constitution provides that, in the event of a vacancy in a superior court, the JSC is obliged to advertise the position, invite the President and the public to make nominations, conduct public interviews and submit a list of three nominees for a single vacancy from which the President makes the appointment. Similarly, section 174(3) of the Constitution of South Africa prescribes that the State President appoints the Chief Justice, the Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal after consulting the JSC and leaders of parties in the National Assembly. The appointment of other judges of the Constitutional Court involves a different approach. Section 174(4) provides that the Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President. The President appoints one judge from the list after consulting the Chief Justice and the leaders of parties represented in the National Assembly. The requirement that the president choose one from a list of three names grants the president in Zimbabwe and South Africa a wider role than that in the Kenyan framework. With respect to judges of other courts, Section 174(6) of the Constitution provides that the President must appoint them on the advice of the JSC.

Related to the power of appointment is that of removal from office of a judge of a superior court. Under Article 168 of the Kenyan Constitution, the JSC has the role of deciding whether a petition presented to the commission by a member of the public for removal of a judge shows any ground for removal. The commission itself can also initiate the process of removal. The President upon receiving a petition from the JSC setting out the grounds upon which a judge should be removed from office, should suspend the judge and proceed to appoint a tribunal within fourteen days. The

tribunal looks into the matter and reports on the facts, and makes recommendations binding on the President.[49]

In the post-2010 dispensation, two tribunals have recommended the removal of judges from office. In August 2012, a tribunal formed to investigate the conduct of the then Deputy Chief Justice Nancy Baraza made a finding that she engaged in conduct that amounted to gross misconduct and misbehaviour thus recommended her removal from office.[50] She vacated office pursuant to the tribunal's findings. Similarly, in September 2016, a tribunal formed to investigate the conduct of Justice Joseph Mbalu Mutava, judge of the High Court, found the judge's conduct amounted to gross misconduct and recommended his removal to the President.[51] The judge has indicated that he intends to appeal the tribunal's findings to the Supreme Court pursuant to Article 168(8) of the Constitution.

The need to comply strictly with the prescribed removal procedure was affirmed by the High Court in *Nancy Makokha Baraza v Judicial Service Commission and 9 Others*,[52] where the Deputy Chief Justice had challenged the process leading to her suspension from office for gross misconduct. The Court held that the process of removal of a judge must respect the rights or fundamental freedoms in the Bill of Rights and must comply with the prescribed procedure in the constitution. It is important to point out that in discharging this function, the JSC has no power to make conclusive findings of facts or make recommendations for the removal of the judge. That is the exclusive duty of the tribunal.[53]

The Kenyan Constitution provides that the grounds for removal are 'inability to perform the functions of office' because of mental or physical incapacity, breach of a code of conduct prescribed an Act of Parliament, bankruptcy, incompetence, gross misconduct or misbehaviour. Section 177(1) of the Constitution of South Africa has more tightly drawn provisions: that a judge may be removed from office only because

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49 Article 168(5), (7) and (9) of the Constitution; See also B Chali, *Mandate of the Judicial Complaints Authority: Analysis of Faustin Kabwe v Attorney General* (2013) 43 (Directed Research Essay submitted to the University of Zambia Law Faculty for the Award of the Bachelor of Laws (LLB) Degree) (On file with the author).

50 *Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza* [2012] eKLR.

51 *Final Report of the Tribunal Investigating the Conduct of Hon. Mr. Justice Joseph Mbalu Mutava*, available at: http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Tribunal_Investigating_the_Conduct_of_Justice_Mutava.pdf (accessed 5 October 2016).

52 Petition Number 23 of 2012; See also *J Harrison Kinyanjui v Attorney General and Judicial Service Commission*, Petition No. 74 of 2011 for the same proposition.

53 *Judicial Service Commission v Mbalu Mutava and another,* Civil Appeal 52 of 2014.

of an incapacity, for gross incompetence or gross misconduct, and only if the National Assembly calls for that judge to be removed by a resolution adopted by at least two thirds of its members. Then the president must remove the judge. By way of contrast, in the Kenyan scheme, the National Assembly plays no role. A conscious decision was made not to have any legislative involvement in the removal process apart from the role of the Speaker as chair of a tribunal to consider the removal of the Chief Justice or Deputy.

The Constitution has no explicit provision for discipline of a judge of a superior court short of removal. Despite the lack of textual support for power to discipline a judge, the JSC has asserted the power to admonish a judge where the misconduct does not rise to the threshold of gross misconduct. The case of Justices Mohamed Ibrahim, JB Ojwang', Njoki Ndung'u is an example of the JSC exercising such a disciplinary role. The JSC received a petition for removal of the three judges from Mr Apollo Mboya alleging that the three judges had gone on a 'go slow' and refused to offer judicial service to members of the public. The JSC upon a preliminary inquiry decided that the conduct of the three judges amounted to misconduct. However, the said misconduct did not warrant the recommendation for the formation of a tribunal as required under Article 168. Instead of recommending the formation of a tribunal, the JSC decided to admonish the judges for misconduct.[54]

The appointment, disciplining, and removal process of magistrates, registrars and other staff of the Judiciary is an exclusive remit of the JSC. For appointment, discipline and removal of judicial officers and staff, the Commission is required to constitute a Committee or Panel which is to be gender representative.[55] In selecting candidates for appointment, promotion and transfer, the Commission must have regard to the efficiency of the judiciary and, in considering public officers for promotion, merit and ability are to be taken into account as well as seniority, experience and official qualifications. The JSC is to carry out proceedings for discipline or removal of judicial staff only if a preliminary investigation by the Chief Justice indicates misconduct, and the staff member has been unable to respond to the charges to the satisfaction of the Chief Justice.

The JSC has delegated its role of preparing and implementing programmes for the continuing education and training of judges and judicial officers to the Judiciary Training Institute (JTI).[56] The JTI performs this mandate in part through various training programmes and seminars, public lectures, research, and other forms of

54 *Njoki S. Ndungu v Judicial Service Commission and another* [2016] eKLR.

55 Section 32 and the Third Schedule of the Judicial Service Act.

56 See http://judicialservicecommission.go.ke/index.php?id=39 (Accessed on 13 September 2016).

discourse targeting all cadres of Judiciary staff, and where, appropriate, members of the academy and the public at large.[57]

The mandate of reviewing and making recommendations on the conditions of service of judges and judicial officers and the staff of the Judiciary speaks to the role of the JSC with respect to the welfare of judicial officers and the staff of the Judiciary. This mandate is informed by the reality that to achieve the goal of an independent and effective judiciary, there must be investment in the welfare of the employees of the Judiciary. This process must be undertaken in consultation and upon the advice of the Salaries and Remuneration Commission (SRC) which is designated to set and review the remuneration and benefits of all state officers, and advising the national and county governments on the remuneration and benefits of all other public officers.[58] It is noteworthy that a person nominated by the JSC sits in the SRC. Judges and magistrates are state officers, [59] so their remuneration and benefits are set by the SRC while that of registrars and other judicial staff are set by the JSC on the advice of the SRC.

In contrast to the Kenyan approach, the Ugandan JSC has the exclusive role of reviewing and making recommendations on the terms and conditions of service of judges and other judicial officers.[60]

Accountability of the Judicial Service Commission

Just as the autonomy of independent commissions is important, their accountability is also crucial given that accountability is a core precondition for the legitimacy of all state institutions.[61] As with judges, the issue of the accountability of independent commissions arises because of their autonomy. The Supreme Court of Kenya in *Re The Matter of the Interim Independent Electoral Commission*,[62] remarked:

> While bearing in mind that the various Commissions and independent offices are required to function free of subjection to 'direction or control by any person or authority', we hold that this expression is to be accorded its ordinary and natural

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57 There is a brief account of the work of the JTI at http://www.judiciary.go.ke/portal/page/judiciary-training-institute (accessed on 30 September 2016).

58 Article 230 of the Constitution. See *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) and 3 Others*, Civil Appeal 196 of 2015.

59 Article 260.

60 Section 147 of the1995 Constitution of Uganda.

61 RE Kapindu, 'A comparative analysis of the constitutional frameworks of democracy building institutions in Malawi and South Africa' (2008) 2(2) *Malawi Law Journal* 239.

62 Constitutional Application Number 2 of 2011at paragraph 60.

> meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the 'independence clause' does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, 'independence' does not mean 'detachment', 'isolation' or 'disengagement' from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonise its activities with those of other institutions of government, or other commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that commissions and independent offices are not to plead 'independence' as an end in itself; for public-governance tasks are apt to be severely strained by possible 'clashes of independences'.

Thus the question to be answered is the age old one of 'who guards the guardians?'[63] For the JSC to be effective in the execution of its mandate it must operate independently and also be accountable. There is the possibility that the independent commissions may engage in corruption or pursue partisan interests rather than the public interest.[64] This speaks to the need for oversight over independent commissions given the reality that when any state organ is left unchecked it can run amok and perpetrate the very ills it is mandated to curb. There is also the need for political accountability, in form of accountability to the elected representatives of the people. In a democracy, all parts of government ought to be accountable to the people. This is driven by the reality that out of the social contract, government in theory is an agent of the citizenry in a democracy. This raises a valid concern of the need for accountability to democratically elected officials to give independent commissions like the JSC legitimacy.

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63 S Andreas, 'Conceptualizing Accountability' in S Andreas *et al* (eds), *The self- restraining state: Power and accountability in new democracies* (1999)25-26.

64 JB Wiener and A Alemanno, 'Comparing Regulatory Oversight across the Atlantic: the office of information and regulatory affairs in the US and the impact assessment board in the EU' in S Rose-Ackerman and PL Lindseth, *Comparative Administrative Law* (2010) 310; See also WO Khobe 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya' (2013) 2 *Young Africa Research Journal* 1-20.

Hatchard *et al* observe that most accountability mechanisms include a requirement that the independent commissions present an annual report to parliament and the head of government/state providing a detailed account of their performance.[65] The Kenya Constitution does provide a reporting framework envisaging that each independent commission will submit a report to the President and to Parliament at the end of each financial year or on a particular issue at any time required by the President or Parliament.[66] The Judiciary has been supplying much fuller reports than in the past.

Accountability to Parliament

Parliament in a democracy is usually conceived as the embodiment of the voice of the people. The effectiveness of a democracy comes into question where those vested with power cannot be held accountable for acts and omissions, decisions, expenditure or policy. The members of parliament as the elected representatives of the people are the embodiment of the sovereign will, needs and preferences of the citizenry. The Constitution prescribes that parliament represents the will of the people and exercises their sovereignty.[67] The National Assembly does this by, among others, scrutinising and exercising an oversight mandate over other state institutions and organs.[68]

As noted earlier, Article 254(1) provides that a constitutional commission, like the JSC, must report to parliament every financial year. Further, article 254(2) envisages that both the National Assembly and the Senate may require a commission to submit a report on a particular issue. The requirement of submission of reports to parliament envisages that the reports will enable parliament to detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the JSC, and to hold the JSC to account in respect of how money allocated to the commission is used. The presentation of reports may also contribute to improve the transparency of the operations of the JSC and thus enhance public trust in the institution.

There is no explicit obligation on parliament to debate the reports submitted by constitutional commissions. This is an unsatisfactory state of affairs as it means that these reports can be ignored. Indeed, these fears have been confirmed given that

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65 J Hatchard *et al*, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African perspective* (Cambridge University Press, 2004).

66 Article 254.

67 Article 94.

68 Article 95(5).

parliament has failed to debate these reports for the last five years. For an effective parliamentary scrutiny system, there should be a legal obligation for parliament to debate the submitted reports within a stipulated timeframe. The JSC commissioners should also be required to appear before the relevant parliamentary committee to discuss the report and the JSC's performance.[69] Such a forum would also ideally involve presentation of 'shadow reports' and presentations by the civil society on their assessment of the commission's performance. It is also worth exploring the establishment of a Committee of the National Assembly on Constitutional Commissions and Independent Offices that can function as a port of call for oversight and scrutiny over constitutional commissions and offices including the JSC.

Similarly, section 181(5) of the Constitution of South Africa stipulates that Independent Institutions Supporting Democracy, like the JSC, are accountable to the National Assembly and requires them to report on their activities and the performance of their functions at least once a year. Thus the legislature has a role in ensuring the accountability of the South African JSC through the reporting mechanism.

Another area where the Constitution confers an oversight role on parliament is with respect to the JSC's role in the appointment of the leadership of the judiciary, a process outlined earlier. The power to approve the nominees for appointment into the office of the Chief Justice and Deputy Chief Justice is designed to ensure that National Assembly scrutinises whether the appointment process by the JSC upholds the values and principles of the Constitution. Section 7 of the Public Appointments (Parliamentary Approval) Act[70] stipulates that the vetting of a nominee by Parliament should relate to: the procedure used to arrive at the nominee; any constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for the appointment having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is made. It is worth pointing out, however, that the practice so far has not lived up to this constitutional ideal and has mainly been about the political acceptability of the nominees.

The constitutional requirement for the JSC to present its budget to the National Assembly for approval also provides an avenue for further checks on this institution. Article 249(3) requires parliament to allocate adequate funds to enable each constitutional commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote. The

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69 J Hatchard et al, Comparative Constitutionalism and Good Governance in the Commonwealth (above note 64) 219.

70 Number 33 of 2011.

National Assembly can through this mechanism ensure that the JSC's proposed budget reflects policy priorities and hold the commission accountable for its performance. Thus the involvement of the National Assembly in the approval of the JSC's budget is aimed at promoting good governance, fiscal transparency and ensuring that the commission adheres to fiscal discipline.

The other means through which parliament may exercises oversight over the JSC is through the process of removal of a JSC commissioner from office. Article 251 provides that a member of a constitutional commission may be removed from office for serious violation of the constitution or any other law, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy. The Constitution assigns the National Assembly a crucial function in the removal process. It has the exclusive power of considering any petition for removal of a commissioner to determine whether the petitioner has shown sufficient grounds for removal, and then recommending the formation by the President of a tribunal to investigate the matter.

Despite the laudable benefits of parliamentary oversight over the JSC, it is worth pointing out that the exercise of this mandate by parliament has been faced with challenges. Concern has arisen that the exercise of oversight powers has been used as a mechanism for interfering with the independence of the JSC for ulterior motives. The JSC initiated a process to remove the then Registrar of the Judiciary, Ms. Gladys Boss Shollei, attracting the attention of the National Assembly, which attempted to intervene in the disciplinary process. The National Assembly initiated a parallel investigation and summoned commissioners of the JSC to appear before the National Assembly's Committee on Justice and Legal Affairs. When the commissioners declined to appear, the National Assembly embarked on a process of removal of some of the commissioners. This was only stopped by the High Court which ruled that parliament's oversight role did not permit it to make 'haphazard or un-coordinated incursions of inquiry into the mandate of another state organ or independent commission or office.'[71] The High Court stated: [72]

> We have taken judicial notice of the report of the debate in Parliament as reported in the Official Hansard of 6-7th November, 2013. This is in accordance with the provisions of section 60 of the Evidence Act. A cursory reading of the same, retrieved from the official website of the National Assembly, demonstrates the animus by a majority of the speakers towards the JSC and the desire for its control. Two examples

[71] *Judicial Service Commission v Speaker of the National Assembly and 8 Others*, Petition Number 518 of 2013 paragraph 200.

[72] As above paragraphs 258-259.

> will suffice. At page 33 of the Hansard, one Honourable Member is reported to have stated as follows: 'The horns of the JSC can only be trimmed by this House through our oversight role'. At page 20 another Honourable Member of Parliament, who was also a member of the committee, in seconding the motion to adopt its report, stated that: 'From the outset I wish to state that the journey which this Committee has travelled with the JSC has been very turbulent. This is a commission (JSC) that would only wish to oversee itself. Before this petition, we had issues with this Commission. This is the time for this House to assert itself ... this Commission snubbed a Committee of Parliament. If members will not assert its authority, tomorrow another Commission will snub another Committee...we have always had commissions appear before us in the past whenever the Committee required them to appear...They have always appeared before this Committee but the JSC did not'.

The High Court established the principle that though the constitutional commissions are subject to oversight by parliament, this must be carried out in conformity to the Constitution and not for ulterior motives.

Accountability to Courts

The Constitution is supreme and every state organ and institution is subject to the constitution and rule of law.[73] Thus the courts being the custodians of the Constitution and the law are mandated to intervene if it is alleged that the JSC has acted in breach of either the Constitution or the law. Article 165 confers on the High Court power to intervene where it is alleged that the constitution has either been violated or threatened with violation. This imprimatur conferred on the courts to supervise the constitutionality and legality of the acts of the JSC has been affirmed in several judicial determinations.

The courts have affirmed that they have a supervisory mandate over the JSC's discharge of its function of recommending the formation of a tribunal to consider removal of a judge. In *Judicial Service Commission v Mbalu Mutava and another*[74] the Court of Appeal held that the Judicial Service Commission, as a state organ, is bound by the national values and principles of governance entrenched in article 10 and by the Bill of Rights. It held that the JSC, in initiating the process of removal of a judge under article 168(2) of the Constitution of Kenya, was bound to respect the judge's right to a fair administrative action under article 47(2).

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73 Article 2.

74 Civil Appeal 52 of 2014.

Similarly, the courts have affirmed that they have the mandate to scrutinise the process of judicial appointment to ascertain whether it conforms to the Constitution and statutory provisions. In *Trusted Society of Human Rights Alliance and 3 others v Judicial Service Commission and another*,[75] the High Court held that it has the jurisdiction, the mandate and power to investigate claims of unconstitutionality, illegality and irrationality on the part of the Commission. The court allowed a challenge to the process of recruitment of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court reasoning that the decision of the Commission to summarily reject applications, where the candidates clearly satisfied constitutional qualifications, before the stage of interview was unsupported by the law and was tainted with procedural irregularity. The court proceeded to compel the JSC to reconsider the names of the applicants which were rejected and thereafter proceed in accordance with the law.

Lastly, the courts are vested with the power to question the legality of any exercise of power by the JSC. The Supreme Court, in *Salat Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission and 7 others*,[76] reviewed the purported retirement of judges by the JSC. The majority, with Chief Justice Willy Mutunga dissenting, took the controversial position that the security of tenure for all judges under the Constitution was sacrosanct, and was not amenable to variation by any person or agency, such as the Judicial Service Commission which had no supervisory power over judges in the conduct of their judicial mandate. The majority held that the commission lacked competence to direct or determine how, or when, a judge in any of the superior courts could perform his or her judicial duty, or when he or she could or could not sit in court. Any direction contrary to those principles would be contrary to the terms of the Constitution which unequivocally safeguarded the independence of judges. It followed that the said directive concerning judges of the superior courts, issued by the JSC, was a nullity in law.

The courts in South Africa are also vested with the power to rule on the legality and constitutionality of the discharge of functions by the JSC. In the case of *JSC v Cape Bar Council*[77] the question before the Constitutional Court was whether the decision of the JSC not to recommend any of the candidates to fill in two vacancies at the Western Cape High Court was unconstitutional. The court held that, since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a

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75 Petition 314 of 2016 and Judicial Review 306 of 2016 (Consolidated).

76 Petition No 23 of 2014.

77 (818/11) [2012] ZASCA 115.

matter of general principle, it is obliged to give reasons for its decision not to do so. The court made a finding that the failure by the JSC to fill any of the two vacancies on the bench of the Western Cape High Court was irrational and unlawful.

Accountability to the Executive

As noted earlier, the Constitution seeks to strike a balance between the independence of the JSC on the other hand and the commission's accountability to the executive on the other hand. Article 254 on the obligation to submit a report to the President annually, and to report on a particular issue if requested by the president, has been mentioned earlier. The presentation of the reports enables the President to hold the JSC to account in respect to implementation of policies of the national government with respect to the judicial branch of government. It should be noted that judicial functions are a functional competence of the national government and is not a devolved function.

Conclusion

The 2010 Constitution has established a JSC that is broader and more representative in composition compared to the JSC during the pre-2010 dispensation. Further, to ensure broad membership the structure of the JSC provides for gender quotas. The re-engineering of the composition of the commission furthers the goal of ensuring that it is a transparent and independent institution. However, it is noteworthy that representatives of the judiciary take up five seats in the eleven member commission, and acting together, would constitute a powerful lobby within the commission. The reported determination of the representatives of judges and magistrates to ensure that the 2016 successors of retired Chief Justice Willy Mutunga and Deputy Chief Justice Kalpana Rawal were recruited from within the ranks of serving judges confirms these fears. On the accountability of the commission, the Constitution envisages a parliamentary oversight mechanism, although this scheme as currently structured is weak and also prone to abuse. There is therefore need for restructuring the accountability scheme to ensure the operations of the JSC adhere to the tenets of transparency and openness. The National Assembly should explore the option of establishing a permanent committee on constitutional commissions and independent offices that will offer oversight over independent commissions and offices, including the JSC.

CHAPTER FOUR

INTERNAL MECHANISMS FOR ENSURING INDEPENDENCE AND ACCOUNTABILITY IN THE JUDICIARY IN KENYA

Patricia Kameri-Mbote and Muriuki Muriungi

Introduction

Independence and accountability of the judiciary have engaged legal scholars, practitioners and crafters of constitutions, the world over.[1] Their meaning, however, has been riddled with controversy.[2] Indeed, as Handberg argues, the two emphasize different facets of the judicial role with independence speaking to absence of bias in decision making; and accountability relating to the responsibility

[1] For instance, see S Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 *Chicago Journal of International Law* 275; PH Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson 1987); J Bell, 'Judicial Cultures and Judicial Independence' (2001) 4 *Cambridge YB Eur Legal Studies* 47; S Shetreet and C Forsyth, *The Culture of Judicial Independence — Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012), ML Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995).

[2] A Cox, 'Foreword: Constitutional Adjudication and the Promotion of Human Rights' (1966) 80 *Harvard Law Review* 91. The author writes that the concept of judicial independence, 'once loosed…is not easily cabined'.

that judges have to society and the citizens.[3] Judicial independence and accountability ensure that judicial power is exercised legitimately.[4]

The founding fathers of the American Constitution, James Madison and Alexander Hamilton appeared to suggest that judicial independence was a crucial aspect and pillar of the constitutionally hallowed doctrine of separation of powers.[5] Scholars have attempted to define what judicial independence entails by describing the results it seeks to obtain, such as the promotion of the rule of law.[6] Paul Bator argues that judicial independence seeks to ensure that, at the end, judges are free from executive and parliamentary control in order to allow them determine whether some power asserted by any of the arms of government against a citizen, is consistent with the law.[7]

So critical is judicial independence to judicial officers that it has been equated to academic freedom for professors in universities.[8] However, Evans notes that the twin concepts are contested at the margins as they are sometimes perceived as tools used by judges and professors respectively, to keep their policy preferences and privileges from public scrutiny.[9]Acknowledging the independence of the judiciary as indispensable, it has been argued that it constitutes the bedrock of the rule of law in a democratic society, [10] because it enables the impartial adjudication of disputes without external interferences and influences.[11]

Independence of the judiciary shields judges from executive influence over the outcomes of cases. Institutional independence relates to aspects entailed in running a functioning judiciary, funding and the general administration of courts.[12] In Kenya, the issue of the financial independence of the judiciary has been an issue of concern

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3 R Handberg, 'Judicial Accountability and Independence: Balancing Incompatibles?' (1994) 49 *University of Miami Law Review* 129.

4 Migai Akech et al., *Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution* (Pact and Act!, 2012).

5 See Alexander Hamilton, *Federalist Papers* No. 78.

6 R Dahrendorf, 'A Confusion of Powers: Politics and the Rule of Law' (1977) 40 *Modern Law Review* 9.

7 PM Bator, 'The Constitution as Architecture: Legislative and Administrative Courts Under Article III'(1990) 65 *Indiana Law Journal* 268.

8 J Evans, 'Adjudicative Independence: Canadian Perspectives' 103, 2013. https://assets.budh.nl/open_access/nall/II_Independence_and_Accountability_of_Judges_and_Adjudicators.pdf accessed 26 September 2016.

9 Ibid.

10 Ibid.

11 Ibid.

12 For more insights on the concept of institutional independence, see Fabien Gélinas, 'Judicial Independence in Canada: A Critical Overview' in Anja Seibert-Fohred., *Judicial Independence in Transition* (Heidelberg: Springer, 2012) 567.

historically.[13] Financial independence insulates the judiciary and courts from external control.[14] Moreover, without judicial independence, hiring and firing of judicial officers; the assignment of cases; transfer of judicial officers from one work station to another; and preparation of cause lists can be remotely choreographed by external actors to achieve particular outcomes. Internal actors can also affect the independence of judicial officers. There have been instances in the past where Chief Justices in Kenya acted as monarchs[15] ordering and directing the activities of judges with non-compliant judges risking transfers and denial of some privileges such as nice cars and houses.[16]

The public constitutes the consumers of judicial services and their perception of the judiciary and individual judicial is critical. Use of the courts is hinged on the assurance that judges will decide matters impartially.[17] Any crisis of public confidence arising from real or perceived lapse in judicial independence erodes the institutional legitimacy of the judiciary and can result in the public shunning it.[18]

Judicial independence necessitates judicial accountability at both institutional and individual levels. In the former, the Judiciary publishes financial reports, annual reports detailing its activities and a general account on the disposal of cases. Individual judges are also required to provide reasons for their decisions, which form the bases of challenges to such decisions on appeal. Without such accountability measures, judiciaries can be far removed from the public which can erode respect for law and the legitimacy of the judiciary.[19]

Discussions on the tension between judicial independence and accountability continue.[20] To some, the mechanisms put in place for accountability within the

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13 P Kameri-Mbote and M Akech, *Kenya: Justice Sector and the Rule of Law* (2011) A Review by AfriMAP and the Open Society for Initiative for Eastern Africa 79-81. https://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf, accessed 28 September 2016.

14 Ibid 79.

15 For a comprehensive treatment of instances of executive interference on the judiciary, see James Gathii, *The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process* (Kenya Human Rights Commission, 1994) 17.

16 Kameri-Mbote and Akech (n 13) 105.

17 Ibid.

18 This was the cause of the 2007-2008 Post Election Violence in Kenya following a disputed presidential election when the aggrieved party refused to go to court arguing that the courts were compromised.

19 Handberg (n 3) 134.

20 JL Waltman and Kenneth M Holland, (eds.), *The Political Role of Law Courts in Modern Democracies* (Palgrave Macmillan, 1988) 1.

judiciary undermine judicial independence.[21] Indeed, some have gone to the extent of arguing that in liberal democratic societies, judicial independence runs against the principle of accountability.[22] While appreciating the inherent tension between the concept of judicial independence and accountability, we are of the view that the two need not be mutually exclusive, and that they ought to operate as two sides of the same coin. Accountability denotes a relationship between 'power-wielders and those holding them to account' in which the latter have the right to hold the former 'to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.'[23] Accountability mechanisms ensure that power is exercised fairly and justly.[24] Accountability can be achieved, as some have noted, by hearing matters in open court as much as practicable, allowing freedom of the media to report on court proceedings, allowing for critical review of court decisions by academics and the possibility of decisions being overturned on appeal.[25]

Despite the arguments, independence and accountability of the judiciary remain cardinal principles in ensuring proper dispensation of justice. Institutions around the world including the Kenya judiciary have evolved various mechanisms to ensure the harmonious application of the two principles.

Within this context, this chapter assesses the internal mechanisms put in place to guide the independence and accountability of the Kenyan judiciary. It is divided into seven parts. Part 1 defines and problematizes judicial independence and accountability. Part 2 examines the normative underpinnings of judicial independence and accountability drawing from global, regional national legal instruments and initiatives. Part 3 critically assesses the available internal mechanisms for ensuring independence and accountability in the judiciary in Kenya. Part 4 canvasses the role inter-agency collaboration through the National Council on the Administration of Justice (NCAJ) in ensuring judicial independence and accountability. Part 5 looks at the role of the judiciary in ensuring independence and accountability in other dispute

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21 AB Atchison et al., 'Judicial Independence and Judicial Accountability: A Selected Bibliography' (1999) 3 *Southern California Law Review* 723-810, FK Zemans, 'Public Access: Ultimate Guardian of Fairness in Our Justice System'(1996) 4 *Judicature* 173-175.

22 PH Russell and David M O'Brien eds, *Judicial Independence in the Age of Democracy*: *Critical Perspectives from Around the World* (University of Virginia Press, 2001) 2.

23 RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics'(2005) 99 *American Political Science Review* 29.

24 M Akech and P Kameri-Mbote, 'Kenyan Courts and Politics of the Rule of Law in the Post-Authoritarian State' (2012) *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701230* 2.

25 H Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa' in *Judicial Independence in the Age of Democracy* (above) 202.

resolution institutions within the broader justice sector such as in the courts martial and administrative tribunals. Part 6 draws lessons from other jurisdictions on the questions of judicial independence and accountability. Part 7 concludes.

Normative Underpinnings of Independence and Accountability in the Judiciary

Article 1 of the United Nations Basic Principles on the Independence of the Judiciary demands the inclusion and guarantee of judicial independence in the constitution and laws of countries, requiring governments to ensure both the observance and respect of judicial independence. The Chairperson of the Judiciary Integrity Group made up of Chief Justices and senior judges from around the world, Christopher Weeramantry, has stated:

> A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under law.[26]

This is the context within which norms have been developed at the global, regional and national level to guide and inform the application of judicial independence and accountability.[27]

Global and Regional

The Bangalore Principles to guide judicial conduct and the Latimer House Guidelines are indications of some consensus at the global level on what judicial independence and accountability should look like.

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[26] Judicial Integrity Group, 'Commentary on the Bangalore Principles of Judicial Conduct' United Nations Office on Drugs and Crime, Commission on Crime Prevention and Criminal Justice (September 2007) 5.

[27] For instance, see the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region ('Beijing Statement'*), which were adopted at the 6th Biennial Conference of Chief Justices of Asia and the Pacific, 28th August 1997, the International Bar Association's *Minimum Standards for Judicial Independence (*'New Delhi Standards'), the *Universal Declaration on the Independence of Justice* ('Montreal Declaration'), the *Syracuse Draft Principles on the Independence of the Judiciary* (drafted by the International Association of Penal Law and the International Commission of Jurists) http://cristidanilet.ro/docs/Siracusa%20Principles.pdf.

Bangalore Principles

The Judicial Integrity Group ratified the Bangalore Principles of Judicial Conduct (hereinafter Bangalore Principles) in 2010 drawing upon over thirty national codes and other regional and international instruments.[28] They comprise seven values or principles, which every judicial officer is expected to uphold namely: independence, impartiality, integrity, propriety, equality, competence and diligence.

The first value is judicial independence, which is perceived as an enabler of a proper and functional judiciary as it ensures the protection of the judiciary and judicial officers from improper and inappropriate interferences and influences from external forces.[29] Other values under the Bangalore Principles buttress judicial independence. For instance, in relation to the third value, it is stated that the 'behaviour and conduct of a judge must reaffirm the peoples' faith in the integrity of the judiciary since justice must not only be done but be seen to be done'.[30] This links the pursuit of integrity among judicial officers to perceived independence of the judiciary,[31] because once judicial officers espouse integrity, then the public will have confidence in the judiciary.

Latimer House Guidelines[32]

These guidelines spell out the relationship of the judiciary with other branches of government. They were adopted in 2003 in Abuja, Nigeria, by the Heads of Government of Commonwealth countries and stipulate that an independent, impartial, honest and competent judiciary is important in upholding the rule of law, engendering public confidence and dispensing justice. To secure these aims, they set out mechanisms to be adopted: judicial appointments based on clearly defined and publicly known criteria in a manner that gives effect to meritocracy, ensures equality of opportunity and the need to remove marginalization existing over time; security of tenure and adequate remuneration of judicial officers; ensuring that interactions between the various arms of government do not compromise the independence of the

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28 Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (22 January 2010) ('Bangalore Principles: Implementation Measures').

29 RE McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy'(1991) 1 *Journal of Judicial Administration* 6.

30 Clause 3.2 of the Bangalore Principles.

31 For a similar argument that perceived independence is the chief aim of pursuing integrity among judicial officers, see Stephen Parker, 'The Independence of the Judiciary' in Fiona Wheeler and Brian Opeskin eds, *The Australian Federal Judicial System* (Melbourne: Melbourne University Press, 2000) 70-71.

32 Available at: http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf accessed 01 October 2016.

judiciary; and ensuring the provisions of adequate resources to ensure the proper functioning of the judiciary.[33]

These Guidelines also outline accountability mechanisms: judges should be subject to removal or suspension for reasons that make them unfit to serve; court proceedings ought to take place in open court; and judicial decisions ought to be publicly available, accessible and issued timeously.[34] Principally, the Guidelines provide that judges are accountable to the Constitution and to the law, which they should apply impartially, honestly and with integrity[35] and underscore the point that judicial independence and accountability instil and inspire public confidence.[36] Further: judicial officers should not use criminal law and the law of contempt to stifle or restrict well-founded criticism of the performance of judicial duties.[37] This ensures that judicial officers are accountable to the public on whose behalf they adjudicate disputes.

To enhance judicial independence, the Guidelines provide that there should be both sustainable and sufficient funding for the judiciary to enable it to perform its functions without difficulty.[38] Withholding funds or even allocation of funding should not be used as means of exercising improper control on the judiciary.[39] A denial of sufficient funding would mean that judicial officers would be beholden to other arms of government, which is inimical to their independence.

Another particularly important issue is judicial training.[40] The Guidelines propose development of a culture of judicial education, which ought to be organized in a systematic and continuous manner under the auspices of a well-funded judicial institution or body.[41]

With respect to judicial accountability, the Guidelines stipulate that the judiciary should develop a Code of Ethics and Conduct with both disciplinary mechanisms against judicial officers[42] and a process for removal and suspension of

33 Ibid. 11.
34 Ibid.
35 Ibid 12.
36 Ibid.
37 Ibid 13.
38 Ibid 18.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid 20.

judicial officers outlined.[43] Further, decisions of judicial officers ought to be amenable to public criticism.[44]

National

Kenya has put in place various laws and procedures to guide the attainment of judicial independence and accountability.

The Constitution of Kenya 2010

A number of provisions of the Constitution have impacts on judicial independence and accountability. Chapter 6 on leadership and integrity applies to judges and magistrates as state officers. Article 73 of the Constitution sets out various responsibilities of leadership and provides that all authority assigned to a state officer is to be exercised in a manner consistent with the objects and purposes of the Constitution; demonstrates respect for the people; brings honour and dignity to the office; and promotes public confidence and integrity in the office. It goes on to state that authority vests in the officers a responsibility to serve rather than to rule.[45] The guiding principles[46] of leadership and integrity, also laid out in the Leadership and Integrity Act 2012,[47] include: objectivity and impartiality in decision making; and in ensuring that decisions are not influenced by nepotism, favouritism and other corrupt practices; selfless service based solely on public interest; honesty in the execution of public duties and the declaration of any conflict of interest; accountability to the public for decisions and actions taken; and discipline and commitment in service to the people.[48]

Article 76 of the Constitution deals with financial probity of state officers. It provides that a gift or donation to a state officer vests in the state unless the gift is permitted under a statute. And a state officer must not maintain a bank account outside the country unless permitted under an Act of Parliament and must not accept a

43 Ibid.
44 Ibid 21.
45 Article 73.
46 Article 73 (2).
47 Section 3 of the Act.
48 Ibid.

personal loan or benefit in circumstances that compromise the integrity of their office.[49]

Chapter 10 of the Constitution relates specifically to the judiciary and sets out a framework for its operations. It deals with the appointment of judges and functions and funding of the judiciary. Article 159 provides that judicial authority is derived from the people and vests in, and is to be exercised by, courts and tribunals in accordance with the Constitution. It follows that judicial officers ought to be accountable to the people.

Article 160 (1) specifically provides for the independence of the judiciary, stating that the judiciary is subject only to the Constitution and the law and not to the direction or control of any person or authority. Security of tenure is protected by Article 160 (2) that provides that the office of a superior court judge must not be abolished while there is a substantive holder of the office, and by Article 168 that prescribes strict procedures for removal of a judge. Under Article 160 (4), the remuneration and benefits payable to a judge may not be varied to the disadvantage of the judge nor his retirement benefits varied to his disadvantage during his lifetime. This provision is contained in constitutions of many jurisdictions. However, there is no similar provision with respect to magistrates yet they are involved in similar work as judges. Article 160 (5) provides immunity for its members against legal challenges for any acts or omissions done in lawful execution of their functions, so long as they are done in good faith.

Article 167 of the Constitution fixes the retirement age of judges at seventy years, though they may opt to retire after attaining the age of sixty-five years. Article 171 establishes the Judicial Service Commission (JSC) to recruit judicial officers to ensure that the executive does not make appointments, as was the case in the past. Article 172 is explicit that the JSC is to promote both the independence and accountability of the judiciary by: receiving complaints; investigating and removing judicial officers (other than judges) in accordance with the law; recommending the appointment of particular persons as judges; reviewing and recommending on the terms and conditions of service of judicial officers; and implementing programmes towards the training of judicial officers.

Most significantly, Article 173 establishes the Judiciary Fund as a charge on the Consolidated Fund and administered by the Chief Registrar of the Judiciary to be used for administrative expenses to enable the judiciary exercise its functions. In the period between the promulgation of the Constitution and now, there have been cuts in

[49] Article 76(1) (2).

judiciary funding as priorities of the country have demanded which is a threat to the proper functioning of the judiciary and its exercise of independence.[50]

Judicial Service Act 2011

The Judicial Service Act, No. 1 of 2011 provides for judicial services and administration of the judiciary; structure and membership of the Judicial Service Commission; regulation of the Judiciary Fund; appointment and removal of judges and magistrates; and powers and functions of the National Council on Administration of Justice. One of the objectives of the Act under section 3 is ensuring that the JSC and the Judiciary facilitate and sustain a judicial system that is independent, impartial and subject only to the law and is accountable to the people of Kenya. Under section 4 on the standard of service that should bind all judicial officers, it includes upholding the judicial code of conduct and ethics and promoting and upholding honesty and integrity in its operations.

Turning to financial accountability, s, 8 of the Act sets out the functions of the Chief Registrar who is the chief accounting officer of the Judiciary and is required to account for any service such as the procurement of goods and services in respect of which funds have been appropriated by parliament and for which issues are made from the exchequer account. Another accountability mechanism is contained in Part VI of the Act where the National Council on the Administration of Justice (NCAJ) is charged with the function of ensuring efficiency in the administration of justice and reform in the justice system. Section 38 of the Act provides for annual reports and audited accounts and demands that the Chief Registrar of the Judiciary makes them available at a determined period. Section 38 in particular, requires that the annual report contain financial statements of the JSC and the Judiciary and a description of their activities, information relating to disposal of cases and issues on access to justice, summary of the steps taken during the year in identification and appointment of judicial officers and information relating to the performance of the judiciary, among other key information. The kind of information required in the annual report, usually published in the *Gazette* and sent to both houses of parliament under section 38 (4) of the Act, points to accountability requirements for the Judiciary. Section 39

[50] A Shiundu, 'Kenyan MPs cut Senate, SRC and Judiciary budgets to fund counties' (*The Standard* newspaper 4th June 2015) http://www.standardmedia.co.ke/article/2000164515/kenyan-mps-cut-senate-src-and-judiciary-budgets-to-fund-counties, accessed 08 October 2016; S Kiplagat, 'Cutting funds from judiciary will hurt public, says Mutunga' (The Star Newspaper 03 March 2014) http://www.the-star.co.ke/news/2014/03/03/cutting-funds-from-judiciary-will-hurt-public-says-mutunga_c904155, accessed 08 October 2016.

provides that the Chief Registrar shall ensure that proper books of accounts are kept and maintained and presented to the Auditor-General within a period of 3 months after the end of each financial year for auditing.

Section 44 of the Act covers the issue of conflict of interest within the JSC and requires disclosure of such conflict and abstinence from taking a vote or deciding a matter. On accountability, the Act puts in place measures to ensure openness and transparency by setting out clear procedures for appointment and removal of judicial officers in schedules to the statute.

Procedural Requirements

Article 47 of the Constitution provides for fair administrative action by providing that all actions taken by an administrative body shall be fair and efficient. It embodies the rules of natural justice which subsume the right to be heard before a decision is passed against one. This needs to be read together with the procedural requirements in Articles 21 and 22 of the Constitution that empower a person who is affected by any decision to challenge it if procedural stipulations have been flouted. Procedural justice, just like substantive justice, can found an action against a body or a particular decision issued by a body.[51]

Fair Administration Action Act, No. 4 of 2015

The Fair Administration Action Act gave effect to Article 47 of the Constitution on fair administrative action. It has made it possible for litigants to challenge decisions of all persons including individual persons whenever the actions of such persons affect their fundamental rights and freedoms of another.[52] This is a shift from the former legal position, particularly prior to the Constitution of Kenya 2010 where the basis of judicial review was under section 8 of the Law Reform Act.[53]

Some of the decisions that are challenged in courts through judicial review applications as empowered by the Fair Administrative Action Act are those issued by

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51 Indeed, judicial review applications are normally concerned with procedural propriety of decisions.

52 Section 2 of the Act defines an administrative action which is amenable to judicial review challenge under the Act as including all actions or decisions that affect the legal rights, interests and freedoms of another person. Also see section 3c of the Act.

53 For an in-depth analysis of the changing landscape in Kenya's administrative law field, see generally, Migai Akech, *The Expanding Domain of Administrative Law in Kenya* (Nairobi: Strathmore University Press, 2016).

subordinate courts and other administrative tribunals.[54] In this sense therefore, accountability of the judiciary, at least for subordinate courts and tribunals, is taken care of since whenever they make decisions that exceed their authority or those that fall foul of procedure, such decisions may be struck down by the superior courts.

Section 3 of the Act applies to all agencies exercising administrative authority and those performing judicial or quasi-judicial functions, which means that the judiciary is included in the Act's purview. While decisions of magistrates' courts are usually challenged on appeal and rarely through judicial review, there is nothing in law barring magistrates' court decisions from being challenged through judicial review Article 165 (6) of the Constitution provides that 'The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.' In *Republic v Senior Resident Magistrate Mombasa ex-parte H L*, the judge questioned the wisdom of filing a judicial review application as opposed to an appeal but did not rule out the possibility of such an application holding and this has been done in some cases.[55]

Internal Mechanisms for Ensuring Independence and Accountability

The Latimer House Guidelines discussed above, provide for oversight of the three branches of government by other bodies and commissions such as the Ombudsperson, Auditor-General, Human Rights Commissions, Anti-corruption commissions and the media among others. These bodies play a critical role in ensuring independence and accountability of the judiciary. The Judiciary has also put in place various internal accountability mechanisms to ensure judicial independence and accountability.[56] In the past, some of the internal accountability mechanisms established included: setting up of Ethics and Governance Sub-committee of the Judiciary to conduct reviews on the integrity and performance of the judiciary;[57] setting up continuous complaints systems to enable litigants file complaints and the adoption;[58] and implementation of

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54 This is generally the nature of judicial review, both under statute and at common law; as a demonstration and exercise of the supervisory powers of the courts over subordinate courts and tribunals.

55 Miscellaneous Civil Application 3 of 2016. For an example of a case of judicial review of a magistrate's decision see *Republic v Principal Magistrate Lamu Magistrate's Court and another ex parte Kenya Forest Service* [2016] eKLR

56 See E Gicheru, 'Independence of the Judiciary: Accountability and Contempt of Court' (2007) 1 *Kenya Law Review* 7.

57 Ibid.

58 Ibid.

the Judicial Code of Conduct and Ethics which all judicial officers are expected to comply with.[59]

In this section, we address some of the internal mechanisms that the Judiciary has put in place to achieve judicial independence and accountability. These mechanisms relate to the institutional organization of the judiciary (strategic planning and the Judiciary Transformation Framework); court administration and case management; the office of the Ombudsman; and the Judiciary Training Institute.

Institutional Organization

The Judiciary has structures of governance and staff and operates in accordance with particular policies, plans and strategies. These strategies, plans and policies have been developed by the institution in consultation with stakeholders, taking into account the long term goals of the institution and the duties imposed on it in law.[60] We assess various policy documents and plans that guide and inform the activities of the judiciary in this section.

Strategic Plans

Strategic planning in the public sector in Kenya was introduced by the Government of Kenya Economic Recovery Strategy (ERS) 2003-2007 as one of the ways to enhance Economic recovery and has since become institutionalized in public institutions. The first ever Judiciary Strategic Plan 2005-2008 in Kenya was launched in March 2005.[61]

The Judiciary has since then institutionalized strategic planning. Its current strategic plan, 2014-2018, is anchored on the Judiciary Transformation Framework discussed below. Coming two years into the implementation of the Framework, it builds '*on the early successes and lessons of Judiciary transformation*'[62] and 'provides fresh impetus and guidance on how we must now broaden, deepen and sustain transformation for the long-term'.[63] It is ambitious and seeks to redouble the transformation efforts.

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59 Ibid.

60 This is in accordance with the strategic plan for the Judiciary as available on the website.

61 Judiciary, *Kenya's Judiciary Strategic Plan 2005-2008*, March 2005.

62 The Judiciary, 'Strategic Plan 2014-2018 Building on the Foundations of Judiciary Transformation' (2014) iv http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/Corporate%20Strategic%20Plan%20%202014%20%202018-min.pdf, accessed 01 October 2016.

63 Ibid.

Judiciary Transformation Framework

The Judiciary, seeking to transform itself as an institution particularly following the adoption of the Constitution of Kenya 2010 and in a bid to shed the image that it had built over the years of inefficiency marked by a backlog of cases among other challenges, developed the Judiciary Transformation Framework (JTF) to transform its service delivery and mode of operation.[64] The framework, a strategic reform blueprint, was launched in May 2012 and was supposed to run for 4 years with its completion envisaged to be in 2016. The framework is hinged on four key pillars.

The first pillar is 'people-focused delivery of justice'[65] under which the Judiciary aims at realizing a legal system that cherishes equality of all before law and which affords an equitable legal process. To achieve expeditious delivery of justice and access to justice, the Judiciary promises to simplify court procedures and drafting of court documents; providing means of accessing the courts by making them more affordable and physically accessible; decentralizing the courts to make them more physically accessible especially in remote areas; enhancing awareness and understanding of the law among the citizenry; introduce timeliness for processing of claims; make the courtroom and court processes more friendly and less intimidating, and the justice system affordable; and adopt alternative dispute resolution mechanisms. These initiatives seek both to obey the constitutional provision that judicial authority ought to be exercised for the benefit of the people and to enhance accountability since the public is able to assess whether the judiciary is serving its purpose.

The second pillar under the JTF is that of transformational leadership, organizational culture and professional staff. The framework seeks to transform philosophy and culture of the judiciary from a 'cultural orientation ... of dominance, power, prestige and remoteness as opposed to service, equality and equality'.[66] Further, the JTF takes issue with 'rules, dress code and other rituals' that alienated the institution for the people.[67] JTF seeks to transform the judiciary into an institution 'that is sensitive and responsive to the needs, feelings, and aspirations of the people… friendly and fair to people… in the hardware of its outlook and in the software of its decisions and processes.'[68] With respect to the key area of leadership and

64 The full text of the Judicial Transformation Framework document is available here: http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf accessed 27 September 2016.

65 Ibid 13.

66 Ibid 15.

67 Ibid.

68 Ibid.

management, it seeks to change the pay inequalities, ethnicisation of positions, clientelism and discrimination at the workplace, the absence of a performance management system and a weak financial policy among other issues.[69] With regard to the organizational structure of the judiciary, the framework notes that it was highly centralized and concentrated with a dense, unclear and incomprehensible relationship between judges, magistrates, registrars and the administrative staff. It also noted the glaring absence of both vertical and horizontal accountability systems and a lack of clarity with respect to reporting lines.[70] In order to deal with this problem and thereby enhance accountability, the framework seeks to decentralize judicial and administrative functions, reengineer the organizational structure so as to establish clear units of responsibility and put up clear reporting lines, institutionalize continuous learning and training at the Judiciary Training Institute.[71] In addition, the framework proposes that the various operational organizational structures clearly define and demarcate the roles and mandates of various units within the judiciary such as courts, court divisions, court stations and directorates.[72]

The third pillar of the JTF that is relevant as an internal mechanism for achieving judicial independence and accountability is on adequate financial resources and physical infrastructure.[73] With respect to resourcing and value for money, the transformation framework seeks to operationalize and build internal capacity to manage the constitutionally created Judiciary Fund. It also seeks to establish sound financial management and accountability systems and strengthen its procurement and accounting capacity.[74] In particular, the framework provides that the Judiciary will put in place and operationalize value for money standards and trails to enable forensic auditing, and develop an annual procurement plan.[75] These are robust strides towards achieving judicial accountability. The fourth and final pillar under the JTF relates to harnessing technology as an enabler of justice. The framework recognizes that information technology has the potential to improve the administration of justice as it cuts through all the pillars by aiding access to justice, improving human resource capacity, speeding up trials, enabling proper data management, data processing and secure archiving of information.[76] This is crucial for both judicial independence and accountability. Speedier trials and proper management of data facilitate accountability

69 Ibid 16.
70 Ibid 17.
71 Ibid.
72 Ibid.
73 Ibid 18.
74 Ibid.
75 Ibid.
76 Ibid.

as trials are handled expeditiously and judgments delivered on time. It also helps to build the institutional and individual confidence of the public.

With the rampant cases of court files getting misplaced or going missing, ostensibly hidden by corrupt judicial staff so as to solicit for bribes,[77] secure archiving and proper data management using technology would not only facilitate faster dispensation of justice but also considerably reduce opportunities for corruption.[78]

The measures identified for harnessing technology within the judiciary include digitization of court records and establishing an electronic case management system among others.[79] The aim is to enhance accountability in the judiciary, eliminate inefficiencies that continue to beset the judiciary as an institution and result in enhanced public confidence.

Court Administration and Case Management

The administration of courts and case management systems and procedures put in place by the Judiciary also constitute some of the internal mechanisms for ensuring judicial independence and accountability. In court administration, various judges are given clearly defined administrative roles with clear reporting lines to ensure the efficient disposal of cases and prevent interested judicial officers assigning themselves particular cases.[80] Similarly, the case management systems and procedures ensure that judicial officers are held accountable to ensure that they do not delay in hearing cases, writing and delivering judgments leading to a backlog of cases and a decline in confidence among the public. In this section, we consider the role of the various cadres of judges in the administrative hierarchy and the performance management mechanisms put in place to hold judicial officers accountable.

The Role of the Chief Justice

The Chief Justice is the technical and administrative head of the Judiciary and is also the President of the Supreme Court. These roles include: issuing practice directions and written guidelines to judges and judicial officers so as to ensure the application of

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77 Ibid.

78 Ibid.

79 Ibid 20.

80 See e.g. report investigating Justice Joseph Mbalu Mutava which was handed over to the President, *The Final Report of the Tribunal Investigating the Conduct of Justice Joseph Mutava* (2016) where one of the allegations the Tribunal found proved against the judge was that he conspired to have a file relating to a particular litigant to be brought before him.

constitutional values and principles;[81] harmonization of the judicial and administrative functions of the court; fostering relationships between judges, judicial officers and staff by promoting teamwork and linkages; overseeing the application of standards and norms for judges and judicial officers in service delivery; and providing for any other matter affecting the accessibility, dignity, effective and expeditious disposal of matters or the functioning of the courts.

The Chief Justice is also mandated under section 13 of the Act with the transfer and deployment of judges from one station or division to another for the purposes of promoting the effective, prompt and efficient discharge of judicial service. A critical point should be made with respect to the powers of the Chief Justice to transfer judges. In exercise of the powers conferred under section 13 of the Act, it has been argued by some that this could be abused and used as an informal disciplinary mechanism[82] for wayward judges or those that issue unpopular judgments.[83] Such a view appears to have been expressed in the *Final Report of the Task Force on Judicial Reforms* popularly called the 'Ouko Report'.[84] For instance, some of the divisions of the court such as the Constitutional and Human Rights Division and the Judicial Review division are considered powerful as they invariably involve cases brought against the state. There is a perception that those who serve there are favoured and that being moved from these divisions is a demotion/punishment.[85] Similarly, the commercial division and courts located in main cities such as Nairobi are considered as more prestigious compared to other remote court stations. The view

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81 For instance, the Chief Justice has since promulgated the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 to enable the filing of constitutional petitions so as to actualize the Bill of Rights. Similarly, the Chief Justice also passed the *Sentencing, Bail and Bond Policy Guidelines* 2015 to provide uniformity and guide judicial officers when considering whether to grant bail or not in criminal cases.

82 See, Jill Cottrell, 'The Indian Judges' Transfer Case' (1984) 33 *International and Comparatively Law Quarterly* 1039,. The author in a note commenting on an Indian case relating to a transfer of a judge, makes the suggestion that transfer could have been made as a disciplinary measure.

83 Yash Vyas, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third Legal Studies*, Article 6, 144. http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1060andcontext=twls, accessed 08 October 2016.
See http://www.judiciary.go.ke/portal/assets/filemanager_uploads/News%20Downloads/LIST%20OF%20JUDGES%20JUNE%202016%20EDITION.pdf accessed 28 September 2016 for the latest transfer of judges that took place.

84 Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (July 2010) Government Printer, 105.

85 For a consideration that some of the transfers are demotions while others are promotions, see Nzau Musau, 'Chief Justice makes major changes among High Court Judges' *The Standard* newspaper, 10 August 2014, p. 1 http://www.standardmedia.co.ke/article/2000131025/chief-justice-mutunga-makes-major-changes-among-high-court-judges, accessed 28 September 2016.

that transfers are sometimes conducted to further a punitive agenda persists despite the Judiciary coming up with a *Human Resource Policies and Procedures Manual* that contains transfer guidelines for judges by prescribing conditions.[86]

It is however, important to mention that considering the constitutional and legal provisions on the management of the judiciary, the Chief Justice does not seem to have power to discipline errant judges. The responsibility of disciplining judicial officers rests with the employer, in this case the Judicial Service Commission, as opposed to the Chief Justice. We regard this as important for judicial independence judging from instances in the past where the Chief Justice would punish judges that were considered non-compliant to the executive through transfers. The Judicial Service Commission is a better institution to perform this task as it is an independent body that is not involved in day to day management of the judiciary. This is important for ensuring intra-judicial independence as noted above.

Role of the Presiding Judge and Principal Judge

The Constitution establishes the offices of the President of the Court of Appeal[87] and the Principal Judge[88] of the High Court. These offices are filled through election by the judges of the respective courts. The wisdom of the choice of election as opposed to other criteria such as seniority as the basis for filling these positions is open to debate. Elections are carried out within a competitive context which can affect civility and collegiality among judges. However, an elected judge is bound to remain accountable to the electorate (in this case the judges who elected them) and it is hoped that this will in turn lead to accountability to the larger society. The office of the Presiding Judge is established under section 7 of the High Court (Organization and Administration) Act 2015. The Presiding Judge whether of a court station or a division of the court is responsible and reports to the Principal Judge and is the chairperson and convener of the Court User Committee in their station.

On the other hand, the Principal Judge ranks higher than the Presiding Judge as per section 8 of the Act and this office is established under section 6 of the Act. The Principal Judge is responsible to the Chief Justice directly for the overall administration and management of the court, ensuring the prompt and orderly conduct of the business of the court; the constitution of benches of two or more judges in

86 The Judiciary, 'Human Resource Policies and Procedure Manual' (2012) 26 http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/HR%20MANUAL.pdf, accessed 28 September 2016.

87 Article 164 (2).

88 Article 165 (2)

consultation with the Chief Justice; and undertaking other duties as assigned by the Chief Justice. Like the Principal Judge, the President of the Court of Appeal is responsible to the Chief Justice directly for the overall administration and management of the Court of Appeal. S/he is responsible for the constitution of benches to hear appeals, and undertaking other duties as assigned by the Chief Justice. There do not appear to be any proper guidance or guidelines to inform the empanelment of benches to hear matters on appeal either by the Chief Justice or the Principal Judge. In the absence of guidelines, there is a likelihood of abuse of such discretion to pack a court sitting on a matter with judges that are sympathetic to a particular cause or sectarian interest, which is bad for judicial accountability.

Thus, there are clear lines of authority and reporting in the judiciary. This is important for accountability purposes as it provides clarity of the persons responsible for particular acts or omissions should remedial action or sanctions are necessary. It is however important to ensure that accountability is actually achieved.

Role of Divisional Heads

Section 11 of the Act establishes divisions of the High Court to promote efficiency in the administration of justice and improve judicial performance. These divisions include: Family and Children; Commercial; Admiralty; Civil; Constitutional and Human Rights; and Criminal.

Section 11 (2) of the Act provides that each division of the court is to be headed by the Presiding Judge of that Division as designated by the Chief Justice with judges serving in the Division under the Presiding Judge. These divisions may be established in any court station in the country, the aim being to have a court station in each county also headed by a Presiding Judge of the Court Station.[89] A Deputy Registrar is also appointed and is responsible for the administration of the division[90] and the court station[91] reporting to the Presiding Judge.

Performance Management

Under Part V of the High Court (Organization and Administration) Act on General Provisions, issues of case management, records of the court, ethics and integrity and issues of performance management are canvassed. Performance management is a

[89] Section 12(2) (a).
[90] Section 11 of the Act.
[91] Section 12 (2) (c).

'means of getting better results by understanding and managing performance within an agreed framework of planned goals, standards and competency requirements.'[92] The goal is to improve organizational and individual performance.[93] Alongside ethics, integrity and case management, performance management provides essential internal mechanisms developed by the institution to ensure accountability to the people.

The judiciary had over the years resisted performance management measures arguing that they would interfere with judicial independence.[94] The Ouko Task Force on judicial reforms also noted that the judiciary was not part of the performance contracting programme for the public service and further that performance evaluation or appraisal system was technically non-existent as there was no evidence that case returns filed by judicial officers were used to improve performance.[95] As noted above, JTF identified 'performance management system to ensure accountability, improvement and transparency' as a critical issue.[96] It proposed the establishment of a Performance Management Directorate[97] recognising that the lack of a performance management affected the judiciary's leadership and management.[98]

Kenya's judges and magistrates signed performance contracts in the 2015-2016 fiscal year and as from July 2015; they are required to submit a daily court return template to the Directorate of Performance Management which then analyses it to generate a judge's productivity index.[99] The performance measures and indicators used deal with 'case clearance rate' and 'integrity of court files' among others.[100] These are weighted to ensure proportionality[101]and taking into account both quantity

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92 M Armstrong, Armstrong's *Handbook of Performance Management; an Evidence-based Guide to Delivering High Performance*, 4th ed, (London and Philadelphia: Kogan Page, 2009) 9.

93 Ibid.

94 Kenya National Assembly, *Official Record* (Hansard), Wednesday, 7th April, 2010, p. 14 (available online at https://books.google.co.ke/books?id=qKyo_jDBRtoCandsource= gbs_all_issues_randcad=1(accessed 7 April 2016). The Prime Minister noted that the judiciary was functionally independent of the executive and therefore could not be forced to adopt performance contracting. However since it is organically part and parcel of government, it would be advised to accept the recommendation of the Executive and introduce performance contracting.

95 The Judiciary of Kenya, above note 88, at 65-67.

96 The Judiciary of Kenya, *Judiciary Transformation Framework, 2012-2016*, p. 12.

97 Ibid 16.

98 Ibid 17.

99 The Judiciary of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (April 2015) 40-41.

100 Ibid.

101 Ibid 27-41. By proportionality we mean that the output (determined by the number of cases disposed of) when divided by the number of judicial officers so as to determine their productivity ought to indicate accountability.

and quality and that some tasks require more time and effort than others.[102] There is no available comprehensive analysis of the impact of these performance measures. There are however returns that individual judicial officers make which do not provide the overall picture.

Section 30 of the Act additionally provides that every judge shall sign and ascribe to the Judicial Code of Conduct, the compliance of which shall be monitored by the Principal Judge.

Appellate Jurisdiction

Litigants who are dissatisfied with a particular judgment of a court may invoke the appellate jurisdiction of courts to challenge the decision of the court that issued it at a higher court. This is a right under law, though it is sometimes circumscribed to only matters of law with respect to particular matters particularly in the Court of Appeal.[103] This appellate jurisdiction is even more limited where it is being lodged in the Supreme Court as the matter must involve an interpretation or application of the Constitution or be certified by the court as raising as a matter of general public importance.[104] Appellate jurisdiction is a judicial accountability mechanism within the judiciary and it inspires confidence among the public and keeps judges alert and conscientious in the knowledge that their decisions are amenable to scrutiny by higher courts with possible reprimands or sanctions where they are found to be patently illegal or biased.

Though not directly related to appellate jurisdiction, a point should be made on the powers of a court to punish for contempt, which we regard as an essential internal mechanism of ensuring judicial independence. Section 36 of the Act provides for this power, vested in the courts for the proper administration of justice. It is also reiterated in section 5 (1) of the Judicature Act and was applied in the case of *Republic v David Makali and 3 Others*.[105] James Oswald, writing on contempt of court, states thus:

> There is probably no country in which Courts of law are not furnished with the means of vindicating their authority and preserving their dignity by calling in the aid of the executive in certain circumstances without the formalities usually attending a trial and

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102 Ibid.

103 See *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others* [2012] eKLR where the Supreme Court of Kenya remarked that a court cannot arrogate jurisdiction to itself that it has not through judicial craft and held that jurisdiction is only granted by law.

104 Article 163 (4).

105 Court of Appeal Criminal Application No. 4 and 5 of 1994.

> sentence. Of this the simplest instance is where the judge orders the officers to enforce silence or to clear the court.[106]

An interesting issue on judicial independence with regard to appellate jurisdiction arose in the case relating to the retirement of judges which was filed challenging the constitutional requirement for judges to retire at 70 years of age.[107] The issue in question was whether judges who had been appointed under the repealed constitution which set the retirement age at 74 could cite security of tenure under that Constitution to defeat the provisions of the Constitution of Kenya 2010, which set new retirement age. It is instructive to note that all judges took their oaths to defend the new Constitution when it was promulgated in 2010.[108] The High Court had ruled that the retirement age was the constitutionally prescribed 70 years, a decision that was affirmed by the Court of Appeal.[109] In an unrelated matter touching on an election petition[110], a section of the Supreme Court pronounced themselves on the issue of the retirement age. The Court of Appeal decision was challenged in the Supreme Court whereupon the judges recused themselves from hearing the matter on the basis that they had publicly aired their views before.[111] Recusal is an important accountability mechanism which ensures that a judge who has an interest in a matter or has aired their view on a matter coming before the court recuses himself/herself to remove the likelihood of bias.

The issue here was whether judges who have expressed their views on the retirement age and some of whom would be affected by the decision could impartially determine the dispute in an impartial and accountable manner. The effect of recusal in this case was lack of quorum. The court rejected the doctrine of necessity that was invoked to enable them hear the matter.[112] The net effect was that the decision of the Court of Appeal which had held that judges would retire at 70 was affirmed, by default.

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106 James Francis Oswald, *Contempt Of Court, Committal and Attachment and Arrest Upon Civil Process*, 2nd Edition (1895) 10, 11. See also Lord Denning, in the Court of Appeal in *Balogh v Crown Court at St Albans* [1974] 3 All E.R. 283.

107 *Kalpana H Rawal v Judicial Service Commission and 4 others* [2015] eKLR.

108 Article 167 (1).

109 *Kalpana H Rawal v Judicial Service Commission and 4 others* [2015] eKLR.

110 *Nicholas Kiptoo Arap Korir Salat v IEBC and others* Petition no. 23 of 2014.

111 *Lady Justice Kalpana H Rawal and 2 Others v Judicial Service Commission and 6 Others* [2016] eKLR.

112 Ibid.

Ombudsperson

Distinct and separate from the office of the Ombudsperson created under the Constitution as a constitutional commission, also known as Commission on Administrative Justice, the Judiciary has also established the office of Ombudsperson. The Judiciary Ombudsperson is mandated to enforce administrative justice by addressing instances of maladministration by putting in place effective complaint handling structures.[113] The office receives complaints from litigants who have grievances against members of the judiciary such as judicial staff, which it considers, and processes. The office also acts as a forum for resolving internal conflicts among staff at the judiciary. The Ombudsperson is empowered to investigate allegations of misconduct of judicial officers (judges and magistrates) and other judicial staff, either on its own initiative or upon a complaint being lodged by a member of the public. The measures taken by this office serve to ensure accountability of the members of the judiciary in the discharge of their functions. It also protects the independence of the judiciary by providing an internal mechanism for handling complaints. The Ombudsperson is required to publish quarterly reports on the complaints received and any action taken guided by the principles of impartiality, confidentiality and independence.[114] The complaints relate to both behaviour of persons and to systemic issues. Examples of complaints acted on by the Ombudsperson include 'allegations of misuse of office, unethical conduct, corruption, lost files, maladministration, delayed cases, poor/slow service, cannibalized files, vindictiveness, incompetence, misbehaviour, inefficiency associated with courts, among others.'[115] According to the State of the Judiciary and the Administration of Justice Report 2013-2014, the office of the Ombudsperson received up to a total of 2, 888 complaints during the period under review and processed and resolved 2, 013 cases out of the total.[116] This translated to a 74% successful closure rate of the complaints on all complaints received in 2014/2015.[117]

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113 For a fuller account of the office of the Judiciary Ombudsperson, see http://www.judiciary.go.ke/portal/page/office-of-the-ombudsperson, accessed 28 September 2016.

114 Ibid.

115 Ibid.

116 Judiciary, *The State of the Judiciary and the Administration of Justice Annual Report 2014-2015* (2015) 20http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf, accessed 08 October 2016.

117 Ibid.

Judiciary Training Institute

Judicial training in the form of induction of new judicial officers and continuing judicial education is an integral aspect of accountability. The training offered to judicial officers includes changes in the law—being a dynamic discipline. It enables them take stock of developing jurisprudence in other jurisdictions so that they make relevant and jurisprudential decisions. It covers emerging jurisprudence and trends, new areas of law and practical aspects of judging and judgment writing. This improves the performance of the judges and magistrates and equips them to perform their functions and serve the people in an accountable manner.

The Judiciary Training Institute (JTI), established in 2008 to provide continuous judicial education to judicial officers, carries on judicial training.[118] This is with a view to keeping the judicial officers informed of the.[119] The JTI essentially carries out the function of the JSC by implementing programmes for continuous education of judicial officers, through public lectures, research, seminars, training programmes and other forms of discourse. As the judicial think-tank and the nerve centre of rich intellectual exchange, the JTI conducts continuous judicial education for judges and magistrates.[120]

Inter-Agency Collaboration in the Justice Sector: The Role of the National Council on the Administration of Justice (NCAJ)

In order for an institution as large as the judiciary to function well, it needs collaborative engagements and efforts with other agencies that do similar or works of its kind. Such collaborative engagements serve to enrich the work of institutions, reduce duplication of effort and resources, and ensure more efficiency. NCAJ is an affiliate institution of the judiciary established under section 34 of the Judicial Service Act, No. 1 of 2011 and is chaired by the Chief Justice. Other members include the Cabinet Secretary responsible for matters relating to the judiciary, the Attorney General, the Director of Public Prosecutions, a representative of the National Police Service, the Commissioner of Prisons, among others drawn from both state and non-state actors.

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118 For more details on the Judiciary Training Institute, see http://www.judiciary.go.ke/portal/page/judiciary-training--institute, accessed 28 September 2016.

119 Ibid.

120 Ibid.

The Council operates as a high-level policy-making, oversight and implementation body of affairs in the judiciary. It is mandated to ensure efficient, effective and coordinated administration of justice and reform of the justice system.[121] The specific functions of the committee include: mobilizing resources for the purposes of administration of justice; facilitating the establishment of Court Users Committees at the county level; formulation of policies relating to the administration of justice and implementation, monitoring and evaluation of the strategies put in place.[122]

NCAJ is expected to enhance judicial accountability. However, its effect has not been felt due to a number of factors including: weak legal and policy framework for the Council; inadequate financial resources for its activities; weak institutional and operational framework for its work; and poor coordination of the strategies it pursues.[123]

The Role of the Judiciary in Ensuring Transparency and Accountability in other Dispute Resolution Institutions

The judiciary stands at a vantage point with respect to other institutions that resolve disputes within the country, being the prime institution charged with the mandate of dispute resolution. However, given the number and variety of disputes that arise in different contexts, the need for specialized courts and tribunals has arisen. This is in a bid both to decongest the courts and to accord specialized handling of the matters some of which may be complex. Two of these deserve mention here namely, courts martial and tribunals. Courts martial deal with infractions of discipline in the military and disciplined forces while tribunals are charged with determinations of a diverse array of issues ranging from disputes in the agricultural sector to conduct of judges. These bodies are subject to the supervision of the judiciary. Laws establishing tribunals will usually indicate to which courts one may appeal—generally the High Court.[124] For instance, for tribunals investigating judges, appeal lies to Supreme

[121] Details on the Council are available here: http://www.judiciary.go.ke/portal/page/national-council-on-the-administration-of-justice, accessed 28 September 2016.

[122] Ibid.

[123] Ibid.

[124] For instance, decisions issued by the National Environment Tribunal or the Capital Markets Authority Tribunal and other tribunals are only appealable at the High Court.

Court[125] while decisions of other tribunals and courts martial are usually challenged by way of judicial review,[126] or civil[127] or criminal appeals[128] to the High Court.

The appellate jurisdiction of superior courts over the decisions of tribunals and court martial is a way of ensuring accountability, transparency and adherence to the rules of natural justice in these other dispute resolution institutions.

Indeed, as discussed above, the implications of the decisions of subordinate courts being subject to scrutiny by higher courts[129] are the same for tribunals and courts martial. The possibility of reversal in case of illegality or bias makes these bodies act in a manner that can stand up to scrutiny thus ensuring accountability , there is a good reason for the continued subjection of tribunals and courts martial by the regular courts either through the exercise of judicial review jurisdiction or appellate jurisdiction.

Lessons from the United States of America

Various jurisdictions around the world have their own internal mechanisms for ensuring judicial independence and accountability. It is worth noting, however, that most of the mechanisms are similar, given the globalization of norms as argued at the outset of this paper, particularly with the adoption of the Bangalore Principles and the Latimer Principles. This notwithstanding, there are varied and minor deviations (if not

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125 Article 168 (8). See for instance, the report investigating Justice Joseph Mbalu Mutava above n 80. The judge has since declared his intention to challenge the decision of the tribunal.

126 See *Republic v Public Private Partnerships Petition Committee (The Petition Committee) and3 others Ex Parte A P M Terminals* [2015] eKLR; *Republic v Chairman, Mumias Land Disputes Tribunal and another Ex-Parte Appolo Osama Maindo and 2 others* [2014] eKLR; *Masagu Ole Koitelel Naumo v Principal Magistrate Kajiado Law Courts and another* [2014] eKLR

127 See e.g. *Peter M Kariuki v Attorney General* Civil Appeal 79 of 2012 filed at the Court of Appeal challenging the decision of the High Court for alleged infringement of constitutional rights and freedoms. The appellant had been convicted for failing to suppress a mutiny during the 1982 attempted coup by the court martial. The various safeguards and scrutiny afforded by the various echelons of the court machinery provide appropriate checks that enhance accountability.

128 See *Jeffery Okuri Pepela and 25 others v Republic* [2015] eKLR, In this case, the appellants had been convicted by a court martial in Mombasa for alleged desertion of duty between 2007 and 2008 contrary to the then Armed Forces Act at the Mombasa Navy Base. They were convicted and sentenced to life imprisonment by the Court Martial in Mombasa in accordance with section 74 (1) a of the Kenya Defence Forces Act 2012. They challenged the decision of the court martial at the High Court on grounds, inter alia, that the tribunal was improperly constituted. However, the High Court dismissed the application and confirmed the decision of the court martial.

129 See the section on 'Appellate Jurisdiction' above in this paper.

subtle), in different jurisdictions. We find the approach taken in the United States instructive.

For instance, the President nominates federal judges although they have to be confirmed by the Senate.[130] This presents the possibility of control by a particular political party particularly that which dominates the Senate.[131] While political considerations play a role during appointments, we are of the view that the chances of a lack of judicial independence are minimized by the fact that judges appointed by the President upon confirmation by the Senate serve for a lifetime so long as they are of good behaviour.[132] This means that upon appointment, the appointing authority has no say on how the judge conducts their business. The distinguishing factor, in the case of the United States, at least for federal judges and judges of the Supreme Court is that they serve for a lifetime.[133] Some of the States in the United States however, have their own means of appointment with some serving until a specified age where they mandatorily retire,[134] others providing for appointment for a fixed term without the option of reappointment,[135] and others having appointment for a fixed term with an option or possibility of reappointment.[136] Cases where appointments are made for a fixed term but subject to reappointment, to us, do not bode well for judicial appointments since judgments issued by such judges within their first term could possibly be used against them during decision making over reappointment.[137] This may contribute to a judge, keen on being reappointed, making decisions that placate the appointing authority, other than being guided by law.

Another unique feature in some of the American states such as Texas is that of election of judges by the people rather than appointment. Such judges run for election just like politicians would. There is a great danger relating to judicial independence with this approach. Ordinarily, judges are usually called upon to decide matters of great social upheaval and contest and law sometimes demands that they make

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130 Article II, section 2, clause 2 of the United States Constitution.

131 The current standoff regarding the appointment of Judge Merrick Garland to the United States Supreme Court to replace the late Justice Antonin Scalia who was nominated by a Republican President Ronald Reagan, is a case in point. The Senate has refused to debate the nominee arguing that the nomination ought to await the incoming President. Battles of political parties, to wit the Democratic and Republican parties are usually fought on this issue.

132 Rutkus, Denis Steven, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* (Congressional Research Service , The Library of Congress) http://fpc.state.gov/documents/organization/50146.pdf, accessed 01 October 2016.

133 Article III of the United States Constitution.

134 Handberg (n 3 above) 127, 128.

135 Ibid.

136 Ibid.

137 Ibid.

unpopular decisions. Indeed, the fact that the judiciary operates as a counter majoritarian institution is perceived as one of its strengths.[138] Making appointments to the judiciary dependent on majority rule as happens in majoritarian democracies[139] is likely to politicize the judiciary and cause an enforcement of the policy preferences of the majority to the possible detriment of the minority. This is inimical to the rule of law.[140]

Appointment of judicial officers through electoral processes may offend the tenet of judicial impartiality and result in the appointment of persons who are either uninterested or unwilling to deal with protection of minority rights owing to their philosophies or the need to placate the electorate, yet the law demands the protection of all.[141] Of course, there are suggestions that election of judges makes them accountable as politicians are accountable to the electorate. The problem with politically chosen judges has a bearing on judicial independence and arises, for instance, in the enforcement of judgments from the courts either against the government or against private citizens who are members of their political party.[142]

Conclusion

Judicial independence, a key feature of judiciaries around the world, is not achieved automatically even when internal mechanisms exist to foster it. It is earned through judicial accountability, excellence and the making of impartial decisions, which help build legitimacy and respect. Judicial independence and accountability are therefore inseparable. Having reviewed the internal mechanisms of ensuring independence and accountability in the Kenyan judiciary, we conclude that adequate normative, procedural and institutional mechanisms exist; are anchored in the Constitution and laws of Kenya; and are aligned to international best practice. The judiciary has indeed made a deliberate effort to shun a past where it was perceived as corrupt, controlled

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138 The selection of federal judges in the United States is a case in point since the majority of members in the Senate will likely prefer a candidate who fits their political persuasion.

139 See e.g. Article II of the United States Constitution and the election of judges in the state of Texas.

140 See e.g. CG Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric,' Indiana University School of Law – Bloomington, Legal Research Paper No. 61, 5, 2006.

141 For an argument that there are instances of staffing or packing courts with carefully selected judges so as to influence policies, see SB Burbank, 'Judicial Independence, Judicial Accountability, and Inter branch Relations' (2007) 95 *The Georgetown Law Journal* 910.

142 For this view, see D Clarke, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments' (1996) 10 *Columbia Journal Asian Law* 1; JA Cohen, 'Reforming China's Civil Procedure: Judging the Courts'(1997) 45 *American Journal of Comparative Law* 802; P Gewirtz, 'Remedies and Resistance' (1983) 92 *Yale Law Journal* 585.

by the executive and unresponsive to public needs. The Judiciary Transformation Framework, an excellent reform blueprint, has yielded some gains in fostering independence and accountability. The institutionalization of performance management, reorganization of the institution and the putting in place of policies to guide administration, and human and financial management are great strides in the right direction. These need to take root to yield the desirable outcomes of judicial independence and accountability.

As intimated above, the financial autonomy of the judiciary as a branch of the government is a constant struggle despite the existence of the Judiciary Fund. Indeed, while the Fund is a charge on the Consolidated Fund, the monies given to the judiciary are usually appropriated to it by parliament and it is a matter of concern that the judiciary has not received the full amount of funds requested. While this may be on account of competing national needs, it may also be occasioned by the perception of the judiciary by parliament as an enemy because of decisions that have overruled parliamentary actions.[143]

Change is not easy, and five years is not enough for real change to be realized. Allegations of graft among judges[144] and judicial staff[145] have resurfaced, raising the need for greater vigilance on the conduct of judicial officers and stricter adherence to public financial management and auditing mechanisms and set procurement processes. With regard to judges, it is disheartening to note that despite the vetting process by the Judges and Magistrates Vetting Board[146] and the rigorous appointment processes, there are still allegations of corruption. This has resulted in proposals for constant vetting of judicial officers.[147] There is no detailed analysis of the impact of the rigorous appointment and vetting processes on the performance of the judiciary. This is required for continuous improvement and learning. Other processes that need

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143 This was the case with Parliament after the courts declared the constituency fund law unconstitutional, sparking anger from members of Parliament who threatened to reject the budget estimates, so as to 'teach it a lesson'. See, J Njagi, 'Furious over constituency fund, MPs threaten to reject Budget' *Daily Nation*, 22 June 2016 http://www.nation.co.ke/news/furious-MPs-threaten-to-reject-Budget-estimates-/1056-3260754-xgpebc/index.html, accessed 01 October 2016.

144 There were allegations of bribery involving some members of the Supreme Court of Kenya, see D Ohito, 'Justice Tunoi fights back on bribery allegations' The *Standard* newspaper, 27 January 2016, p. 1 http://www.standardmedia.co.ke/article/2000189469/justice-tunoi-fights-back-on-graft-allegations, accessed 01 October 2016.

145 The recent scandal involving the leasing of Judges' chambers in the Elgon place in Upper Hill which led to the removal of former Chief Registrar Gladys Boss-Shollei, is a case in point.

146 The Vetting Board Chair Sharad Rao has since admitted to corruption being prevalent despite the vetting, see E Shimoli, 'Kenya: Judiciary Still Reeks of Corruption, Admits Rao Team' *Daily Nation*, 2 March 2016 http://allafrica.com/stories/201603020246.html, accessed 01 October 2016.

147 Ibid.

to be critically analysed are the operations of the office of the Judiciary Ombudsperson; the NCAJ; and performance management. It is notable, for instance that in countries such as Israel, a specific law exists on the Ombudsman for Complaints against Judges.[148] The issue of whether that should be internal to the judiciary or not, should be considered taking into account the hierarchies in the judiciary and the limitations that may arise if the officer designated an Ombudsperson is of a junior rank to the judge against whom complaints are levied.

We note that the performance of judicial work depends immensely on documentation. In this regard, expediting the digitization of court records and the recording of court proceedings and transcription is recommended as a proxy factor in enhancing judicial independence and accountability. This is in line with the Judiciary Transformation Framework that identifies technology as an enabler of the quest for justice. This will ease the work of judicial officers; enhance the integrity of information; and minimize opportunities for corruption.

[148] T. Strasberg-Cohen, 'Judicial Independence and the Supervision of Judges' Conduct: Reflections on the Purposes of the Ombudsman for Complaints against Judges Law' (2002) http://www.justice.gov.il/En/Units/OmbudsmanIsraeliJudiciary/MainDocs/Article.pdf, accessed 10 October 2016.

CHAPTER FIVE

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN LIGHT OF THE JUDICIARY CODE OF CONDUCT AND ETHICS OF KENYA, 2016

Luis G Franceschi

Introduction

A strong judiciary is the pillar and foundation of the rule of law in a democratic system. It necessitates intellectual, structural and financial independence, coupled with professionalism. The judiciary is the lubricant that facilitates and harmonizes institutional and personal relationships in a society. When the judiciary weakens other institutions collapse, and this causes a domino effect that ultimately undermines the rule of law in its entirety, and eventually destroys democracy. Judges develop the law; they constantly expand the limits of the law through their decisions. Judges are the guardians of democracy; a judge is called to be the 'guardian of the constitution…and the guardian of every individual, against every power'.[1]

It is not sufficient to be independent; it is also necessary to appear to be independent. It is precisely this difficult interplay between reality and perception that makes judicial codes of ethics a precondition for legitimacy. A judicial code of ethics not only directs the actions of judges towards what is good in itself, but it also limits the judge's behaviour outside that perceived goodness, and punishes whatever offends

[1] A Addison, *The trial of Alexander Addison, Esq: President of the courts of common pleas, in the circuit consisting of the counties of Westmoreland, Fayette, Washington, and Allegheny, on the impeachment by the House of Representatives, before the Senate of the Commonwealth of Pennsylvania* (1803) 110.

it. Thus, the underlying aim of a judicial code of ethics is to inspire public confidence in the judiciary by protecting judicial independence.

The fact that judges perform their duties within a given physical space, within a structure and a somewhat comfortable budget, is a precondition for a working judiciary. However, judges also require a special professional preparation and training, a deep knowledge of the law, of the human being, and of society. Judges must be true thinkers, fair, impartial and independent-minded persons. The best judge is not necessarily the most efficient, the one who decides most cases in less time, nor the most popular one.

Justice Aharon Barak stresses the idea that judges should never appear to be fighting for their own power, but to protect the constitution and democracy. They do not express their own personal views, but rather the fundamental beliefs of the nation.[2]

The Constitution of Kenya 2010 sought to strengthen the financial, political and administrative independence of the judiciary by creating safeguards that would prevent outside interference with the judicial function, the easy manipulation of the judge to satisfy superficial and temporary political or social whims. *The Judiciary Code of Conduct and Ethics* concretised and developed these basic safeguards further from an inner perspective, from within the judiciary, and from within the judge himself, who had to apply the law faithfully within a social context and devoid of personal prejudices. This chapter deals with this recent code and examines its theoretical, historical and comparative parameters from the perspective of judicial independence.

Historical Background

Kenya, like other African countries, was subjected to a colonization process that led to the imposition of legal, social and economic structures without due contextualization of local customs, usages and millennial traditions. The British colonial structures were originally not interested in the social and economic growth of Africa and its peoples, but blindly aimed at the efficient depletion of natural resources for the benefit of the colonizing power and the enrichment of Her Majesty's subjects, without paying due attention to the importance of educating the local population. This

[2] A Barak 'The Supreme Court 2001 term - foreword: A judge on judging: The role of a supreme court in a democracy' (2002)116 *Harvard Law Review* 59.

mad gold rush had been officially flagged off at the Berlin Conference which led to the declaration of Kenya as a British Protectorate on 15th June 1895.[3]

Before too long, the colonizing power realized that Africa did not have law in the Anglo-American sense.[4] Coupled with the fact that colonies were treated as extensions of the mother country, the United Kingdom, it became necessary for common law to be imported.

Common law was the substantial product of English traditions and practices as propounded by the courts, and enriched by social, economic, cultural and political experiences. These traditions and practices were remote from the indigenous Kenyan experience. The philosophical contradictions between the two systems were also overlooked, to Africa's detriment.[5]

In the pre-colonial epoch, the legal system in most African countries was defined predominantly by African traditions, which broadly encompassed their customs, system of beliefs and practices.[6] However, these traditions were not codified but rather handed down by word of mouth across generations.[7] Lumped together, it is these traditions that informed a customary law system. It was an informal judicial system in which the elders, guided by customary law, settled their disputes.[8] Furthermore, there was no demarcation between customary law, on the one hand, and religion and moral preconceptions, on the other. All these were conglomerated into one mutually supportive system of customary law.[9]

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3 JW van Doren, 'Death African style: The case of SM Otieno' (1988) *56 American Journal of Comparative Law* 331.

4 J O Ambani and O Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' (2015)1 *Strathmore Law Journal* 46.

5 Whereas, for instance, criminal law in the common law setting would be retributory, African philosophy believes in deep notions of inclusivity, communalism and reconciliation. Therefore, the overarching principle is one of restoration. See *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14, where the court noted as follows: the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and … [that] these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions.

6 E Kinama, 'Traditional justice systems as alternative dispute resolution under article 159 (2) (c) of the Constitution, 2010' (2015) 1 *Strathmore Law Journal*.

7 J Fremont, 'Legal Pluralism, customary law and human rights in francophone African countries' (2009) 40 *Victoria University of Wellington Law Review* 150-151.

8 JB Ojwang, Constitutional development in Kenya: Institutionalism adaption and social change (ACTS Press,1990).

9 D Pimentel 'Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique' (2011) 14 *Yale Human Rights and Development Journal* 59.

In 1897, the East Africa Order in Council declared the supremacy of common law over all other systems. The common law, in the sense of judge-made law, was to apply, as were certain statutes prepared by the colonial power for India, and statutes in force in England as at the date of the Order. Communities other than the British settlers were allowed to observe their systems but only in limited circumstances; customary law was to apply only in personal law matters such as marriage, divorce and succession its application was permitted only to the extent that it was not repugnant to common law. English law was to apply only as far as 'the circumstances of the colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary'.[10] In reality, judges trained in England rarely found that law inappropriate.

Parallel systems of courts came into existence.[11] Courts for the settler communities were creatures of common law with common law judges, while the indigenous peoples had supposedly traditional tribunals (eventually abolished in 1978), but only for personal law.

The colonial and post-colonial legacy institutionalized a foreign legal system that progressively and persistently eroded social equality, equity and access to justice by downgrading customary laws. As years went by, the social fabric started to tear apart. This degeneration opened the floodgates that allowed the politicians' use of powers over land allocation to further their political and ethnic interests; the widespread manipulation and deeply rooted corruption; the taking away land from the poor and the displacement of people; the concentration of land ownership in a few hands and the subsequent growing poverty and human misery.

This situation was unsustainable; it was a bubble ready to burst at the first act of provocation, and it did burst in 2007-2008 after the mismanaged and controversial 2007 presidential election. A solution had to be found, and this solution was twofold: first, a new governance system, called devolution, that would bring power closer to the people, while at the same time it healed the so-much desired and damaged unity of the country; second, a strong and independent judiciary that would ensure the survival of the new governance model by securing the sustainability of the rule of law and a wider access to justice.

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[10] See Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27 *Journal of African Law*, pp. 42-61.

[11] Ibid.

Judicial Independence

Independence, in the ordinary sense of the word, points at freedom, liberty, the capacity to choose without coercion or pressure from external factors. Independence may be personal or institutional. Personal independence refers to free choice, which is the capacity to make decisions based on the choice of one singular course of action after due consideration of given alternatives. Institutional independence is rather complex. It presupposes not only the personal independence of the individuals within the institution but also the structural, financial and organic independence of the institution itself.

The Constitution of Kenya Review Commission set up an Advisory Panel of Eminent Commonwealth Judicial Experts, chaired by the Hon. Justice Dr George W Kanyeihamba. The Panel's report identified the urgency to design a judiciary that is 'independent, efficient and accountable. Independent in terms of institutional and financial autonomy; freedom from undue executive, parliamentary or private sector interference; independence in administrative operations; and also the independence of individual judges and magistrates, and freedom from executive, judicial or other patronage structures that influence their work.'[12]

The report states that,

> The maintenance of judicial independence and impartiality is the very reason why judges are given such a privileged position in society. It is why they have security of tenure in office. It is why they are given guarantees of financial independence. It is why they are treated with deference and respect in their courtrooms. As the High Court has stated in the Gachiengo case: 'A judge occupies an enviable position in society. He is enveloped by an aura of dignity. He is always on a pedestal. That position has to be jealously guarded. Where corruption occurs in the Judiciary, it is the worst form of abuse of public trust since honesty, integrity and fairness are the features that entice citizens to such recourse in the courts, only to be ambushed'.[13]

Individual judges' independence does not prevent them from bringing into the judicial discourse their personal, moral and philosophical convictions, as every human being must unavoidably use them within the rational discourse of decision making. Aristotle argues that every art, inquiry, action or pursuit by man, aims at some good, 'the chief good'. In this sense, all state actions, including legislation, should be viewed as

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12 *Report of The Advisory Panel of Eminent Commonwealth Judicial Experts*, 17 May 2002, available at http://www.commonlii.org/ke/other/KECKRC/2002/8.html, last accessed on 8 October 2016.

13 Ibid.

'geared towards an end, good for man'.[14] Aristotle seems to provide an appropriate justification of the ethical standards required by Article 166 (2) (c) of the Constitution of Kenya, which requires that judges be persons of 'high moral character'. That this was made a key constitutional requirement for judges could point at a classical understanding of personal independence, where Aristotelian virtue ethics is at the very core of the philosophical foundations of judicial independence.

Thus, judicial independence points to the fact that the judge must be free from coercion, free to decide, free to choose which personal tenets, if at all, will influence a decision, and at the same time, aim at justice with due regards to the boundaries set by the legislator and the social context. In this sense, the judge's independence must be legal, it must accompany the spirit of the law in the pursuit of justice.

Judicial independence also requires that a judge be able to exercise the power of choice within an established space, mandate or jurisdiction, for the judge's independence is nurtured, maintained and enhanced within a given space. This space is called the judiciary; this is the space within which the judge exercises the judicial function. Therefore, judicial independence also includes and refers to the structural, financial and organic independence of the judiciary as an institution.

The Constitution of Kenya adopted well-defined steps to secure the judiciary's institutional independence. It granted powers to the Judicial Service Commission to nominate, oversee, discipline and dismiss judicial officers. The Constitution also secured the tenure of judges and established a Judiciary Fund. Moreover, the Constitution went unusually further by establishing in Article 166 (2) (c) that judges must be persons of high moral character. This new provision gave the judiciary in Kenya an Aristotelian virtue approach, and such standards are constitutionally required from individuals and institutions.

It is, precisely, this virtue approach within the realm of the judge's personal independence that may have led the Chief Justice of Kenya to enact a Code of Conduct and Ethics just before his retirement. This code fosters the independent work of the judge and prevent, in theory, any possible conflict of interest that could tarnish, disfigure or ruin judicial independence and jeopardise the pursuit of justice in the exercise of the judicial function. This code reinforces the institutional independence of the judiciary by limiting and directing the judge's personal and social behaviour in the attainment of a high moral character.

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[14] See generally Aristotle *Nicomachean Ethics* (trans. WD Ross) Book 1.

The Status of the Judiciary in Kenya

Kenya has repeatedly established bodies to examine, among other things, the terms and conditions of service, and the need for reform of the administration, for integrity, ethics and governance. The first properly established body to take a look at the judiciary's accountability crisis was the *Committee to Inquire into Terms and Conditions of Service of the Judiciary* of 1992.[15] This looked into possible ways of establishing a structure of salaries, the terms and conditions of service and related benefits to identify ways of enhancing the independence of the judiciary. The terms of reference of the Committee noted that, '...the Government has accepted the principle of financial independence for the Judiciary and decided to seek ways and means of securing it by establishing a structure of salaries, conditions of service and related benefits separately from the Civil Service. Consequently the Committee sees its task as narrowed down to finding ways and means of establishing such structure of salaries and conditions of service and benefits as will enhance the Judiciary's capacity to administer justice.'[16]

It was necessary, according to the Committee, to ensure independence of the judiciary as '...there are complex, sensitive and vitally important responsibilities vested in the Judiciary.'[17] The Committee also included independence, fairness and impartiality in its list of the basic essential features required of the judiciary.[18] It further observed, while highlighting the challenges facing the Judiciary, that they could '...be addressed effectively only if judicial officers are of the right calibre, professional preparedness and have positive attitudes. In particular (...) high degree of integrity and professional ethics (...) independence of mind and grounding in logic (...) loyalty to the Constitution, and the law of the land…'[19] The Committee observed that, '…having regard to the expectations and challenges (...) the Committee recommends that the Judicial Service Commission should formulate principles and procedures for the maintenance of standards of conduct by judicial officers. The Judicial Service Commission, in this regard, should formulate a code of conduct for the guidance of judicial officers.'[20]

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15 Kotut Committee. The report is available on the KenyaLaw website under 'Commissions'. (www.kenyalaw.org)

16 Para 13.

17 Ibid, para 15.

18 Ibid, para 16.

19 Ibid, para 25.

20 Ibid, para 26.

In 1998, the Committee on the Administration of Justice[21] was tasked with investigating, among other issues, the public's limited access to courts, judicial laxity, allegations of corrupt practices and the general lack of training among judicial officers and staff members.[22] The Committee visited, apart from various parts of Kenya, the United Kingdom, Botswana, Namibia and Tanzania to get a comparative grasp of the conditions and challenges of the judiciary.[23] The Committee observed that

> Over the years, the Judiciary has been perceived with a lot of awe. But of late, Kenyans have been treated to a Judiciary which is not delivering. If you file a case, it takes a very long time before the same is heard and determined. Sometimes, the case is neither heard nor determined. You may even die and leave the case still pending in court.[24]

It observed that 'an independent Judiciary is indispensable to justice in a society. A judicial officer should personally observe high standards of conduct so that the integrity and independence of the Judiciary is preserved.' According to the Committee, this could not be realized owing to corruption. So the Committee called for 'the introduction to the Judiciary of a code of ethics to apply to all judicial staff. It will outline the expected and prohibited forms of conduct as well as attendant penalties for transgressions against this minimum standard.'

The 2003 Integrity and Anticorruption Committee of the Judiciary, also known as the Ringera Committee, identified human greed, inaction or ineffective action against identified corrupt officers and conflict of interest on the part of judicial officers as some of the causes of corruption in the judiciary.[25] Corruption, the Committee observed, had led to loss of confidence in the judiciary, delay and denial of justice and apathy and inefficiency in judicial officers.[26] It noted that the Judicial Code of Conduct which had been published just then addressed the issue of conflict of interest in fairly broad terms. It recommended that the code be amended to specifically prohibit engagement in certain activities, for example, shop keeping and public transport.[27] The findings of this Committee led to what came to be known as

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21 The Kwach Report.

22 Republic of Kenya, *Kenya National Assembly Official Report* (Hansard) 29 November 2000 2981.

23 Ibid, 2982.

24 Ibid.

25 Republic of Kenya, *Report of the sub-committee on ethics and governance of the Judiciary* 2005, 164.

26 Ibid, p. 165.

27 Ibid, p. 171.

the 'Judiciary's radical surgery' and caused the dismissal of a good number of judges.[28]

In 2005, Chief Justice Johnson E Gicheru, established the Sub-committee on Ethics and Governance to investigate integrity issues in the judiciary.[29] This was part of the biennial review of the state of the judiciary and it also served as a follow-up mechanism on the 2003 Integrity and Anti-Corruption Sub-committee findings. The Sub-committee found that some judicial officers were involved in conduct amounting to breach of the code of conduct, for example, inordinate trial delays, drawing pleadings for litigants, giving preferential treatment to certain advocates and parties, irregular dealing with exhibits, nepotism and granting *ex-parte* orders and, in some instances, final orders without observing basic legal tenets.[30] It recommended that 'strict supervision and enforcement of the Judicial Code of Conduct' was necessary and that '[t]hose guilty of breach should be subjected to disciplinary procedure.'[31]

A few years later, the Committee on Ethics and Governance of the Judiciary of 2008 addressed the issues once again. It observed that judicial integrity is more than just a legal requirement.[32] Having looked at the complaints against judicial officers, the Committee noted that it was necessary to ensure adherence to the judicial code of conduct so that such behaviour could be eradicated.[33] It agreed with the observation of the 2005 Sub-committee on Ethics and Governance that the existing code was not strictly enforced and did not provide for effective sanctions.[34] Its recommendations were that a code should be developed with clear penalties for breach and that it should be reviewed regularly to take into account new challenges to ethical conduct.[35] It is also suggested that judiciary officers and staff should be sensitised on the requirements of the code during training sessions.[36]

In 2010, another Task Force on Judicial Reforms was constituted. It was mandated to consider and make recommendations on ways in which corruption or the

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28 The affected officers were 5 out of 9 Court of Appeal judges, 18 of 36 High Court judges and 82 out of 254 magistrates. One of them, Justice Philip Waki, was absolved and reinstated in late 2004.

29 Republic of Kenya, *Report of the sub-committee on ethics and governance of the Judiciary* 3. (Chaired by Justice JW Onyango Otieno) available at http://www.deontologie-judiciaire.umontreal.ca/en/textes%20int/documents/KENYA_RAPPORT_COMITe_000.pdf.

30 P. 33.

31 P. 34.

32 Republic of Kenya, *Report of the Committee on Ethics and Governance of the Judiciary* 2008 (Kihara Kariuki Report), 13.

33 P. 15.

34 P. 17

35 P. 21

36 P. 22

perception of corruption in the Judiciary could be addressed among other things.[37] It recommended the development and implementation of a judicial ethics, integrity and anti-corruption strategy.[38] It also called for the development and regular review of a code of conduct and that it be communicated to the public for the purpose of enhancing accountability.[39] The Task Force pointed out the essence of requiring the judiciary to abide by ethical values:

> Judicial officers and staff are expected to conform to high moral and ethical standards of behaviour befitting persons mandated to safeguard the law and administer justice. They are also expected to be above reproach, scrupulously impartial and fair in their judicial functions as well as in their public and private lives. These precepts are not ends in themselves, but means of safeguarding the personal and moral integrity of judicial officers and staff, thereby ensuring public confidence in the justice system.[40]

The work of all those bodies presented the constitutional drafters with specific common threads. They all insisted on the importance of ensuring the independence, impartiality and the conduct of the judiciary.

The constitutional review process provided the perfect platform for all those historical conclusions and recommendations to be put into effect. The constitutional framers had the clear realisation that it was of utmost importance and urgency to enhance and regain public confidence in the judiciary. This would not be achieved unless judicial independence and integrity were dealt with appropriately, in order to give a new breath of fresh air to a bleeding and discredited judiciary. These recommendations could only be wholly enshrined in a comprehensive judiciary code of ethics and conduct.

It is interesting and opportune to note that the findings and recommendations from these commissions and committees, along with the accurate and timely recommendations given by the Advisory Panel of Eminent Commonwealth Judicial Experts,[41] informed the constitution-making and drafting process in compiling values and principles that guide judicial officers in the discharge of their duties, shielding judicial action from political and social pressure. Article 160 (1) of the Constitution established the judiciary's independence by stating that in its exercise it shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. In order to secure this independence, the

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37 Republic of Kenya *Final Report of the Task Force on Judicial Reforms* (Ouko Report) 2010, iii.

38 P. xxx.

39 Ibid.

40 P. 73.

41 Above n 12.

judiciary's budget size increased substantially and its budget went from less than 3 billion Kenyan shillings to almost 12 billion in barely two years. In the first financial year after promulgation of the new Constitution, the judiciary cost the taxpayer less than KSh 3bn in new staff and extraordinary programmes. By 2012/13, this amount had increased exponentially to more than KSh 12bn and by 2013/2014 the figure had reached KSh 15,263bn, which is seven times the Budget Estimate in 2006/07.[42]

Judiciary Budget Allocation (Kshs bn)									Projection
	2006/ 07	**2009/ 10**	**2010/ 11**	**2011 /12**	**2012/ 13**	**2013/ 14**	**2014/ 15**	**2015/ 16**	**2016/ 17**
Recurrent		581	589	1,404	1936	11215	12167	12785	13525
Capital		2639	3324	6142	10221	4048	4961	4863	4903
Total	**2,100**	**3,220**	**3,913**	**7,546**	**12,157**	**15,263**	**17,128**	**17,648**	**18,428**

The extra/margin cost incurred by the judiciary in any financial year from 2012/13 onwards is greater than the overall budget estimate for each of the years preceding the 2010 Constitution.[43]

The Judiciary Code of Conduct and Ethics

The dignity of the office of the judiciary is of high importance in the promotion of justice, democratic culture and public trust in government institutions. As noted by Israel's Justice Barak 'the judge has neither a sword nor a purse, all he has is the public's confidence in him.'[44] In order to gain and guard the judiciary's public confidence, the conduct of the judge and the judiciary as an institution should be beyond reproach.

The Judiciary Transformation Framework[45] identified the revision and implementation of a judiciary code of ethics and conduct as one of the strategies

42 Source: Controller of Budget office. Refer also to: *National Treasury Budget Policy Statement*, 2014.

43 For example, while the Overall Budget Estimate was KSh 3.913bn on 2010/11, the additional cost for the year 2012/13 was more than KSh 6bn.

44 Barak (note 2 above) 59.

45 *Judiciary Transformation Framework*, 2012-2016.

necessary for the reinvigoration of ethics and integrity in the judiciary. A Committee was appointed by the Chief Justice, with Justices Jackton B Ojwang and Erastus Githinji as co-chairs.[46]

The Committee faced the dilemma of having to decide between one or more codes; perhaps two or even three: one for judges, a second for magistrates and other judicial officers and a third for judicial staff. Opinions were divided, and some members argued that the judiciary is a rigid and hierarchical structure and it would not be easy for judges to accept being regulated together with magistrates. It was also argued that the jurisprudential power of judges placed an enormous burden on their shoulders and therefore the responsibility to abide to principles of independence, efficiency and integrity were far more impacting and important for judges than for any other judicial officer. Perhaps more important was the realisation that the constitution required that judges should be removed if they were found to be in breach of a code of ethics specifically for judges. The drafting committee finally settled for one code with three different parts, and it was named, 'The Judiciary Code of Conduct and Ethics of Kenya.' This code was intended to give effect to Article 168 (1) (b) and Article 172 (1)(c) of the Constitution, and it is aligned to the Judicial Service Act, 2011 and to the general provisions on leadership and integrity. It applies in addition to, and not in derogation of, other laws relating to ethics. The code promotes the values of prudence, justice, equity and integrity in the judicial profession for the benefit of the whole society and the effective implementation of the rule of law and other democratic values.

The code also borrows heavily from international principles that have guided the drafting of most modern judiciary codes of conduct. At the international level, in 1985, the United Nations issued the UN Basic Principles on the Independence of the Judiciary[47] to assist national governments in achieving this public confidence and promoting judicial independence. The two key objectives were: to safeguard the independence of the judiciary in relation to other powers and foster professionalism within the institution. Stakeholders from various jurisdictions would later adopt a universally acceptable statement of judicial standards known as the Bangalore Draft Code of Judicial Conduct 2001, which in 2002 became the Bangalore Principles of Judicial Conduct.[48]

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46 Its work was funded by the International Development Law Organisation (IDLO).

47 *United Nations Basic Principles on the Independence of the Judiciary*, Milan, 13 December 1985.

48 The Bangalore Principles would be later adopted by the UN General Assembly as a complementary to the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolutions 40/32 and 40/146, and were included and reaffirmed by the ECOSOC 2006/23 Resolution.

The Bangalore Principles insulate the judiciary from any pressure or conduct that might undermine judicial independence, integrity and impartiality, while at the same time attempting to establish practical parameters to bolster the public's confidence in the judiciary's independence and integrity .[49] The Principles proffer six core values to guide judicial conduct: independence, impartiality, integrity, propriety, equality, and competence and diligence.[50] These values have become the pillars and foundation of judicial ethics codes around the world and are regarded as a template for an effective judicial code of conduct.

The drafters of the Judiciary Code of Conduct and Ethics of Kenya intended to address five ethical objectives. First, driving behaviour change based on the Bangalore Principles and the key Aristotelian virtues of prudence, justice, self-control and courage. To increase public trust in the institution it was necessary to specify clear measures to foster integrity, professionalism, combat sexual abuse and corruption. Second, the code should prevent unethical practices by incorporating the Leadership and Integrity Act requirements such as the rule of law, public trust and the performance of responsibilities and duties in an honest, transparent and accountable manner.[51]

The third objective was the efficient detection of any unethical practice by establishing a management of control systems ensuring that integrity programmes and initiatives were put into practice, as well as data collection and analysis about risks and actual instances of corruption, including an annual assessment of possible improvement areas and non-performing areas. To this end, the task of court administration should be clearly defined for judges and judicial officers, and an appropriate and comprehensive sexual harassment policy put in place.

Fourth, the code should state mechanisms for the investigation of unethical practices and behaviour, personal misconduct that could affect decision making, particularly those areas that could bring disrepute to the institution. The Committee gave due importance to instances of conflict of interests and abuse of power, establishing clearly defined parameters, and taking into consideration specific prohibitions imposed on judges and other judicial officers to prevent them from engaging in activities that might jeopardise the reputation of the judiciary.

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49 N Jayawickrama and JB Wysluch, 'Global Challenge: Restoring trust for peace and security' 14th International Anti-Corruption Conference, Bangkok, 12 November 2010.

50 The Bangalore Principles of Judicial Conduct 2002, available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf, last accessed on 8 October 2016.

51 Here it was important to take into consideration that Article 160 (5) of the Constitution affords the judiciary immunity with respect to the lawful performance of judicial functions.

Fifth was the establishment of appropriate response mechanisms to address the outcome of investigations. The Committee envisioned the establishment of an Ethics Advisory Board, in charge of disciplinary processes under a prescribed procedure and threshold of evidence, with clearly stipulated sanctions. It was important that the code should set a standard for removals or disciplinary actions according to the law, and that these standards should be always pegged to a fairly specified level of breach. The drafters also considered essential the declaration of wealth so as to enhance transparency, as well as a clear procedure for collecting, systematising and disclosing information. Finally, it was considered important and essential that investigations in matters related to sexual harassment should be conducted with expediency and confidentiality.

The drafters also envisioned that the code's success would be measured by four key ethical indicators. First, open culture, communication and dissemination. Second, disciplinary procedures. Third, building ethical capacity. Fourth, proper monitoring and control of ethical progress.

The work of this Committee eventually produced the Judiciary Code of Conduct and Ethics that was signed by the Chief Justice pursuant to the Judicial Service Act.[52] It replaced the Judicial Service Code of Conduct and Ethics under the Public Officer Ethics Act.[53] The code applies in addition the other laws that relate to codes of conduct and ethics and serves as the specific code for the judiciary with respect to the provisions of the Public Officer Ethics Act,[54] the Leadership and Integrity Act[55] and the Public Service (Values and Principles) Act.[56] The code has five parts: Part I on the interpretation of terms. Part II contains provisions applicable to judges. Part III contains provisions applicable to judicial officers. Part IV regulates the conduct of judicial staff, and Part V deal with enforcement, oversight and implementation.

In regard to judges and other judicial officers, the code deals extensively with independence, impartiality, integrity, propriety, equality and non-discrimination, professionalism, accountability and prohibition against corrupt practices and prohibition against sexual harassment. In what refers to judicial staff, the code focuses on performance of duties, confidentiality, conflict of interest, prohibition of improper enrichment, accountability and prohibition against corrupt practices, prohibition of

52 Section 47 Judicial Service Act 2011.
53 Section 5(1) Public Officer Ethics Act 2003.
54 Act No. 7 of 2007.
55 Act No. 47 of 2012.
56 Act No. 1A of 2015.

sexual harassment and general matters. The aspects of the provisions common to judges, judicial officers and judicial staff are those on accountability and prohibition against corrupt practices and against sexual harassment. Breach of the provisions may amount to misconduct for which the appropriate lawful action may be taken. The provisions of the code may be reviewed, from time to time, by the Judicial Service Commission and the Chief Justice. The Judicial Service Commission and the Chief Justice may, from time to time, issues guidelines on the oversight and implementation of the code.

The provisions of the code on the conduct to be observed by judges, judicial officers and judicial staff may be said to be progressive. However, the greatest and perhaps saddest challenge is that the code's provisions relating to enforcement and implementation were watered down to the point of making the code practically barren and sterile, to the point of not outlining any specific sanction to be taken in case of violation. This omission castrates any hope of immediate implementation. The original draft had envisioned an advisory ethics board and a clearly defined disciplinary procedure. All this was sadly deleted in the final version as there was no consensus within the Committee on the opportunity and viability of a judiciary ethics board. This move disregarded recommendations that go as far back as 1998, when the Kwach Committee declared that vices like corruption, could only be brought to an end by having, among other things, a code of code of ethics that 'will outline the expected and prohibited forms of conduct as well as attendant penalties for transgressions against this minimum standard.'[57] The 2008 Kihara Kariuki Committee of the Judiciary also considered the outlining of clear consequences in case of violation as an important way to ending unethical conduct in the Judiciary.[58] It in fact agreed with the 2005 Sub-committee on Ethics and Governance that the lack of effective sanctions in the then existing code as a downside to enforcement of ethical conduct.[59] Therefore, the code's failure to provide clear sanctions for breach has made it a beautiful and ineffective instrument. Part IV, 1 provides that, 'A breach of this code may amount to misconduct for which appropriate lawful action may be taken' and Part IV, 2 reads, 'The Commission and the Chief Justice may, from time to time, issue guidelines and directions on the oversight and implementation of the code including the lodgement and resolution of complaints against judges, judicial officers and members of the staff of the judiciary.' Such vague provisions are a sad disservice to the original inspiration and intended objectives of the code. This situation could be

57 Above, n 22, p. 2982.
58 Above, n 32, 21.
59 p. 17.

reversed by the Judicial Service Commission and the Chief Justice, who are empowered to review the code.

The 2005 Sub-committee on Ethics and Governance had called for 'strict supervision and enforcement' of the code of ethics and that those who violate it 'should be subjected to the disciplinary procedure'.[60] This was also very much present in the mind of the drafters and the committee appointed by the Chief Justice. As a matter of fact, the original draft enshrined a detailed disciplinary and complaints mechanism (see Appendix to this chapter).

The task of putting in place an implementation framework is still pending. The code can only be useful to the judiciary if it is enforceable and if its disciplinary procedures and institutions such as peer review committees and disciplinary boards have been established. Unless this legal mischief is redressed the code will be largely useless and jeopardise the purposes for which it was intended.

Lessons from Codes of Conduct and Ethics in Selected Jurisdictions

Ghana's 2003 code[61] summarises the Bangalore Principles five rules: Upholding integrity and independence of the judiciary; avoiding impropriety and the appearance of impropriety in all the judge's activities; performing the duties of judicial office impartially and diligently; conducting the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations. Finally, it limits the political and quasi-political activity of the judge: a judge should not allow family, social, and political or other relationships to influence judicial conduct or judgment. Nor shall they advance private interests because of the office they hold or permit others to convey they are in special position to influence the judge.[62]

This is in many ways similar to the Guiding Principles of the England and Wales bench as well as most modern codes which have borrowed largely from the Bangalore Principles and the Commonwealth Latimer Principles on independence. The code does not give an exhaustive list of restrictions and therefore leaves it to the judge's own judgment of what is improper in a particular case. It has an objective test of what 'improper' means: conduct that would 'create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity,

60 Above n 29, p. 34.

61 Code of Conduct and Ethic for Judges and Magistrates in Ghana http://www.jtighana.org/new/links/publications/trainingmaterials/CODE%20OF%20CONDUCT%20FOR%20JUDGES.pdf.

62 Pp. 2, 3.

impartiality, and competence is impaired.' On impartiality, a judge must hear all cases except for those in which is he or she is disqualified.

The judge is required to be faithful to the law and maintain professional competence, order, decorum and courtesy, perform all duties without bias or prejudice, accord the right to be heard to every person with a legal interest.[63] In maintaining professionalism, a judge must not be swayed by partisan interests, public clamour or fear of criticism. The Ghanaian code also prescribes that a judge should maintain order and decorum, and be courteous to litigants, jurors and other people whom the judge deals with in his or her official capacity. The code also establishes that a judge can initiate communication where the judge reasonably believes that no party will gain a procedural or technical advantage as a result. Interestingly, a judge is also expected by the Ghanaian code to be on the lookout for the potential contravention of the code by other judges, and may, in addition to speaking with the judge in contravention of the code, report such a judge to the Chief Justice.

The Ghanaian code allows judges to take part in extra-judicial activities so long as they do not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial officer or interfere with the proper performance of judicial duties. With regard to political and quasi-political activity, a judge is only allowed to participate in political activities where such actions improve the law, legal system or administration of justice or as is expressly provided by the law.

In 2013, England adopted a Guide to Judicial Conduct (the 'Guide'),[64] which is in line with the UN Basic Principles on the Role of Lawyers.[65] This is simply intended to assist judges in deciding on issues. The Guide aims to equip judges with a practical tool to deal with difficult ethical questions but is intended to offer assistance to judges about their conduct. There are seven principles: Judicial independence; impartiality; integrity; propriety; competence and diligence; personal relationships and perceived bias; and activities outside the court.

The Guide acknowledges that, whether the judiciary is viewed as an entity or by its individual membership, it is and must be seen to be independent from the legislature and executive arms of government. In affirming that a judge will 'do right to all manner of people after the laws and usages of this Realm, without fear or

63 P. 15.

64 Revised in 2016 https://www.judiciary.gov.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf.

65 https://www.un.org/ruleoflaw/files/UNBasicPrinciplesontheRoleofLawyers.pdf, last accessed 30 September 2016.

favour, affection or ill will', the judge acknowledges that he or she is primarily accountable to the law, which he or she must administer.[66]

For a judge to be impartial and be seen as such, a judge should strive to ensure that, in and out of court, his or her conduct maintains and enhances the confidence of the public, the legal profession, and the litigants. Political ties should be avoided, and the judiciary should restrain itself from participating in demonstrations or any partisan activity.[67] The Guide also speaks about the question of disqualification of a judge in the face of possible or perceived bias or conflict of interests, and sets out directions as to what a judge should bear in mind in deciding whether to disqualify him/herself or not. It further cautions judges to be wary of giving encouragement to attempts by a party to use procedures for illegitimate disqualification.[68]

The principle of integrity requires that a judge's conduct must uphold the high status of the judicial office. The Guide further acknowledges public interest in a judge participating, as far as the office permits, in the life and affairs of the community. While judges, like all other citizens, have a right to privacy they must avoid situations that might diminish their authority and expose them to ridicule by reason of private life conflicts or behaviour. However, the limitations imposed on the judge's private life should not go against Article 8 of the European Convention on Human Rights. The right to respect for private and family life enshrined in Article 8 of the Convention dictates that, '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

According to Lord Gill, President of the Supreme Court of Scotland, Article 8 "confers universal right to privacy of those residing in countries which are signatories to the convention. Not all immoral conduct in a judge's private life shall necessarily therefore result in their removal from office. However, it is a finely balanced argument. Should any immoral or illegal conduct undertaken in their private life impinge on their ability to conduct their court fairly, independently and impartially, that shall result in the consideration of removal from office. For example, immoral or improper conduct that is made public and is scandalised can open the judge to

66 Page 9.

67 Page 10.

68 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451.

criticisms of hypocrisy, to increased press interest and to a loss of public confidence."[69]

The Guide also affirms that the appearance of propriety is essential to the performance of all the activities of the Judge.[70] To ensure competence and diligence, the Guide requires the judge to take reasonable steps to maintain and enhance the judge's necessary knowledge and skills for the proper performance of judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.

In 2012, South Africa adopted the Code of Judicial Conduct pursuant to Section 12 of the Judicial Service Commission Act of 1994.[71] It binds all judges including those not in active service in so far as is applicable.[72] The code aims at assisting judges dealing with all ethical and professional issues and informing the public about the judicial ethos of the republic. It also punishes wilful or grossly negligent breach of the code, and it guards jealously self-regulation of the judiciary and accountability on the part of the public with regard to the judiciary.[73] The interpretation of the code must first be in line with the South African Constitution. It does recognise, but limits the applicability of, international standards and those in comparable jurisdictions to act as relevant and useful sources for interpreting, understanding and applying the South African Code.[74] The judge is expected to avoid and disassociate himself or herself from comments or conduct by persons that promote inequality or bias, and to uphold the dignity of all with courtesy. Regarding transparency, the code applies it to accessibility of the courts and public understanding of judicial proceedings, to the conduct in judicial proceedings and making decisions known in open court, to the right to fair trial and the situation of recusal.[75] The code also encourages officers to be diligent in judicial administration and duties in general.[76]

Moreover, the code also directs the judges to exercise restraint[77] by not commenting publicly on *sub-judice* matters nor entering into public debates on such cases. It also limits the right of association of judges, who should not belong to any political party or secret organization.[78] Judges should not ask for or receive any special favour or

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69 B. Gill, Lord President and Lord Justice General of Scotland, Speech delivered at the Qatar forum on judicial conduct, 2014, P. 11. Available at: http://www.scotland-judiciary.org.uk/Upload/Documents/LPQatarspeechApril2014.pdf, last accessed on 9 October 2016.

70 Above n 64, p. 15.

71 http://constitutionallyspeaking.co.za/code-of-judicial-conduct-for-south-african-judges/.

72 Article 2.

73 Article 3.

74 Article 3 (3).

75 Article 13.

76 Article 10.

77 Article 11.

78 Article 12.

dispensation, and they should minimize risk of conflict with judicial obligations. They must respect separation of powers when considering requests to perform non-judicial obligations for or on behalf of the state. Additionally, judges should avoid any business or financial dealings with legal professionals, and any extra-judicial activities that may pose a conflict of interests.[79] A judge may receive extra income,[80] with the written consent of the minister and in consultation with the Chief Justice, for royalties for legal books written or edited by the judge and/or for delivering public lectures or papers.

Where there is inappropriate conduct on the part of a legal practitioner or public prosecutor, a duty exists upon the judge, having concluded the proceeding, to inform the relevant body of the misconduct or of professional incompetence and this should be done in a neutral way.[81] A judge discharged from active service,[82] may not sit as a director of a public company, become member of a professional partnership or body corporate or enter party positions.

In the United States of America a code of conduct applicable to federal judges was initially adopted by the judicial conference on April 5 1973 as the 'Code of Judicial Conduct for United States Judges'.[83] The code is composed of five canons. The first establishes that a judge should uphold the integrity and independence of the judiciary. A judge is expected to maintain and enforce high standards of conduct and should personally observe those standards so that integrity and independence of the judiciary may be preserved. The second canon stipulates that a judge should avoid impropriety and the appearance of impropriety in all activities. Judges should not allow outside influence to interfere with their judicial conduct or judgment. Judges should not hold membership in any body that practises invidious discrimination. The third canon deals with the performance of judicial duties. A judge should perform the duties of the office fairly, impartially and diligently. The fourth canon forbids a judge to engage in extra-judicial activities that are inconsistent with the obligations of judicial office. The fifth canon directs that a judge should refrain from political activity.

The chart on the following pages compares and contrasts specific elements among these codes.

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79 Article 14.

80 Article 15.

81 Article 16.

82 Article 17.

83 http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges, last accessed on 8 October 2016.

No.	Bangalore Principles	South Africa	Botswana	Ghana	England	Kenya	USA
1.	**Independence**: An important pre-requisite to the rule of law. Judicial independence is twofold in this respect: a) individual; and b) institutional.	Article 4: It provides for individual independence and institutional independence	Chapter 2 provides for Judicial Indepen-dence	Rule 1 provides for the independence of the Judiciary and that the same should be upheld	Chapter 2 deals with Judicial Indepen-dence both individual and institutional	Part II, 1. It contains 10 sections	Canon 1 provides for the independence of the Judiciary
2.	**Impartiality**: impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.	This principle is not expressly provided. However, elements of impartiality can be found in the provision for recusal of a judge which calls for avoidance of bias, and in the provision that requires a judge to act honourably.	Chapter 6 provides for impartiality	Rule 3 caters for impartiality of a Judge	Chapter 3 provides for impartiality of a Judge	Part II, 2. It contains 8 sections	Canon 3 caters for the principle of impartiality
3.	**Integrity**: Integrity is essential to the proper discharge of the judicial office. The rationale behind integrity is that it reaffirms the people's faith in the judiciary.	No express provision of the same provided but elements exist in the provision that provides that a judge must act honourably.	Chapter 3 provides for integrity of the Judge	Rule 1 caters for the integrity of the Judiciary	Chapter 4 caters for Judicial integrity	Part II, 3. It contains 6 sections.	Canon 1 deals with the integrity of the Judge
4.	**Propriety**: Propriety and the appearance of propriety are essential to the performance of all the activities of the judge.	Article 16 touches on propriety, not expressly but impliedly	No provision for propriety	Rule 2 provides for this	Chapter 5 provides for propriety	Part II, 4. It contains 17 sections. It forbids judges to conduct, direct, preside or play a central part in *harambees*	Canon 2 deals with propriety

No.	Bangalore Principles	South Africa	Botswana	Ghana	England	Kenya	USA
5.	**Equality**: ensuring equality of treatment to all before the courts are essential to the performance of the judicial office.	Article 7 provides for the principle of equality	Chapter 5 deals with equality	No express provision for the same, however, it is catered for in part through the code	Not expressly provided for but can be found in part in Chapter 7	Part II, 5. It contains 6 sections	
6.	**Competence and diligence**: competence and diligence are pre-requisites to the due performance of judicial office	No express provision for competence on the same. However, Article 10 provides for diligence	Chapter 4 provides for diligence. No provision for compe-tence.	Rule 3 provides for diligence of a Judge and the Judiciary as a whole	Chapter 6 deals with competence and diligence	Part II, 6 on professionalism. It contains 10 sections	Canon 3 deals with diligence of the judge
7.	**Accountability and prohibition against corrupt practices**					Part II, 7 is an innovative addition to the Kenyan code, perhaps due to the adverse and corrupt environment prevailing in most public offices. It contains 3 sections.	
8.	**Sexual harassment**					Part II, 8 on prohibition against sexual harassment. It contains 6 sections.*	

* Included at the expressed request of the drafting Committee. Sexual harassment in the Kenyan code has the meaning assigned to it under the Sexual Offences Act, the Employment Act and the Public Officer Ethics Act.

Conclusion

Kenya's social disintegration had its genesis in the erosion of a system of laws that was easily manipulated; a system that imported structures without the essential spirit that created them; a system that disregarded local customs and traditions by imposing foreign social concepts devoid of meaning.

The 2010 Constitution was perceived to be the only way to redress Kenya's self-disintegration and instil a sense of ownership in the country, its progress and its deep desire for justice.

This Constitution enshrined a financially, politically and structurally independent justice system. The spirit of this new dispensation sought to help the judiciary to regain its lost public confidence, which, according to the Israeli Judge Aharon Barak, is one of the essential conditions for the realization of the judicial function, which means

> that the judiciary is dispensing justice according to the law (…) and that judging is being done fairly, impartially, with equal treatment of both parties and without any trace of a personal interest in the outcome. It means public confidence in the high ethical level of judging. Without public confidence the judiciary cannot operate.... [P]ublic confidence in the judiciary is the most precious asset that this branch of government has. It is also one of the most precious assets of the nation. As De Balzac noted, lack of confidence in the judiciary is the beginning of the end of society.[84]

We began this chapter by stating that judges must be true thinkers, fair, impartial and independent-minded persons, and that the best judge is not necessarily the most efficient one, nor the one who decides most cases in less time, nor the most popular one. Instead, the best judge is the one who is able to interpret the law and understand the social context, thus making rational judgments in the pursuit of justice. The country thirsts for such judges, the country needs them urgently. The recently issued Judiciary Code of Conduct and Ethics is a simply a declaration of principles that will guide the conduct of judges towards the common good. Nevertheless, the code still lacks the mechanisms of enforcement and accountability required to become a useful and relevant instrument to enhance and preserve public confidence in the judiciary. The Constitution of Kenya 2010 placed the judiciary on a well-defined path towards independence. We had hoped the Judiciary Code of Conduct and Ethics would do the

[84] HC 732/84 *Tzaban v Minister of Religious Affairs*, 40(4) PD I4, 148.

necessary to foster accountability. This is not yet so. The path of judicial accountability is still blurred, undefined and abstract.

Appendix: Original Provisions on Enforcement

PART III—THE ETHICS ADVISORY BOARD FOR JUDGES AND JUDICIAL OFFICERS

1. (1) There is established an Ethics Advisory Board for judges and judicial officers.

(2) The members of the Ethics Advisory Board shall be persons of proven ethical profile, excellent standards of professionalism, good character, and demonstrable commitment to eradicate unethical practices and corruption.

(3) The Ethics Advisory Board shall consist of—

(a) one judge of the Supreme Court elected by the judges of the Supreme Court from among themselves;

(b) two judges of the Court of Appeal elected by the judges of the Court of Appeal from among themselves;

(c) the judge who may be appointed to act as director or head of the Judiciary Training Institute;

(d) two other judges of the High Court, elected by the judges of the High Court from among themselves;

(e) two retired judges nominated by the Judicial Service Commission;

(f) one senior counsel nominated by the president of the Law Society of Kenya;

(g) one distinguished scholar, of at least 10 years of experience, in legal education, nominated by the Chief Justice;

(h) the Chief Registrar of the Judiciary shall be an ex-officio member of the Board and shall act as its secretary;

(i) the Members of the Board shall elect a chairperson and a vice chairperson from among themselves;

(4) The appointment to this Board shall take measures to implement the gender rule as stipulated in Article 27(8) of the Constitution.

2. The functions of the Ethics Advisory Board shall be to—

(1) provide mentoring and peer advise to judges and judicial officers on ethical matters generally;

(2) respond to consultations by judges, judicial officers, and members of the public, whether anonymous or not, on ethical matters and positions regarding past, present or anticipated conduct,

(3) address matters of ethical concern in relation to judges or judicial officers on their own motion;

(4) assist and advise the Commission and its delegated bodies in developing materials, curricula and trainings on ethical issues;

(5) monitor ethical progress using a review mechanism capable of addressing emerging ethical issues and improving compliance and effectiveness;

(6) assist and advise on the publication and/or dissemination of experiences that may aid judges, judicial officers and scholars in the study of judicial ethical dilemmas and their possible solution;

(7) give recommendations and act, under the powers of the Commission, on any ethical issue that may be referred to it by the Commission as stipulated by Section 13(5) of this Act;

(8) advise the Commission on possible remedial action as provided for under the law.

(9) liaise and coordinate with the National Council on the Administration of Justice, on any ethical policies and ethical matters generally that may be relevant to the fulfilment of the Council's mandate;

(10) the Board shall inform the relevant authority or authorities, as well as the participating judge or judicial officer, of the outcome of its deliberations and study.

(11) the Board may issue opinions at its own initiative, on any matter relating to the Judiciary Code of Ethics and Conduct.

(12) the Board shall endeavour to carry out its mandate with utmost impartiality, independence, diligence, and confidentiality.

3. (1) the Chief Justice shall see to it, through the Judiciary Training Institute, that appropriate personnel, administrative, material and financial support is made available for the Board to fulfil its mandate.

(2) Membership to and participation in the Ethics Advisory Board meetings shall be voluntary and not remunerated;

4. The elected or nominated members of the Board shall serve for a term of four years, and shall be eligible for further nomination or re-election for one further term of four years.

5. The Board shall ensure ongoing ethical training of the Ethics Advisory Board members.

6. The Chief Justice shall determine the mechanism for the devolution of the functions of the Ethics Advisory Board to serve all jurisdictions.

PART IV—ENFORCEMENT OF THE JUDICIARY CODE OF ETHICS AND CONDUCT

7. A newly appointed judge or judicial officer or judicial staff shall submit to an induction course relevant to the duties and expected performance in his or her exercise of the judicial function and activity such as may be required by the Commission.

8. The Commission may issue opinions on its own initiative, on matters relating to the Code of Ethics and Conduct.

9. (1) Any person may submit a petition to the Commission on the violation of the Code of Ethics and Conduct.

(2) A complaint submitted to under subsection (1) shall be in writing and signed by the person making the complaint, and shall include the name of the judge, judicial officer or judicial staff concerned, a detailed description of the alleged misconduct, the names of any witnesses if any, the complainant's address and telephone number and any other means by which the complainant may be identified and contacted.

(3) The Commission shall not notify the judge, judicial officer or judicial staff as the case may be of such complaint unless it determines that a violation of the Code of Ethics and Conduct may have occurred.

10. (1) All proceedings under this Act shall be confidential.

(2) If the Commission determines that a violation of a provision of the Code of Ethics and Conduct may have occurred, it may proceed informally and counsel the judge, judicial officer or judicial staff as the case may be.

(3) Where the complaint is against a judge, the Commission may issue a formal charge against the judge if it finds, after conducting an inquiry, that the charge is well founded and it may recommend the removal of the judge in accordance with Article 168(1) (b) of the Constitution.

(4) Where the matter does not disclose sufficient reasons to recommend the establishment of a tribunal, the Commission may refer the matter to the Ethics Advisory Board.

(5) The Ethics Advisory Board on receiving a charge referred to it by the Commission may–

(a) reprimand the judge or judicial officer privately;

(b) issue a written warning to the judge or judicial officer;

(c) require the judge or judicial officer to cease, forthwith, the violation, if it is a continuing violation;

(d) place the judge or judicial officer on a period of supervision subject to such terms and conditions as the Board may deem fit;

(e) require the judge or judicial officer to apologise to the complainant, in a manner specified by the Board;

(f) order any form of compensation, as may be appropriate, to be paid by the judge or judicial officer to the complainant;

(g) require the judge or judicial officer to submit to appropriate counselling;

(h) require the judge or judicial officer to attend or undergo such specific training course as the Board may determine;

(i) recommend the removal of the judge or judicial officer in accordance with Article 168(1) (b) of the Constitution;

(j) take any other corrective measure as in the opinion of the Board may be appropriate.

11. (1) For the purposes of Article 168(1)(b) of the Constitution, and without prejudice to section 10, it shall be at the sole discretion of the Commission, subject to subsection (2), to recommend the establishment of a tribunal.

(2) If the Commission, having heard the opinion of the Board, deems a complaint against a judge or judicial officer to be sufficiently serious to require removal of the judge from office, it shall recommend the establishment of a tribunal.

(3) The Commission shall be guided by the following considerations in recommending the removal of a judge or judicial officer for the violation of the code of conduct for judges and judicial officers—

(a) violation relating to corruption;

(b) Violation relating to oath of office or affirmation;

(c) violation relating to gross incompetence;

(d) violation relating to conflict of interest;

(e) violation relating to persistent violation of the Judiciary Code of Ethics and Conduct, or repeated violations.

12. At the conclusion of any proceedings in which the complainant has participated, the Commission shall inform the complainant of its determination.

13. (1) Any person aggrieved by the decision of the Board has, at the first instance, the right to apply for the Board to review its decision.

(2) There is no right of appeal against the decision made by the Board.

(3) The application for review of the decision shall be made within 14 days of the issuance of determination by the Board.

(4) Any action taken by the Board shall form part of the records of the judge or judicial officer as the case may be.

14. The Commission shall establish regulations to deal with judicial staff as may be necessary to–

(1) reprimand the judicial staff;

(2) issue a written warning to the judicial staff;

(3) require the judicial staff to cease, forthwith, the violation, if it is a continuing violation;

(4) place the judicial staff on a period of supervision subject to such terms and conditions as the Commission may deem fit;

(5) require the judicial staff to apologise to the complainant, in a manner specified by the Commission;

(6) order any form of compensation, as may be appropriate, to be paid by the judicial staff to the complainant;

(7) require the judicial staff to submit to appropriate counselling;

(8) require the judicial staff to attend or undergo such specific training course as the Commission may determine;

(9) recommend the removal of the judicial staff in accordance with the law;

(10) take any other corrective measure as in the opinion of the Commission may be appropriate.[85]

[85] Draft Judiciary Code of Ethics And Conduct Bill, 2015, submitted to the Committee by the author of this chapter.

CHAPTER SIX

THE KENYAN JUDICIARY'S ACCOUNTABILITY TO PARLIAMENT AND TO INDEPENDENT COMMISSIONS: 2010-2016

James Thuo Gathii*

Introduction

In many democracies, judicial independence is fundamental as a guarantor of both the separation of powers and the rule of law.[1] International legal instruments recognize the importance of judicial independence. These include the Universal Declaration of Human Rights (UDHR),[2] and the International Covenant on Civil and Political Rights (ICCPR),[3] which both guarantee everyone the right to equality before the law and a fair hearing by an independent and impartial tribunal, and the Convention on the Elimination of All forms of Racial Discrimination against Women

* I acknowledge the research assistance of Smith Otieno and Adhiambo Okuom. Thanks too to Jill Ghai for providing excellent guidance and materials for this chapter.

1 Geoffrey Robertson, 'Judicial Independence: Some Recent Problems', International Bar Association's Human Rights Institute Thematic Papers No. 4, June 2014, 3.

2 The UDHR proclaims that ' everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him' see UDHR Art 10, Adopted 10 December 1948 UNGA, Res 217 A (III).

3 ICCPR provides that 'everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law'. See ICCPR art 14(1), Adopted 16 December 1996.

(CEDAW), which guarantees access to protection and remedies violations under the Convention.[4].

Notwithstanding their 'independence', judiciaries are accountable, particularly for their expenditures of public funds. In addition, independent commissions are accountable for decisions on the recruitment, discipline and removal of judicial officers. In addition, independent commissions like the Salaries and Remuneration Commission and the Commission on Administrative Justice as well as independent state officers such as the Controller of the Budget have oversight responsibilities over certain aspects of the non-judicial administrative functioning of the judiciary. Notwithstanding this, the relationship between the judiciary, the legislature and other independent state organs is one of interdependence and mutual respect.

Mutual respect is particularly relevant where the activities of the various government organs and responsibilities overlap or intersect.[5] For example, the *sub judice* rule bars persons, including members of parliament, from discussing current court cases. This means that members of parliament cannot speak about current court cases during parliamentary debates.[6] Rule 89 of the National Assembly Standing Orders also bars members from discussing matters that are *sub judice*. The *sub judice* rule is designed to give the judiciary a chance to determine cases with finality without interference from any person, including legislators.

Another example where friction often arises between the judiciary and parliament relates to the internal proceedings of parliament. The Constitution vests parliament with the exclusive power of establishing rules to govern its proceedings as well as those of its committees.[7] As discussed later in this chapter, the manner in which these rules are to applied in practice by the speakers of both houses has been contentious as a result of judicial decisions that parliament interpreted as inconsistent with its exclusive mandate to control its own proceedings.

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4 CERD, art. 6 requires states to 'provide everyone within their jurisdiction effective protective remedies through competent national tribunals'. Entered into force on 30 September 1981.

5 Hon. Wayne Martin, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect', (2015) 30(2) *Australasian Parliamentary Review* 4.

6 P. 13. This position has been supported by Lord Neuberger in the U.K who stated;

> The House of Parliament's *sub judice* rules are an example of the way in which Parliament and the Courts are concerned to ensure that each refrains from trespassing on the other's province. Their proper application ensures that the rule of law is not undermined and that the citizen's right to fair trial is not compromised.

See Committee on Super-Injunctions, *Super-Injunctions, Anonymized Injunctions and Open Justice* (Master of the Rolls, England, 2011) vi. https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf.

7 Article 124 .

The emergence of an empowered judiciary that has not been hesitant to assert its power of judicial review vis-à-vis the executive and the legislature and a parliament protective of its prerogatives has set the stage for a contentious relationship.[8] The judiciary's empowerment is undergirded by the transformative nature of the 2010 Kenyan Constitution. This departs from the legislative supremacy of the 1963 Constitution and is instead based on the principle of constitutional supremacy.[9]

This Chapter discusses the balance between independence of the judiciary and the oversight responsibilities that parliament and independent bodies, such as the Salaries and Remuneration Commission and the Controller of Budget, have over the judiciary. In particular, it examines parliament's oversight mandate over the judiciary's finances and the reporting requirements that the judiciary has to parliament. In addition, the chapter examines, the obligation judicial institutions including the Judicial Service Commission to comply with the Constitution and in particular the Bill of Rights.

Underpinnings of the Relationship between the Judiciary and Parliament in the Context of Accountability

This part of the chapter discusses the rationale for independence of the judiciary and the Judicial Service Commission in the context of the judiciary's accountability to other organs such as parliament. How can the judiciary interpret the Constitution and the laws without interference from other organs of the government, and yet remain accountable to those organs? This is particularly relevant because Kenya is a representative democracy and elected officials in parliament represent the will of the people while institutions like the judiciary have appointed officials. Even the judiciary derives its authority from the people.[10] This question about how the judiciary can decide cases without external interference and yet remain accountable has in a large measure been settled by the Constitution through the principle of constitutional supremacy which governs the conduct of all state actors.[11] Constitutional supremacy requires all the conduct of all state actors to be consistent with the Constitution, otherwise referred to as the legality principle.[12] Judicial accountability ensures that

8 See analysis in James Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis* (Sheria Publishing House, 2016).

9 Ibid. at 69.

10 Article 159 (1).

11 Article 2.

12 See James Gathii, *The Empowerment of the Kenyan judiciary, 2010-2015*: above.

the judiciary upholds constitutional supremacy to prevent arbitrariness.[13] Accountability as envisioned in the 2010 Constitution is not incompatible with judicial independence although as we shall see, parliament and the judiciary do not often agree how the exercise of judicial authority and accountability, on the one hand, relates to parliamentary authority and its supervisory role over the financial affairs of the judiciary, on the other.

Independence of the judiciary is a major precondition for courts to exercise their authority with justice, equity and predictability, as well as for guaranteeing that judicial decisions are not undermined by parliament or the executive.[14] Judicial independence applies both to the judiciary as an institution but also to individual judges and magistrates who make pronouncements after litigants have presented their cases. This is referred to as personal independence. Personal independence requires that judges and magistrates be able to decide cases without fear of being influenced by others.[15] Personal independence requires a judge to exercise 'the judicial function independently on the basis of his/her assessment of facts and in accordance with a conscientious understanding of law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or, for any reason'.[16]

At the institutional level, judicial independence means protection of the institution of the judiciary from interference from other branches of government.[17] Institutional independence is designed to ensure the judiciary can protect and promote the constitution and its values.[18] Institutional independence shields judges and judicial officers from external influence and is critical to the preservation of rule of the law. Institutional independence is important in preserving the integrity of the process and method of appointment of judges and judicial officers, their security of tenure, the process of fixing their salaries and other conditions of service.[19] It is worth noting that safeguarding both institutional and personal independence is critical to guaranteeing

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13 Stephen Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations' (2007) 95 *Georgetown Law Journal* 909.

14 Geoffrey Robertson, 'Judicial Independence: Some Recent Problems', above 3.

15 John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California Law Review* 355.

16 The Bangalore Principles of Judicial Conduct, 2002 para 1.1.

17 Patricia Hughes, 'Judicial Independence: Contemporary Pressures and Appropriate Responses' (2000) 80 *Canadian Bar Review* 186.

18 Ibid.

19 Joseph Raz, 'Rule of Law and its virtue', in *Authority of the Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 217.

the rule of law and the place of the courts in a constitutional democracy. This is reflected by the Supreme Court of Canada as follows:

> Independence reflects or embodies the traditional constitutional values of judicial independence and connotes not only the state of mind, but also a status or relationship to others particularly to the executive branch of governments that rest on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships the individual independence of a judge is reflected in such matters as security of tenure, and the institutional independence of the courts as reflected in its institutional or administrative relationships to the executive and legislative branches of government.[20]

Judicial independence goes hand-in-hand with judicial accountability both for individual judges and for the judiciary as an institution. Accountability can both be internal and external. Internal accountability is guaranteed by checks and balances within the judiciary and as such amounts to self-policing by the judiciary.[21] External accountability is guaranteed where other government agencies have oversight authority over non-judicial matters such as the finances of the judiciary.[22] External accountability also means that the judiciary is accountable to the people who confer judicial authority on the judiciary. Accountability to the people is guaranteed by the constitutional provisions giving persons the right to institute proceedings where their rights have been violated[23] as well as the provisions that enable individuals to initiate proceedings for the removal of judges and judicial officers.[24] Judicial accountability however, does not imply the erosion of judicial independence and a delicate balance

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[20] *Walter Valante v The Queen* (1985) 2 SCR 673 cited in *Home Park Caterers Limited v Attorney General and 2 Others* [2007] eKLR HC Petition No. 671 of 2006 http://www.kenyalaw.org/Downloads_FreeCases/Homepark%20Caterers%20Ltd%20v%20AG.pdf. Institutional independence however, does not, on its own, create more independent outcomes or even perception of a more independent judiciary. See Rehan Abeyratne, 'Judicial Supremacy, not independence, Upheld in NJAC Judgment', (2015) Int'l J. Const. L. Blog available at http://www.iconnectblog.com/2015/10/judicial-supremacy-not-independence-upheld-in-njac-judgment/.

[21] Robin Cooke, 'Empowerment and Accountability: The Quest for Administrative Justice' (1992) 18 *Commonwealth Law Bulletin* 1326.

[22] Within the judiciary, internal accountability mechanisms include the judiciary Ombudsman who receives and investigates complaints against judicial officers and the Court Users Committees established in every court station to enable public participation and consultation in the delivery of justice. On these accountability mechanisms, see The Judiciary, *State of the Judiciary and Administration of Justice 2012-13,* 88; The judiciary, 'Office of the Ombudsperson', available at http://www.judiciary.go.ke/portal/page/office-of-the-ombudsperson, accessed September 20, 2016. The overarching policy body that oversees these mechanisms within the judiciary is The National Council on Administration of Justice, which is charged with ensuring efficient administration of justice, see Judicial Service Act, (2011) s. 6.

[23] Article 22 (1).

[24] Article 168 (2).

ought to be struck between the two.[25] Judicial accountability proceeds on the basis that the wielders of power, whether judicial, legislative or executive, are entrusted to perform these responsibilities on condition that they account for their stewardship to the people who authorize them to exercise such power.[26]

Accountability is required in the appointment and promotion of judges and judicial officers particularly in ensuring that only the proper criteria for making these decisions are used[27] and that decisions are made transparently. In a recent case, the Supreme Court of India rejected arguments that the appointments process was not important for ensuring independence, and that the real issue was security of tenure once appointed.[28] Judges and judicial institutions are also required to perform their duties openly and transparently. In part two of this chapter, a recent High Court of Kenya decision reversing the decision of the Judicial Service Commission on the process of shortlisting candidates for Chief Justice and President of the Supreme Court, which exemplifies this point, is discussed.

Accountability can take a variety of forms. The appellate structure of the judicial system as well as complaints mechanisms established within the judiciary are designed to ensure internal accountability.[29] Accountability is not designed to diminish the freedom of a judge to make independent decisions but on the contrary it promotes the kind of independence needed for judges to adhere to the rule of law.[30] The critical challenge is how to strike a balance between guaranteeing judicial independence while at the same time ensuring that the judiciary is held to account for its actions. Accountability is a building block for an independent judiciary and it increases public confidence in the judiciary.

Background to Judicial Independence and Accountability in Kenya

The judiciary inherited at the end of colonial rule lacked independence. It was a handmaiden of the executive. Over time, the administration of justice came into

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25 Michael Kirby, 'Judicial Accountability in Australia' (2003) 6(41) *Legal Ethics* 42.

26 Kirby at 43.

27 Kirby at 45.

28 See *Supreme Court Advocates on Record Association and another v Union of India* Petition No. 13 of 2015.

29 Judiciary of England and Wales, 'Accountability of the Judiciary', 7 available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf. For more on this topic see the chapter by Professor Kameri-Mbote in this book.

30 Charles G. Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric', (2006) Indiana University School of Law Legal Studies Research Paper Series, Research Paper No. 61.

disrepute.[31] This was particularly the case during the single-party regime in the country where the executive consolidated all governmental power and subjected to the judiciary to its control.[32]

In this period, the appointment and removal of judges and judicial officers remained the prerogative of the president. Successive presidents used this power to appoint regime-friendly judges or to remove those who were perceived as anti-establishment.[33] In the late 1980's, the one-party controlled parliament removed security of tenure of judges.[34] Dependence on the executive and legislature for finances became another avenue through which the two organs maintained their control of the judiciary.[35]

It is against this backdrop that institutional reforms in the judiciary were proposed in the aftermath of the violence that followed the 2007 general election violence. Lack of confidence in the judiciary removed it as an option to resolve the validity of the closely contested 2007 presidential election. [36] Dissatisfaction with the manner in which that election was conducted and the ballots were counted resulted in violence. The importance of reforms to make the judiciary more accountable and independent was incorporated as a central recommendation in the National Dialogue and Reconciliation Agreement that was negotiated to bring an end to the 2007 post-election violence. Several institutional reforms were proposed in this agreement

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31 Julie Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform'* PhD Thesis University of Leicester (2011) 124.

32 Judges also confirmed the fact that the judiciary was faced with an independence challenge and one judge was quoted to have stated that:

> The Judiciary in Kenya is at crossroads. Its authority has been denuded over the years…It is no longer seen as Lion on the throne, but just a mouse squeaking under the chair of the executive. As Judges, we violently resent this label, but deep down some of us know that it is true. When faced with claims against the government, we sometimes behave like a river by taking the course of least resistance.

See Winnie Mitullah *et al* (eds), *Kenya's Democratization: Gains or Losses* (Nairobi: Claripress, 2005) 34. The judiciary inherited at the advent of the new Constitution in 2010 was one that needed massive overhaul of systems and the first Chief Justice under the 2010 Constitution, Willy Mutunga, in his 120th day address to the public on 19th October 2011 lamented that:

> We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficit in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic…

33 Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) *Human Rights Quarterly* 96-118.

34 James Gathii, *The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process*, Kenya Human Rights Commission Publication, December 1994.

35 Ibid.

36 The Office of the AU Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (African Union, 2014) 188.

including financial independence; transparent and merit-based appointment, discipline and removal of judges; strong commitment to human rights and gender equity; and reconstitution of the Judicial Service Commission to include other stakeholders and enhance independence and autonomy of the Commission.[37] The 2010 Constitution reflects many of these reforms intended to guarantee the independence of the judiciary.[38] The following section highlights some of the safeguards that have been adopted in the Constitution that seek to promote independence of the judiciary and its accountability.

The 2010 Constitution and Judicial Independence

As already alluded to above, the Constitution is premised on the doctrine of constitutional supremacy. This is a departure from the 1963 constitutional order under which parliament and the executive were considered supreme. Article 2 of the Constitution provides that the Constitution is the supreme law of the republic and binds all persons and all state organs at both levels of government. This means that all institutions established under the Constitution are required to comply with the Constitution.[39]

The Bill of Rights in the Constitution also guarantees access to justice for all persons and in particular provides that where any fee is required, it shall be reasonable and shall not impede access to justice.[40] Important also is the fact that the Constitution puts an affirmative duty on the state to ensure that the provisions in the

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37 Kenya National Dialogue and Reconciliation Agenda Item 4: Long-Term Issues and Solutions Matrix of Implementation Agenda. Available at http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_15_KNDR_Statement_of_Principles.pdf, accessed August 5, 2016. Some of the broad reforms proposed included: a) constitutional review that would make arrangements to (i) guarantee the judiciary's financial independence; (ii) establish a transparent and merit-based appointment system and system for disciplining and removing judges; (iii) entrench a commitment to human rights and gender equity; (iv) reconstitute a truly independent Judicial Service Commission to include other stakeholders; b) enact a Judicial Service Act, with provisions for peer review and performance contracting; and c) streamline the operations of legal and judicial institutions (by adopting a sector-wide approach to recruitment, training, planning, management and the implementation of programmes and activities).

38 James Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015*: above.

39 Article 1 (3) of the Constitution provides that sovereign power under the Constitution is delegated to: parliament and legislative assemblies in the County Governments; the national executive and the executive structures in the County Governments; and the judiciary and independent tribunals, which are required to perform their functions in accordance with the Constitution.

40 Article 48.

Bill of Rights are observed, respected, protected, promoted and fulfilled.[41] Article 160(1) of the Constitution provides that 'in the exercise of judicial authority, the judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.' In addition, the independence of the judiciary is protected by a special amendment provision to the Constitution.[42] No amendment of the Constitution that relates to the independence of the judiciary can be made unless it is approved not only by the usual two-thirds majority in both houses of parliament, but also by the people in a referendum.[43]

Other safeguards to ensure independence of the judiciary include: guarantees against the abolition of judicial offices of superior courts,[44] and of the remuneration and benefits of judges, before or after retirement,[45] as well as immunizing judges from suit in respect of good faith acts or omissions in the lawful performance of a judicial function.[46] Financial autonomy of the judiciary has been guaranteed through the establishment of the Judiciary Fund that is administered by the Chief Registrar of the Judiciary.[47] This fund must only be used for administrative expenses of the judiciary or for other purposes necessary for its functions.[48] The Chief Registrar is required to prepare estimates of expenditure every financial year for the following year and to submit these estimates to the National Assembly for approval.[49] Upon approval, this budget is to be charged on the Consolidated Fund and the funds are to be paid directly into the Judiciary Fund.[50] The fact that the judiciary can accept grants, gifts, donations, or bequests towards the achievement of its objectives further strengthens its fiscal autonomy.[51] These funds cannot however, be accepted if they are meant to direct or influence the judiciary to perform its duties in favour of the party giving the funds.[52] The fact that the judiciary can receive funds from other bodies has largely eliminated the ability of the executive or parliament to starve the judiciary of

41 Article 21(1).

42 Julie Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform*, PhD Thesis University of Leicester 207 (2011).

43 Article 255(1)(g).

44 Article 160(2).

45 Article 160(4).

46 Article 160(5)

47 Article 173(1).

48 Article 173 (2).

49 Article 173 (3).

50 Article 173 (4).

51 See Judicial Service Act (2011) s. 26.

52 Ibid.

funds.[53] The Judiciary Fund Act of 2016 has additional safeguards to promote the judiciary's financial accountability.[54] The Act provides that the objectives of the Judiciary Fund are to: a) safeguard the financial and operational independence of the judiciary, b) ensure accountability for funds allocated to the judiciary, and c) ensure that the judiciary has adequate resources for its functions.[55]

In the period following the enactment of the Constitution in 2010, the judiciary received increased funding compared to the allocations that had been made to it before.[56] Reports of financial impropriety within the judiciary however, subsequently resulted in the reduction of appropriations by parliament. The reduced funding should also be viewed in light of the supremacy wars between parliament and the judiciary. As already noted above, parliament has expressed its displeasure with a number of judicial decisions that in its view undermined its authority to legislate.[57] The reductions in the judiciary's funding by parliament cannot therefore be understood without taking into account its disapproval of the judiciary's exercise of its judicial independence in reversing unconstitutional parliamentary conduct.[58]

As will be discussed more fully below, the judiciary's responsibility to account for its funding to parliament has been a crucial axis along which tensions between the judiciary's accountability to parliament and the judiciary's independence have played out. This chapter therefore argues that parliament has abused its financial oversight authority over the judiciary in part to punish it for decisions that parliament did not approve.

Judicial Accountability to Parliament and Independence of the Judiciary: 2010-2016

In Kenya, the accountability of the judiciary can only be understood in the context of the principle of constitutional supremacy. Constitutional supremacy subjects all actors, including state organs, to conduct themselves in accordance with the Constitution. Where they fall short, the judiciary has the last word on the constitutionality of their conduct. To understand this balance between accountability

53 See analysis in James Gathii, *The Contested Empowerment of Kenya's Judiciary* above p.115.

54 See Judiciary Fund Act No. 16 of 2016.

55 S. 3.

56 S. 3.

57 See Republic of Kenya, *Public Accounts Committee Report on the Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014* (11th Parliament Third Session 2015).

58 Ibid.

and independence, this section of the chapter discusses the relevant constitutional and legal provisions.

Parliament's primary role is to enact laws through Bills. The president subsequently assents to these Bills.[59] In exercise of this function, parliament passes laws that govern the conduct of the judiciary and the Judicial Service Commission. In doing so, parliament must not undermine the judiciary's decisional independence to decide cases only on the basis of the facts and the law, its operational autonomy or financial independence.

The Judiciary's Financial Accountability to Parliament

The National Assembly oversees the funds it appropriates to all state organs including the judiciary and the Judicial Service Commission.[60] This oversight is exercised through various committees such as the Public Accounts Committee (PAC).[61] Accountability of other government organs to parliament through parliamentary committees borrows from a long established common law tradition. In the United Kingdom, select committees play a critical role in holding the judiciary to account to the public through their elected representatives in parliament. This is achieved, in part, by the submission of an annual report by the Judiciary to parliament.[62] Balancing this function with judicial independence can strain judicial independence when parliament uses the power of the purse to undermine the judiciary's independence and operational autonomy by denying or reducing appropriations to it as has happened recently in Kenya. These tensions therefore invariably occur even though the Constitution guarantees the judiciary financial autonomy through the establishment of the Judiciary Fund.

The Public Accounts Committee (PAC) particularly plays a key role in monitoring how funds allocated to the judiciary, with approval of the National Assembly, are spent. The PAC has oversight responsibility for the expenditure of public funds by ministries/departments, constitutional commissions and independent

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59 Article 95 (3)).

60 Article 95 (4)(b) and (c).

61 Article 124(1).

62 Select Committee on the Constitution 'Parliament and the Judiciary' available at http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15105.htm Para 126.

offices like the judiciary.[63] Standing Order No. 205 (2) of the National Assembly provides that:

> The Public Accounts Committee (PAC) shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may deem fit.

When then Chief Justice Willy Mutunga, was summoned to appear before a parliamentary committee to answer questions regarding financial improprieties in the judiciary,64 he failed to honour the summons citing independence of the judiciary.65 The former Chief Registrar of the Judiciary, Gladys Shollei, who had been suspended following findings of financial impropriety, however, honoured the PAC summons. The Registrar had earlier on refused to appear before a different body, the Judicial Service Commission, (JSC), to answer questions on judiciary expenses arguing that she was only answerable to parliament, the Treasury and Public Procurement Oversight Authority.[66] This divergence of views among senior judicial officers on the accountability of the judiciary to parliament perhaps reflected the circumstances surrounding the acrimonious removal from office of the first Chief Registrar of the Judiciary by the Judicial Service Commission.

As the chief accounting officer of the judiciary, the Chief Registrar of the Judiciary is the person responsible to account to the National Assembly on matters relating to the judiciary's budget. Even though the Chief Registrar of the Judiciary is the accounting officer to parliament on financial matters, the Constitution guarantees that office administrative autonomy.[67] Administrative autonomy means the Registrar is not under the control of any person in exercising the functions of that office, but in doing so, the Registrar must be accountable particularly to parliament on how monies appropriated to it are spent. Where the circumstances demonstrate that the National Assembly has motivations beyond the judiciary's financial accountability, as was the case with the summoning of Chief Justice Willy Mutunga by the Public Accounts

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63 The National Assembly, *Public Accounts Committee Report on the Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014*, 11th Parliament, Third Session 2015.

64 The power of the National Assembly to summon anyone to appear before it is discussed below.

65 See Isaac Ongiri, 'Showdown looms as JSC ignores House summons', *Daily Nation* August 26, 2013 available at http://www.nation.co.ke/news/judiciary-chiefs-reject-summons-by-House/-/1056/1969154/-/157ok1xz/-/index.html, accessed August 9, 2016.

66 The National Assembly, Public Accounts Committee Report above.

67 The Judicial Service Act also grants the Chief Registrar administrative autonomy. Section 8 of the Act outlines the functions of the Registrar and this office is considered to be key in the proper functioning of the judiciary.

Committee, parliament's exercise of its power to summon, discussed below, would arguably be in bad faith.

Chief Justice Mutunga, in declining to accept the summons, took into account the National Assembly's objections to a number of judicial decisions that the National Assembly argued undermined its internal workings, as well as the fact that various members of the National Assembly were unhappy with the removal of the first Chief Registrar of the Judiciary.[68] This is important in light of the historical relationship of the office of the Chief Justice and the National Assembly being one defined by parliament and the executive seeking to subjugate the judiciary to the political branches. Chief Justice Willy Mutunga's defence of the judiciary's autonomy in exercise of its judicial functions free from undue influence by the National Assembly was met with resistance.

Using Financial Accountability as a Sword rather than a Shield

Following the refusal of the Chief Justice to appear before the PAC, the PAC decided to request the Auditor General to conduct a special audit on the financial transactions of the judiciary and the Judicial Service Commission over the 2011/2012 and 2012/2013 financial years.[69] The Auditor General's Report, which both the Chief Justice and PAC requested to be prepared, noted that at the start of the audit, the judiciary complained that too many agencies were at the time doing audits on the judiciary which was overwhelming and confusing.[70] The Auditor General's Report further noted interference by the JSC into matters that are reserved for the Chief Registrar of the Judiciary under the law such as making payment to suppliers.[71] The Auditor General's Report not only reviewed financial transactions within the judiciary but also certain administrative actions. For example, the report reviewed the recruitment and promotion process for judiciary staff members.[72] The report found that some of these promotions had been conducted unlawfully.[73]

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68 Paul Ogemba, 'Mutunga accuses Parliament of issuing misleading reports', *Daily Nation* October 30, 2015.

69 The National Assembly, Public Accounts Committee Report above.

70 Office of the Auditor General, 'Special Audit Report on the Judicial Service Commission and the Judiciary' 7 April 2014. The main objective of the audit was to establish whether the financial transactions and operations at the judiciary were in accordance with the law and Government Financial Regulations and Procedures and whether the JSC influenced the financial operations of the judiciary. (at p. 8).

71 Ibid. 30.

72 Ibid. 50.

73 Ibid. 50.

For its part, the PAC report found that the judiciary was unable to account for a large percentage of its funds at a time when budgetary allocations to the judiciary had increased.[74] Further, the report detailed financial improprieties including irregular procurement, poor human resource management and weak internal control mechanisms from poor record keeping to imprest management. The former Chief Registrar, Gladys Shollei was singled out as having failed to perform her duties as stipulated in the Constitution and the Judicial Service Act. The JSC and Chief Justice were also found to have failed in performing their duties. The Auditor General therefore, recommended that the Director of Public Prosecution conduct an investigation of the activities of those linked to the financial improprieties pointed out in the report. To facilitate the hearings, the PAC subpoenaed current and former staff members of the judiciary, the JSC as well as officers from the companies that were said to have dealt with the judiciary in allegedly illegal transactions.[75]

The fact that the PAC was critical of the Judiciary Transformation Framework (JTF), which was the blueprint prepared by the Judiciary to guide the reforms it was committed to, means that the committee, and parliament by extension, understood itself to be performing its pre-2010 constitutional functions during which it had more control over the judiciary and its affairs. When the National Assembly adopted the PAC recommendations, it added new ones including that the JSC desist from interfering with the financial administrative and operative functions of the judiciary and that the National Assembly undertake a review of the Judicial Service Act to prevent future 'overstepping' by the JSC. The recommendations made relating to the Chief Justice are a clear indication that parliament, through PAC, was exercising more than financial oversight. For example, the PAC report called out the Chief Justice for not providing leadership within the judiciary, an allusion to the view among critics of the Judiciary that it was headless.[76] A legitimate interpretation of parliament's concerns in both the PAC report but also subsequently is that the judiciary needed parliamentary supervision and not merely oversight over its finances. In fact, another justification for closer supervision of the judiciary by parliament are what the parliamentarians have called 'activist judges' who needed to be nipped in the bud. [77] Collectively, these actions by parliament undermined the independence of the judiciary. Parliament's disapproval of the exercise of judicial

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74 The National Assembly, Public Accounts Committee Report above.

75 Ibid. 24.

76 John Ngirachu, 'Speaker faults Mutunga for addressing parliament 'through the media'', *Daily Nation* November 13, 2016.

77 Roselyn Obala and Moses Njagih, 'MPs, Senators now vow to punish 'activist' judges', *The Standard* February 21st 2014 available at http://www.standardmedia.co.ke/article/2000105136/mps-senators-now-vow-to-punish-activist-judges, accessed August 11, 2016.

review in ways that impinged on parliament is reflected by a February 2014 statement by the Speaker of the National Assembly to the effect that the Assembly would not comply with every 'idiotic and unreasonable court order'.[78] A further example of the National Assembly's disapproval of the judiciary came when the National Assembly failed to send lawyers to represent it in cases before courts.[79] It also refused to accept service of court orders; and it then allowed a Member of the National Assembly declared by the courts to have lost her seat for violation of electoral laws to continue serving on the pretext that the Speaker had not been served with the court order that would be a condition precedent to declaring the seat vacant.

It is therefore accurate to note that the National Assembly has exercised its authority to hold the judiciary financially accountable as an occasion to express its disapproval of the judiciary's exercise of its judicial function. Even more, the National Assembly has openly defied judicial orders. However, when the decisions were in favour of the National Assembly, as was the case when Court of Appeal reversed the impeachment of a county governor, the National Assembly was quick to praise the judiciary for upholding the principle of separation of powers.[80] Thus when courts decide in favour of parliament, parliament is content until the next time that the judiciary reverses parliamentary conduct.

The Judiciary's and Judicial Service Commission's Reporting Obligations to Parliament

The Judicial Service Act also requires the Chief Justice to give an annual report to the nation on the state of the judiciary and the administration of justice and this is to be published in the Gazette and a copy of the report must also be sent to each of the two Clerks of the Houses of Parliament for it to be placed before the respective houses for

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78 See Moses Njagih, 'Parliament will not honour 'idiotic and unreasonable' court orders, says Justin Muturi', *The Standard* March 3rd 2014 available at http://www.standardmedia.co.ke/article/2000105985/parliament-will-not-honour-idiotic-and-unreasonable-court-orders-says-speaker-justin-muturi, accessed August 11, 2016.

79 See *Judicial Service Commission v Speaker of the National Assembly* Petition No. 518 of 2013 where the Speaker of the National Assembly chose not to appear in the proceedings which the JSC had instituted following interference with its workings by parliament.

80 Roselyn Obala, 'Senators welcome court verdict on Wambora', *The Standard* February 16th 2015 available at http://www.standardmedia.co.ke/article/2000151846/senators-welcome-court-verdict-on-martin-wambora, accessed August 11, 2016. On the contrary however, when the Chief Justice was summoned to parliament to answer questions on the termination of the then Chief Registrar, he refused to attend but instead the JSC sent a lawyer arguing that the Chief Justice had constitutional protection of the independence of the judiciary and was therefore, not answerable to parliament.

debate and adoption.[81] The Chief Justice has in the past prepared reports. These have detailed the judiciary's work, highlighted issues such as case load, access to justice, infrastructure in the judiciary as well as the financial situation in the judiciary.82 These reports have been discussed in both houses of parliament. In discussing the 2012-2013 report presented to it by the judiciary, the Senate Standing Committee on Legal Affairs and Human Rights noted among other points, that the Judicial Service Commission was not being accountable to parliament for the money parliament had approved for its operations.[83] One of its recommendations was that the JSC submit an annual report to the Senate.

Parliament's Power in the Appointment, Discipline and Removal of Judicial Officers

The National Assembly has oversight responsibilities over the conduct of individual members of the judiciary and other state organs as well. The Constitution requires the National Assembly to review the conduct in office of the president, the deputy president and other state officers and to initiate the process of removing them from office.[84] The Constitution in Article 260 defines the term ' state officer' as a person holding a state office, which includes the office of a judge or a magistrate. The Constitution therefore, seems to envision the National Assembly having a role in the removal of state officers such as judges. But the specific provisions (which take precedence over general ones) state only that the Speaker of the National Assembly chairs proceedings to investigate the conduct of the Chief Justice and make necessary recommendations.[85] There seems no other role envisaged in the Constitution for the National Assembly to play in removing judges. The National Assembly also has responsibilities in approving the appointment of the Chief Justice and the Deputy Chief Justice.[86]

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81 Judicial Service Act (No. 1 of 2011) s. 5 (2)(b).

82 For an example see, The Judiciary, *State of Judiciary 2011-2012* available at http://www.judiciary.go.ke/portal/assets/files/Reports/STATE%20OF%20THE%20JUDICIARY%20ADDRESS%202011_2012%20.pdf, accessed August 30th 2016.

83 Republic of Kenya (The Senate), 'The Committee Report on the Annual Report (2012/2013) of the Judiciary and State of Administration of Justice', (November, 2014).

84 Article 95 (5)(a).

85 Article 168 (5).

86 Article 166 (1)(a).

Parliament's Power to Subpoena Judicial Officials to Appear before Committees

Another important National Assembly Committee, established under its Standing Orders, is the Justice and Legal Affairs Committee. Its mandate covers constitutional affairs, the administration of law and justice, including the judiciary, public prosecutions, elections, ethics, integrity and anti-corruption and human rights.[87] This committee exercises some oversight responsibilities over the functioning of the judiciary in its non-judicial functions. One important power granted to both houses of parliament to facilitate the exercise of this oversight function is to summon any person to appear before it to give evidence or provide information.[88] Both houses can enforce the attendance of persons summoned, examine them under oath and even compel the production of documents.[89] The exercise of this power has at times brought the judiciary and the National Assembly to disagree on the boundary between judicial independence and parliament's power to summon. This was particularly the case when the Chief Justice refused to honour a summons by the Parliamentary Accounts Committee as noted above.[90]

The High Court has jurisdiction to hear and determine whether a person has been validly elected as a Member of Parliament or whether the seat of the member has become vacant.[91] This is an oversight responsibility that the judiciary has over parliament and the decision made by the courts on the validity of an election is binding on both houses.

The Judicial Service Commission's Accountability

The Judicial Service Commission, (JSC), is an independent commission with the primary mandate of promoting and facilitating the independence and accountability of the judiciary.[92] Under the Constitution the JSC is insulated from external influence from other government organs.[93] It is charged with the recruitment, discipline and removal of all judicial officers in Kenya, in other words, a power to compel

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87 Republic of Kenya, *The National Assembly Standing Orders* (Government Printers, 2013).

88 Article 125 (1) .

89 Article 125(2)..

90 See Republic of Kenya, *Public Accounts Committee Report on the Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014* (11th Parliament-Third Session 2015).

91 Article 105 (1).

92 Article 172.

93 Article 172 (1).

accountability of individual judicial officers. But under the Constitution, 'judicial officer' does not include judges of superior courts (the High Court and above).[94] And the only disciplinary power it is given by the Constitution over those superior court judges is in connection with their removal.[95]

The JSC chose to 'reprimand' three judges of the Supreme Court of Kenya, Justices Mohammed Ibrahim, Jackton Ojwang and Njoki Ndung'u, for threatening to withhold their services because they disagreed with how the JSC was handling a personnel decision involving two judges of the Supreme Court.[96] Justice Ngung'u went to court to challenge whether the JSC was empowered to make such decisions.[97]

The JSC, like all state actors, is accountable to the judiciary for the manner in which it conducts its affairs. This principle was announced in *Gladys Boss Shollei v Judicial Service Commission*[98] where the applicant sued for wrongful dismissal. The Court found that the JSC had, in arriving at its decision, acted in violation of the procedural guarantees in the Constitution.

This decision, that the JSC cannot act arbitrarily in violation of the Constitution was recently reaffirmed in *Trusted Society of Human Rights Alliance and 3 Others v. Judicial Service Commission and 3 others.*[99] The petitioners in this case argued that the JSC had, in shortlisting candidates for the position of Chief Justice, and other judges, violated the Constitution by declining to provide information on the justification for the exclusion of those not shortlisted, and had used unconstitutional criteria.[100]

In agreeing with the petitioners, the High Court begun by noting that although the JSC is an independent body not subject to any direction or control by any person or authority,[101] its conduct is subject to review by the courts for assessment of its conformity with the Constitution and the law. According to the court, whenever any

94 Article 260.

95 Article 168.

96 Abiud Achieng, 'JSC wants three Supreme Court judges censured for misconduct,' *Daily Nation*, May 10 2016, available at http://www.nation.co.ke/news/Three-Supreme-Court-judges-face-reprimand-for-misconduct/1056-3197216-1kvdujz/index.html.

97 Jilo Kadida, 'Judge challenges JSC's reprimand over strike,' May 17, 2016 available at http://www.the-star.co.ke/news/2016/05/17/judge-challenges-jscs-reprimand-over-strike_c1351206.

98 Petition 39 of 2013.

99 Petition 314 of 2016.

100 Ibid. para. 13.

101 Ibid. para. 243

state organ acted outside its mandate, judicial review of such conduct was justified.[102] The court directed the JSC to reconsider its shortlisting.

The Judiciary's Power of Judicial Review over Internal Workings of National Assembly

Parliamentary Standing Orders govern the conduct of proceedings in the National Assembly.[103] The Speaker of the National Assembly has in the past invoked these rules to suspend members from attending sittings. One notable case that brought the judiciary and the National Assembly into conflict was the suspension of the Member of Parliament for Ugunja Constituency, James Wandayi. Mr Wandayi sued the National Assembly in the High Court.[104] He alleged that the Speaker of the National Assembly, in violation of the Constitution, had unlawfully mentioned him for contempt and ordered him out of the National Assembly without according him the opportunity to explain himself.[105] According to Mr Wandayi, the Speaker's invocation of Standing Order No. 11 of the National Assembly Standing Orders was unconstitutional and inconsistent with his right to a fair hearing and administrative action.[106] The Speaker by contrast argued that the orders that the applicant sought delved into the merits of the decisions of the Speaker and that the court ought to decline to sit as an appellate court over his decision.

According to the Speaker, Mr Wandayi had been suspended from the sitting as a Member of Parliament following several warnings that had been issued and as such his suspension conformed to Parliamentary Standing Orders.[107] The Speaker further argued that his decision to strip Mr Wandayi of his seat that resulted in a loss of

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[102] Para. 245, citing Advisory Opinion No. 2 of 2011 (*Re The Matter of the Interim Independent Electoral Commission*). Similarly in *The Council of Governors and Others v. The Senate* Petition No. 413 of 2014 it was held that:

> this Court is vested with the power to interpret the Constitution and to safeguard and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of government and State organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court.

[103] Republic of Kenya, *The National Assembly Standing Orders* (Government Printers, 2013).

[104] See *James Opiyo Wandayi v Kenya National Assembly and 2 Others* J.R Application No. 258 of 2016.

[105] Ibid. para. 3.

[106] Ibid. para. 4.

[107] Para 6-10.

privilege and immunities was a power exclusively bestowed on him as the Speaker.[108] For the Speaker, if the court agreed to review his decision, this would be inconsistent with Article 124 of the Constitution granting parliament what he argued was an exclusive authority to establish its committees and make Standing Orders for the orderly conduct of its proceedings. Finally, the Speaker argued that reversing his orders would be in violation of the principle of separation of powers.[109] In support of these positions, the Speaker cited the Supreme Court Advisory Opinion in *Speaker of the Senate and another v. Attorney General and 4 others*[110] where it was held that courts cannot supervise the workings of parliament in part because of the institutional comity between the three arms of the government.[111]

The High Court disagreed with the Speaker on the basis that the suspension of the Member of Parliament affected the rights of the people of Ugunja Constituency who had elected Mr Wandayi to represent them as their Member of Parliament.[112] The National Assembly swiftly criticized and rejected this decision.[113] The Speaker argued that the matters raised in the case presented a question of the privilege of the house in terms of Article 117(2) of the Constitution.[114] He therefore directed the National Assembly Committee on Privileges and make necessary recommendations to members of the National Assembly on whether or not to expel Mr Wandayi.[115] In the meantime, the Speaker directed that his earlier decision on suspension of Hon. Wandayi would stand—a move that was protested by a section of members of the opposition Orange Democratic Movement. These members vowed to disrupt parliamentary proceedings if the Speaker did not lift the ban.[116] The Powers and

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108 Para 12.

109 Para 15.

110 Advisory Opinion Reference 2 of 2013.

111 In particular, the Supreme Court held that, 'where a failing is attributed to the internal procedures of Parliament during legislation; and our position is that while the Court has all the powers when such a course of conduct is set against the terms of the Constitution, it is necessary for the Court to have a sense of the prevailing *state of fact*; thus, the Court has a *discretion in appraising each instance*, and taking a decision as may be appropriate,' id at para. 150. The Speaker also cited *Republic v National Assembly Committee of Privileges and 2 Other* J.R Case No. 129 of 2015, which also concerned the exclusive control of the House over its proceedings.

112 *Wandayi v National Assembly* (above) para 53.

113 *National Assembly Official Report* 6th July 2016, p. 13 of unpublished online version.

114 Ibid. 15.

115 Ibid. 15.

116 Ibid. See also Nelcon Odhiambo, 'Opposition MPs vow to disrupt House proceedings over Wandayi suspension', *Daily Nation* July 15th 2016 available at http://www.nation.co.ke/news/politics/ODM-MPs-give-Muturi-ultimatum-to-lift-Wandayi-suspension/1064-3296934-vui22w/index.html, accessed August 12, 2016. In issuing these threats, one of the opposition MPs stated that the High Court was superior to the Powers and Privilege Committee of Parliament and that the Speaker ought to respect the High Court order.

Privileges Committee recommended the lifting of the ban against him thereby effectively giving effect to the decision of the court, but this time on the basis of a decision by a parliamentary committee.[117]

In short, there has been a struggle in defining the boundaries between the judiciary's power of review when parliament is involved, on the one hand, and the judiciary's accountability to parliament, on the other. According to parliament, as indicated in holdings by the Speaker of the National Assembly, the judiciary should not issue orders that affect the internal working of parliament and as such parliament would not accept decisions that intruded on its prerogatives. The judiciary has not hesitated to repeatedly rule that it has jurisdiction to determine when parliament had acted inconsistently with the Constitution. It is in this context of constitutional supremacy that that the judiciary's accountability to the National Assembly has played out and must therefore be understood.

Judicial Accountability to Constitutional Commissions such as the SRC and the CAJ

The Constitution also envisages certain oversight responsibilities over the judiciary finances by the Salaries and Remuneration Commission (SRC) with regard to salaries and allowances that are under the Constitution under the mandate of the SRC. The SRC has the constitutional responsibility of setting and regularly reviewing the remuneration and benefits of all state officers.[118] Salaries of judges and judicial officers are therefore, set by the Commission and judges have no control of their remuneration. The SRC has used its constitutional powers to cap the sitting allowances of JSC members. This has been opposed by the JSC which has challenged the SRC's decision to cap JSC allowances in court.[119] According to the Chief Registrar of the Judiciary, who sits as the Secretary to the JSC, the actions by the SRC exceed the SRC's mandate and are inconsistent with the independence of JSC.[120] The case has yet to be heard.

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117 See John Ngirachu, 'Wandayi returns to Parliament after ban lifted', *Daily Nation* July 26, 2016 available at http://www.nation.co.ke/news/politics/Wandayi-returns-to-Parliament-after-ban-lifted/1064-3316648-4r8vuk/index.html, accessed August 12, 2016.

118 Constitution of Kenya (2010) Article 230 (4).

119 Paul Wafula, 'Salaries agency defends caps on sitting allowances for JSC members', *The Standard* July 27th 2016. Available at http://www.standardmedia.co.ke/article/2000209918/salaries-agency-defends-caps-on-sitting-allowances-for-jsc-members, accessed August 26, 2016.

120 Paul Ogemba, 'JSC fights off bid to cap sitting allowances', *The Standard* September 22, 2016.

The judiciary may also be required to account to other constitutional offices. One such office is the Commission on Administrative Justice (CAJ). The Commission is established under Article 59 (4) of the Constitution, which is given effect by the Commission on Administrative Justice Act.[121] The Commission is responsible for investigating any conduct in state affairs, or any act or omission in public administration by any state organ, state or public officer in national and county governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice.[122] On occasion, the Commission on Administrative Justice has addressed administrative shortcomings in the judiciary.[123] Administrative actions, not judicial decisions, of judges and judicial officers may be reviewed by the CAJ. The authority of CAJ is however, limited because it is not allowed to investigate a matter pending before any court or judicial tribunal. In addition, the CAJ cannot commence the conduct of criminal or civil proceedings before a court or other body carrying out judicial functions.[124] This is an accountability mechanism that ensures that judges and judicial officers uphold administrative justice when dispensing their responsibilities. A final example is the Controller of Budget.[125] The judiciary can only withdraw funds from the Judiciary Fund if the Controller of Budget is satisfied such withdrawal is permitted by the law.[126] This safeguard ensures checks and balances in judicial spending. Oversight over the judiciary's finances falls under the mandate of the Controller of Budget before the funds are withdrawn, and after the money has been withdrawn and spent by the Auditor General.

Conclusion

A delicate balance has to be struck in the relationship between the judiciary and other government organs. The Constitution simultaneously guarantees the independence of the judiciary particularly in the performance of judicial functions, and requires the judiciary to account particularly for the funding parliament has approved for it. In addition, both parliament and the judiciary must act in accordance with the

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121 Act No. 23 of 2011.

122 Commission on Administrative Action Act Section 8.

123 See for example Commission on Administrative Justice, *Annual Report* Pages, 18, 31, 41 and 43 (2014) (highlighting the commission's work in relation to complaints that arose within the judiciary).

124 Commission on Administrative Justice Act No. 23 of 2011 s. 30 (c).

125 Constitution of Kenya (2010) Article 228(1) (establishing the position of Controller of Budget).

126 Article 228(5) (providing that no money can be withdrawn from a public fund unless the Controller of Budget is satisfied such withdrawal is in accordance with the law).

Constitution, an imperative of the supremacy of the Constitution.127 In exercising its authority to hold the judiciary accountable for its funding, parliament has declared that it is exercising parliamentary sovereignty. The judiciary has by contrast held that parliamentary sovereignty must be understood in the context of the supremacy of the Constitution. It is in this context of competing claims of supremacy—constitutional and legislative—that the judiciary's accountability to the National Assembly has played out and must therefore be understood. In fact as demonstrated in this chapter, parliament, and the National Assembly in particular, has used the occasion of exercising its oversight functions over the judiciary's finances to signal its displeasure with court orders reviewing its conduct and internal workings. This chapter has also examined the much less controversial accountability mechanisms of the judiciary and the Judicial Service Commission. These mechanisms include the Salaries and Review Commission, the Council on Administrative Justice as well as the Controller of Budget who all have constitutional authority to have oversight responsibilities over all government actors including the judiciary.

127 Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64 *Modern Law Review* 3.

CHAPTER SEVEN

OTHER MECHANISMS OF ACCOUNTABILITY

Jill Cottrell Ghai

This final chapter looks at other agencies and sectors that may have an impact on the accountability of the judiciary as an institution or on its individual members.

The Courts: Especially Judicial Immunity

Judicial Immunity

An earlier chapter has discussed the role of the appellate system.[1] That of course has a main role other than accountability: reaching the right decision for the parties.

Here the concern is rather different. While the ordinary professional, or even public servant, is potentially subject to civil, or even criminal liability for failure of competence or honesty in the course of their work, judges are in a privileged position. At common law, judges could not be sued for anything which they say (or perhaps do) in court, even if they were malicious. Lord Denning put it:

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an

[1] Kameri-Mbote and Muriungi.

> absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court of appeal or to apply for habeas corpus, or a writ of error or certiorari, or to take such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the court of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear.[2]

The following reasons explained this immunity for Lord Coke the famous jurist and Chief Justice of the Common Please in the sixteenth/seventeenth centuries: '(1) It insures the finality of judgments; (2) it protects judicial independence; (3) it avoids continual attacks upon judges who may be sincere in their conduct; and (4) it protects the system of justice from falling into disrepute.'[3]

Until relatively recently, in England this privilege extended to magistrates only if they were acting within their jurisdiction. But in *Sirros v Moore* in 1975 Lord Denning, again, said,

> As a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear.

In Kenya now the Constitution refers to members of the judiciary not 'judges' or 'magistrates.' The position used to be based on statute: the Judicature Act still provides:

> 6. No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial

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2 *Sirros v Moore* [1975] 1 Q.B. 118, 781. Older leading cases include *Royal Aquarium and Summer and Winter Garden Society Limited v Parkinson* [1892] 1 QB 431.

3 In the case of *Floyd v Barker* (1572-1616) 12 Co Rep 23; 77 *English Reports* 1305 (1 January 1572) available at http://www.commonlii.org/uk/cases/EngR/1572/142.pdf . The summary of the reasons is that of Jeffrey M Shaman, 'Judicial Immunity from Civil and Criminal Liability' (1990) 27 *San Diego Law Review* 1, 3.

> duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of.

But now the issue is based on the Constitution, which says

> 160. (5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

Interestingly, the CKRC draft said,

> No judicial officer shall be liable in an action or suit in respect of anything done in the performance of a judicial function.

The words 'in good faith in the lawful' were inserted at the National Constitutional Conference (Bomas). The decision seems to have been a deliberate one. At Bomas, the Chair of the Technical Committee on the Judiciary, Kivutha Kibwana (now Governor of Makueni), said,

> We also discussed the question of, no judicial officer shall be liable in any action or suit in respect of anything done in good faith in the lawful performance of a judicial function. So we want to restrict the liability but to be sure that its liability [sic] only when they do their duties in good faith and lawfully.[4]

One of the leading earlier cases was *GBM Kariuki v Fred Kwasi Apaloo.*[5] The plaintiff, a judge, sued the Chief Justice. The latter, in connection with a highly political case,[6] had written a letter to the petitioner in that case to explain his own ruling. In it he said 'I suggest you obtain competent legal advice preferably from a lawyer of standing who would have no motive to misrepresent the true legal position to you'. Mr Kariuki was that earlier petitioner's lawyer and objected to what he viewed as an aspersion upon his competence. The Court of Appeal said,

> The respondent, a judge, holding administrative office of Chief Justice while executing his judicial duties in Court or in execution of his administrative duties within the jurisdiction, enjoys absolute privilege from being sued civilly for his expressions either in writing or verbally. This is so under the common law and under the provisions of section 6 of the Judicature Act cap 8.

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4 'Plenary Proceedings Held in the Plenary Hall, Bomas of Kenya, on 26th September, 2003' available on the Katiba Institute Website (Archives).

5 [1994] eKLR http://kenyalaw.org/caselaw/cases/view/29687/.

6 Kenneth Matiba's election petition against President Moi.

The different phraseology in the Constitution does not yet seem to have been addressed in court. Various cases have treated the Judicature Act and the Constitution as identical—and as giving complete immunity. In 2015 a Kenyan court said,

> It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, 'there never will be an end of causes: but controversies will be infinite.'[7]

These cases raise a number of issues:

Does the common law still apply in Kenya in this context?

In *Kariuki v Apaloo* the Court of Appeal said that the common law 'is applicable in this country by virtue of section 3(1) (c) of the Judicature Act'. But that sub-sub-section says the common law applies 'subject thereto and so far as those written laws do not extend or apply', referring back to written laws and the Constitution. If the Constitution or statute whittles down the common law protection or expands it, surely the common law no longer applies?

What is a 'judicial function'?

In *Kariuki*, Justice Akiwumi said that the plaintiff conceded that the Chief Justice was acting in a judicial capacity when he pleaded that, 'At the time of writing and publishing the words complained of, the defendant was the Chief Justice in charge of the administration of justice in Kenya'. But, with respect, while this conceded that he was not acting in a personal capacity, was it a *judicial* capacity?

The common law immunity applied to 'judicial proceedings' which is limited to judging. On the face of it, 'judicial function' would seem to mean 'the function of judging' or 'a function of a judge'. The work of a judge may involve administration, work that might, for example, be subject to scrutiny by the ombudsman, as other authors in this book have observed, whereas the judicial decisions of a judge are not.

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[7] *Maina Gitonga v Catherine Nyawira Maina and another* [2015] eKLR (http://kenyalaw.org/caselaw/cases/view/115499/), citing Joseph Ramagnoli, 'What Constitutes a Judicial Act for Purposes of Judicial Immunity?' (1985) 53 *Fordham Law Review* 1503 (1985).

One judge put it,

> Judicial function integrally involves adjudication of cases, which, by the oath of office, should be done without fear or favor.[8]

But this was *obiter* because the function in question was clearly judicial.

The article cited in *Maina Gitonga* discusses US authority on the meaning of judicial function. The leading authority at the time was *Stump v. Sparkman*,[9] where, the author said, the Supreme Court had 'held that a judge will remain absolutely immune from a damage suit if he acted within his jurisdiction, or even in "excess of his jurisdiction," but not in the "clear absence of all jurisdiction" and the act he performed was a "judicial act."'[10] The author proposes that the first element in the Supreme Court's statement must mean 'a function normally performed by judges only and not by administrators or executives or legislators'. And the second element should be taken to mean acts of a judicial nature. He went on,

> In short, the doctrine of judicial immunity is meant to protect only judicial acts, which, by definition, are acts requiring judicial discretion. When a judge does not exercise judicial discretion, the policies supporting absolute immunity disappear. A ministerial act requires no discretion, and while administrative, legislative, or executive acts require varying degrees of discretion, it is not judicial discretion merely because the actor is a judge.[11]

It is submitted that this makes sense.

In *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya*,[12] a citizen challenged the transfer of judges to newly created courts. One of the arguments raised against this was judicial immunity. But Justice Odunga declined to strike out the case, thus indicating that he did not accept that argument as self-evidently correct. As mentioned in another chapter, transfer of judges should be only for certain purposes.[13] It would be regrettable if what is plainly an administrative decision could not be challenged.

One interesting issue is that, while the common law rule would cover other adjudicators performing judicial roles, if they are not part of the 'judiciary' they are

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8 *Moses Wamalwa Mukamari v John O. Makali* [2012]eKLR (http://kenyalaw.org/caselaw/cases/view/84579) para. 6.

9 435 U.S. 349 (1978).

10 At p. 1504.

11 At p. 1513.

12 2016 eKLR http://kenyalaw.org/caselaw/cases/view/122449/.

13 Kameri-Mbote and Muriungi.

not protected by the Constitution. It is suggested that the common law could be invoked here. But the common law should be adapted to comply with the Constitution or the odd result would be that a tribunal members would have more protection than a High Court judge.

What is an action or suit?

In *Sirros v Moore* Lord Denning makes it clear that there is no complete exemption from criminal liability. But Lord Denning's remarks embrace only certain types of criminal conduct, and acts that are clearly outside the scope of the judge's authority.

The Judicature Act provides for immunity only from civil action. The Constitution refers to action or suit. It is suggested that action or suit refers only to civil cases. Canadian usage would seem to be standard: 'A civil case is a private case where someone sues someone else. This is also known as a suit or action.'[14] The use of the phrase 'action or suit' seems to exclude criminal prosecution from immunity. This seems to raise the risk of judges being prosecuted for what they say on the bench, especially as Kenya has not abolished criminal defamation. This might be a most unfortunate interpretation.

Suppose a judge's remarks in a case can be interpreted as sedition or criminal defamation? If the acts are a way of performing his or her duty, albeit a bad way, it seems he or she would not be liable under the common law, but the Constitution does not exclude liability. Even if 'action or suit' is interpreted as including criminal prosecution, criminal acts usually involve a criminal intention, and if this is proved, the Kenyan Constitution would seem to rule out immunity because there would be no good faith.

For what is the judge liable?

The common law position related most obviously to words said, and is usually invoked in defamation cases. But it does apply to court orders that result in things being done, as in the US case of a judge who ordered a lawyer be 'roughed up a little' because he had failed to appear in court, the judge was immune from prosecution.[15]

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14 http://www.justice.gc.ca/eng/csj-sjc/just/08.html.

15 *Mireles v. Waco* (1991) 502 US 9.

What is 'good faith' in this context?

The Constitution says immunity does not apply to 'anything done or omitted to be done in good faith'. On the face of it this would seem to mean that what it done must be done genuinely, with a belief that it is the right thing to do. This seems to turn what, in the context of defamation, is known as 'absolute privilege' into qualified privilege. In this context it is called malice, which means improper motive—not using the occasion for the purpose for which privilege is given. In an old case in Zanzibar, a contractor reported the PWD superintendent for taking bribes because he wanted him sacked because he was keeping down the rates paid.[16] That was malice. A judge commenting critically on a litigant not in any spirit of fair criticism but for personal spite, or one sentencing a person for a length of time for political motives, would not be acting for the right reason. One could also say they were not acting in good faith. The proof of bad faith would be upon the persons suing.

What does 'lawful performance' mean?

The common law position was (until *Sirros v Moore*) that lower court judges had privilege only for what they said in the exercise of their jurisdiction. This is a possible interpretation of the phrase in this context.

> The judge in the *Makamari* case saw no problem:
>
> [16] The words used in Article 160(5) to wit; *in the lawful performance of a judicial function* are very specific, and refer to the undisputed fact that a judicial officer having been duly appointed, is bestowed on him judicial authority, and when he exercises it, it must be taken as a matter of law, is the lawful performance of a judicial function in the sense of the Constitution.[17]

But if the judge or magistrate is acting without jurisdiction, hearing a case that he or she had no power to hear, or imposing a sentence the was no power to impose, can that be 'lawful performance'? Suppose, however, the judge/magistrate believed that he or she was acting within jurisdiction? The language of the Constitution is 'anything done or omitted to be done in good faith in the lawful performance …'. It is unclear whether 'good faith' refers to anything done or to the judicial belief about jurisdiction. But it would be most unfortunate if the judge or magistrate was liable to be sued for a mistake about jurisdiction. It is, after all, clear that he or she could not

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16 *Tharia v Morrison* (1910) 1 ZLR 315.

17 *Mukamari*, above.

be sued for making a similar mistake about the substantive law, criminal, civil or constitutional. It is suggested that 'good faith' should be read as applying to both the belief as to jurisdiction and as to the act done.

The Policy Issue

There has not been absolute unanimity that judges ought to have such sweeping immunity for their words. At least Chief Justice Cockburn (dissenting and anyway on a case not involving the judiciary) said in 1869,[18]

> For my own part I should prefer to treat the immunity of judges as a matter … as settled by decision and authority, rather than as resting on sound or satisfactory principles, on which, were the matter *res integra* [i.e. undecided], it would be desirable to act. I cannot believe that judges or juries would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences, or witnesses give evidence less truthfully, from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of. While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged.

Shaman has argued strongly that complete immunity is not justified. He concludes,

> A grant of immunity for intentional and malicious civil wrongs has not been found necessary in the executive branch of government. Judicial independence should be scrupulously guarded and some degree of immunity from civil liability must be maintained for judges. But absolute judicial immunity from civil liability remains a debatable practice.[19]

Kenya no longer has such absolute immunity.

Reviewing Recusal

The behaviour of judges may be scrutinised in other ways than their being the object of litigation. Most obviously this is so on appeal. The issue of recusal is an interesting example. The most fascinating Kenyan example is the recent Supreme Court case

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[18] *Dawkins v. Paulet* (1869-70) LR 5 Q.B. 94.

[19] Above, p. 28.

about the retirement age, discussed by Kameri-Mbote and Muriungi. But there have been other cases.

Judges are usually solely responsible for deciding whether they should recuse themselves. The decision should be made responsibly—whichever way the judge goes. To insist in sitting despite knowing one has a bias is wrong. Not to sit because one wants to avoid a difficult or sensitive or even embarrassing case is equally wrong—a dereliction of duty.

Many judiciaries have produced their own guidelines for judges.[20]

An appeal against a decision of a judge to recuse or not to recuse is rare. It happened in England in 2014. A High Court judge recused himself on application by a party, not because the allegations of bias carried conviction but because the allegations were so serious. The Court of Appeal held he was wrong. Not every objection by a party should be taken an accusation of actual bias. And a judge should be very reluctant to recuse him or herself in a long complex case on the basis of ruling made at an earlier stage in the case by the same judge. 'If the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should.'[21]

More often cases concern whether the judges themselves should recuse themselves. This was the case in *Rai v Rai*.[22] Justice Tunoi had, while a Court of Appeal judge, recused himself in a case; so he did not sit. He gave no reason. Counsel argued that whatever the reason was it should lead him to recuse himself again in the Supreme Court in the same case. The judges focussed on the particular situation of the court itself (at some risk of not having a quorum), and said there was no reason for Justice Tunoi to recuse himself.

One important question is: should a judge recuse him or herself without giving reasons. A judge of the Indian Supreme Court said judges ought to give reasons: *Supreme Court Advocates-on-Record Association and Anr. v/s Union of India.*[23] However, the issue was not before the court, and there was no discussion of the matter. But should not a judge generally give reasons? And if there is some justification for not doing so, should not the judge explain to his or her superior in the hierarchy?

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20 E.g. the New Zealand Court of Appeal https://www.courtsofnz.govt.nz/old/business/guidelines/conflicts-of-interest/COA-Recusal-Guidelines.pdf.

21 *Otkritie International Investment Management Ltd and Ors v Urumov* [2014] EWCA Civ 1315 para. 32 (Longmore LJ). Contrast *Mulugeta Guadie Mengiste and Other v Endowment Fund for the Rehabilitation of Tigray and Others* [2013] EWCA Civ 1003: judge ought to have recused himself.

22 *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others* [2013] eKLR.

23 Writ Petition (Civil) No. 13 of 2015.

The Profession

Both as individual practitioners and as an institution the legal profession has some role to play in judicial accountability.

We can begin with the most confrontational: the possibility of a lawyer being directly critical of a judge in court. I am not speaking of the famous retort 'Your lordship is quite right, and I am quite wrong—as your lordship usually is.'[24] Though witty, it does not pinpoint anything the judge has done wrong. A lawyer's duty to his or her client will sometimes require an objection to a ruling of the court, on the admission of evidence for example.

The individual lawyer will also be responsible for advising the client on whether to appeal—itself a form of accountability as discussed in the chapter by Kameri-Mbote and Muriungi.

Individual lawyers are members of the JSC. Through its members of the JSC it is in theory able to contribute to the processes of that body including in disciplined, though it is not clear how far those JSC members consider themselves as representing the LSK.

In matters of appointment, lawyers, like any other member of the public, but with some with special knowledge, have the opportunity to contribute to the process. Individual lawyers played some part in the vetting process.

Individuals may, lawyers or not, petition the JSC to inquire into the behaviour of judges with a view to their removal. In 2015 the CEO of the LSK, Apollo Mboya, did just that. The issue was the alleged 'go slow' by the judges over the retirement age question.[25] He later protested to the JSC about their having 'reprimanded' the Supreme Court judges rather than recommend a tribunal to consider their dismissal.[26] He also said he would petition the National Assembly for the removal of the JSC from office.

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[24] Various attributed to FE Smith and Lord Bethell (http://nuk-tnl-deck-prod-static.s3-eu-west-1.amazonaws.com/projects/c59b469d724f7919b7d35514184fdc0f.html).

[25] William Mwangi, 'Apollo Mboya petitions JSC for removal of three Supreme judges' *The Star* Oct. 09, 2015 http://www.the-star.co.ke/news/2015/10/09/apollo-mboya-petitions-jsc-for-removal-of-three-supreme-judges_c1220991.

[26] http://www.standardmedia.co.ke/article/2000201858/former-lsk-ceo-apollo-mboya-wants-jsc-dissolved-over-petition.

It is not clear how active the LSK has been in reporting errant judges. However, it has certainly expressed views as in the case of Justice Mutava, making clear its view that the judge should be investigated—as he eventually was.[27]

There have been other occasions of LSK action against the judiciary. An example is the yellow ribbon campaign of 2002. The following newspaper items trace it:[28]

> Sept. 27 (2002) — ' The High Court yesterday confronted a tidal wave of protest by issuing an order stopping public debate on the judicial reforms proposed in the Constitutional review report.' Law Society of Kenya chair Raychelle Omamo vows LSK opposition to the order.
>
> Sept 28 — The 280-page draft constitution is released by Professor Ghai who, along with opposition members of Parliament, claims the right to publish it under Parliamentary orders that supersede court orders not to. The Federation of Kenya Women Lawyers Chair Martha Koome threatens demonstrations if the judiciary persists in efforts to block the review process.
>
> Sept. 29 —…215 LSK announces plans to support the review process: with press statements and disobedience of court orders against discussing the judiciary section of the draft constitution; filing a motion of censure against the two advocates who filed the suit to block the review; staging a yellow ribbon campaign in support of the review; boycotting of the courts; lobbying MPs to censure the judiciary; organizing mass action marches led by NGOs, with the LSK providing legal support; networking with regional African court and legislative bodies such as the East African Community, East African Legislative Assembly, East African Court of Justice, and the African Union.
>
> Oct. 3 — Members of Parliament attack efforts by Moi's courts to silence debate over the draft constitution. More than 1,000 lawyers sign a protest note to Chief Justice Bernard Chunga over the courts' attempted interference in the review process.
>
> Oct. 10 — 'Most of Kenya's 3,000 lawyers held prayers, demonstrated in the streets (Oct. 9) and shunned the courts for one day to protest attempts by the Judiciary to block the work of the Constitution review team.'

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27 'Mutunga moves judge in the eye of Pattni storm' *Business Daily* Nov. 26 2012 http://www.businessdailyafrica.com/Mutunga-moves-judge-in-the-eye-of-Pattni-storm-/539546-1629908-g1190/index.html.

28 Edited from Robert Maxwell Press, *Establishing a Culture of Resistance: The Struggle for Human Rights and Democracy in Authoritarian Kenya* 1987-2002 (PhD dissertation University of Florida 2004) http://etd.fcla.edu/UF/UFE0003820/press_r.pdf. Published as a book *Peaceful Resistance: Advancing Human Rights and Democratic Freedoms* (Ashgate Publishing, Ltd., 2006).

Of course, this whole confrontation was heavily political, not concerned only with the appropriate behaviour of judges.

The LSK has a public interest litigation programme and sometimes appears in court as a party or *amicus curiae* or interested party. It was involved for example in the *Trusted Society of Human Rights Alliance v Judicial Service Commission*, on the issue of shortlisting procedure for Supreme Court judges, as in interested party.

But in *Trusted Society of Human Rights Alliance v Mumo Matemo and 5 others* the LSK was denied the possibility of being interested party in the case about the chair of the anti-corruption commission on the ground that it was supporting the respondent, but 'the Society holds a special responsibility for championing the wider public interest, rather than individual interests clothed as public interest. The Society cannot use its mandate for such a cause, as that would be ultra vires its statutory mandate'.[29]

Academic Comment

One of the roles of a legal academic is usually reckoned to be commenting on the decisions of courts. Indeed, young academics used to be advised to write a comments as their first publication. And at least in some jurisdictions, and in relation to some academics, courts have taken such comments seriously. There is evidence that A L Goodhart did have some impact. Goodhart, for many years editor of the *Law Quarterly Review*, wrote several case notes in each issue. In 1947 Denning wrote 'The essays of Professor Goodhart have had a decisive influence in many important decisions'.[30]

But in Kenya we have no *Law Quarterly Review*. And there are very few case notes even in the somewhat sporadic journals we do have. Academic scholarship is at something of a low ebb, though there has been some recent improvement. It is true that the *Nairobi Law Monthly*, and *The Platform* do occasionally publish critiques of particular cases. And of course the presidential election petition has generated a certain amount of literature. But we have some way to go before Kenyan legal literature is going to have much of an impact on the judiciary.

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[29] 2014eKLR para. 28 http://kenyalaw.org/caselaw/cases/view/94848/.

[30] Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing, 2001) 88 (I was unable to verify the original because I was reading a Google Book version of Duxbury.

The Media

There are hurdles in the way of media commentary. First is the law of defamation. There is certainly irony that judges who cannot be sued can themselves sue. Ironically, at about the time Justice Vishram (against whom there lingers criticism of his award of KShs30 million damages for defamation to Biwott) lost his latest chance to become Chief Justice, he was awarded KShs26 million against the *Standard* for its publication of an LSK statement that he was unfit to be Chief Justice—the case dating back to the time of his previous attempt to become CJ in 2011. The *Star* commented,[31]

> Even if the Standard erred, was the story so bad that it justified an award of Sh26 million damages? The previous benchmark award was Sh6 million awarded to Chief Justice Evan Gicheru in 2006.
>
> In June the High Court awarded Justice Samuel Mukunya Sh20 million in a libel suit against the Nation.
>
> The Star is also facing multiple libel suits from judges over various stories.
>
> Judges are public figures who should accept that criticism, unfair or not, is part of their job. Moreover will it be a level playing field if a judge brings a libel suit to court?
>
> These huge libel awards given to judges by judges have the potential to bankrupt media houses. They need to be reviewed.

Our libel law is draconian. So far Kenya has not seen any modification of the law on the basis of freedom of speech, not even to the extent of the modest broadening of qualified privilege for media reports of prominent persons in England in *Reynolds v. Times Newspapers Ltd and Others*.[32] Still less have we followed the US cases[33] that makes it very hard for those in the public eye to sue successfully for defamation (though they may make a real nuisance of themselves trying). There they have to prove actual malice— but at least one judge has succeeded.[34]

In Kenya the defendants in a defamation case must prove that what they said was true (if they are arguing it was true); it is not for the person suing to show the statement was untrue.

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31 'Massive libel awards need to be reviewed' http://www.the-star.co.ke/news/2016/09/02/massive-libel-awards-need-to-be-reviewed_c1413351.

32 [1999] UKHL 45, [2000] EMLR 1, [2000] HRLR 134, [2001] 2 AC 127.

33 E.g. *New York Times Co. v. Sullivan* (1964) 376 U.S. 254.

34 *Murphy v. Boston Herald, Inc*., 865 N.E.2d 746 (2007).

And the damages are obscene in a country in which personal injury damage are so parsimonious. For example, a person who suffered a fractured jaw, and fractures to both hands gets KShs4 million for pain and suffering.[35]

In the past, the courts penalised comment by means of contempt and scandalising the court. One of the most famous cases in Kenya involved Wangari Mathai and Salim Lone,[36] and another, more overtly political, involved has been described recently by one of those convicted:

> The former weak-kneed Attorney General Amos Wako filed in the Court of Appeal contempt proceedings against me and my client Kenneth Matiba and journalists David Makali and Bedan Mbugua for allegedly scandalizing the court. The Court of Appeal was then a court of final resort. The Court of Appeal eventually fined me and Hon. Matiba Shs.500,000/= each and Shs.300,000/= and Shs.400,000/= against Makali and Mbugua respectively.[37]

In one of the more recent examples,[38] the court quoted the now quaint words of Justice Wilmot, J.:[39]

> The arraignment of the justice of the Judges, is the arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals; but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

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35 *Duncan Kimathi Karagania v Ngugi David and 3 others* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/123105/.

36 The first had said in an interview after her divorce 'there can only be two reasons for the court to have said that I committed adultery: corruption or incompetence'. *Republic v Wangari Mathai and 2 others* [1981] eKLR http://kenyalaw.org/caselaw/cases/view/8052/.

37 GBM Kariuki (the same as in the Kariuki case above) explaining why he had been asked to recuse himself and why he would not in *RPM v PKM* [2011] eKLR http://kenyalaw.org/caselaw/cases/view/77448. An interesting question: under the new Constitution would Justice Kariuki be deprived of judicial immunity if Mr Wako could prove that Kariuki was not 'in good faith' in his remarks, but was motivated by old political battles?

38 *Republic v Tony Gachoka and Another* [1999] eKLR http://kenyalaw.org/caselaw/cases/view/74916/

39 *Rex v. Almon Wilmot's Notes* 243 (1765) 97 *English Reports* 94.

That was 1999.

Though the concept of scandalising the court survives in Kenyan statute,[40] it is a relief to see Judge Byram Ongaya say,

> This court is alert that the court's scandalising jurisdiction as founded in the common law offence of contempt of court may be largely outdated in this new republic under the Constitution of Kenya, 2010 under which the only type of sovereignty which informs our legal system and our laws is the democratic sovereignty of the people. The court is further alert that the Constitution enshrines the freedom of conscience, the freedom of expression, the freedom of the media, the right of access to information, political rights, and the freedom of association which must all be recognised, protected and upheld by the judiciary and not defeated by the manner in which the courts exercise the scandalising jurisdiction.[41]

'Justice is not a cloistered virtue', observed Lord Atkin famously, 'she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men'.[42] Various Kenyan courts have quoted, or more usually obscurely referred to it.[43] The boundary between respectful and outspoken is not perhaps always observed by the Kenyan media.

The press are not well informed on the whole about the workings of the legal system. Former CJ Cockar complained that the *Daily Nation* had attacked a paper at a judicial colloquium by a judge. And in two occasions he said he had sued a paper for defamation, because it had attached the Rent Tribunal for not doing what it had no legal power to do.[44] He complained that

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40 E.g. the Court of Appeal (Organization and Administration) Act, 2015 'scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court' (s. 35(4)(a))- see *Hussein Roba Boru v County Government of Isiolo and 2 others* [2015] eKLR Petition 11 of 2015 *: 'In R-Versus-Gray (1900) QB 36 at 40, Lord Russell defined the scandalising offence as any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority.'
* http://kenyalaw.org/caselaw/cases/view/116730/.

41 *Hussein Roba Boru.*

42 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335.

43 It as accurately quoted in RPM v PKM [2011] eKLR, and in the Wangari Mathai case where it was promptly ignored. The judge said 'the court must scrupulously balance the need to maintain its authority with the right to freedom of speech' but would the words of an angry woman soon after her divorce really have undermined the authority of the court?

44 P. 252.

> despite the damages that this paper had to pay on the earlier occasion, neither its editorial staff nor its reporter had taken any trouble to familiarize themselves with what the law was in relation to the Tribunal's decision or order.[45]

Newspapers do include a certain amount on the courts. As I write this, the day's *Daily Nation* contains reports of cases of an MP and others being fined for conspiracy and fraud, an MP charged with inciting ethnic hatred, denial of bail to a terrorism suspect, brief mention of a pending case on plagiarism. This being judicial recruitment season, there was a platitudinous article by a clergyman on the necessary qualities of judges. There is a tendency to focus on the court involvement of the already well-known or somehow 'big people'—like MPs. It is unlikely that there will be any serious interrogation of why an MP should be only fined for grave offences. Perhaps the most interesting item in the issue was in the form of an advertisement: 'East African Court of Justice decides case challenging the enactment of Uganda's Anti-Homosexuality Act 2014.'[46] The fact that it is a paid advertisement suggests that there was no confidence that a good report—or any report—would otherwise appear in the press. It also demonstrates the weakness of the paid medium: to get one's money's worth one feels obliged to cram in so many words that the reader needs a magnifying glass. Little effort is made to make it comprehensible—I remain unsure what the court decided.

The *Gachoka* case also illustrates other problems. The statement complained of included statements like 'Unfortunately for the country Chesoni has directed his considerable skills to subverting the judicial process rather than growing and enhancing it, particularly in the famous Goldenberg affair.' This might be fair comment based on facts. But statements of fact included 'It is immediately prior to his visit to New York that Chesoni received a bribe of KShs. 30 million from Kamlesh Pattni from a Nairobi Bank.' The media need to be better equipped with facts it is able to defend.

The so called *sub judice* rule is also something rarely relied on these days (it was an issue in the *Gachoka* case). The idea is that it is contempt to try to influence courts in their decision while the decision is under judgment. The courts have not forgotten it. In *Kenya Youth Parliament and 2 others v Attorney General and 2 others*,[47] the court observed that an article had been written in the media designed to influence the decision in the case and said 'To publish articles anticipatory of a

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45 P. 270.

46 In the name of Human Rights Awareness and Promotion Forum and Civil Rights Coalition on Human Rights and Constitutional Law.

47 [2012] eKLR http://kenyalaw.org/caselaw/cases/view/79843.

judgment and/or attempting/seeking to influence the court to decide a case in a particular way is to cross the boundary and wade into the realm of contempt.' However, they took the case no further. Wisely no doubt, as courts have a hard time convincing people that there is any serious risk of their being influenced in their judgment. The rule is perhaps still appropriate in a country with jury trial—and great efforts are taken to prevent juries being influenced by what is in the media—but trial by professional judges is very different.

Even where trial is by professional judge, caution over comment on guilt or innocence in criminal cases is wise. While the judges may be unmoved—should be unmoved—much adverse advance comment in the media may give an impression that a trial was not fair. It is this sort of issue that Justice Mutava had in mind when he said, 'The Kenyan jurisdiction is replete with skewed media reporting of court proceedings, which at times defies the sub-judice rule' in *Republic v. Attorney General and 3 others ex-parte Kamlesh Mansukhlal Damji Pattni* in 2013.[48]

The media are not necessarily ill-informed. Justice Mutava is facing dismissal for having favoured the very Kamlesh Patni in whose case he made that last comment. And the defamation cases faced by the *Star* at one point included one by the entire Supreme Court for a suggestion that one judge was corrupt—something that seems less improbable after the Tunoi affair though that ended without any conclusion.[49] What the media seem less good at is unearthing evidence enough to sustain a plea of justification (truth) in court when sued.

And they need better qualified people to explain and comment on the law, especially among its regular staff as opposed to columnists. Unfortunately, at present there also seem to be more concern about personalities than about the working of the law, somewhat similarly to the nature of reporting on politics which is more about who is in bed with whom than who has what policies.

The Public: Organised and Unorganised

Kenyans, including even the courts, are fond of saying that under the Constitution sovereignty is with the people. But in terms of judicial accountability, what does that mean? It has to be said that Kenyan followed the interviews for Chief Justice with remarkable attention and may know more about judges than people in most countries,

[48] http://kenyalaw.org/caselaw/cases/view/87687/.

[49] 'Supreme Court judges sue paper over story' *Daily Nation* July 13 2015 http://www.nation.co.ke/news/Supreme-Court-judges-sue-paper-over-story/1056-2788008-6rrmyo/index.html.

at this point in time. The twittering classes may express views, usually strongly divergent but based on prejudice. It is probably wise for the judiciary to ignore them, at least ostensibly, unless, of course, they speak truth, in which case this might be a less wise course, though suing is still unwise. Suing, as Justice Njoki Ndung'u threatened to sue Jacob Juma, simply brings the tweets to the attention of the non-tweeters.[50]

Most of the action is taken by organised civil society. This tends to mean, when it comes to issues concerning the judiciary, NGOs, often foreign funded. The International Centre for Policy and Conflict petitioned the JSC to have Justice Mutava removed from office. Various NGOs have funding for public interest litigation—though not necessarily for particular cases, which are unpredictable. In the case about shortlisting for the post of Chief Justice and other in the Supreme Court, no fewer than four NGOs were involved, plus two concerned citizens associated with those NGOs.[51] The Law Society joined as an interested party. This was clearly a case of holding the JSC accountable.[52]

The Constitution, with its provisions about broad standing and *amici curiae* has made the involvement of organised civil society much easier. They may bring a case on behalf of a person who cannot do so for himself or even in the public interest.[53] And the courts may permit a person or body with no particular axe to grind to appear as *amicus curiae* or friend of the court.[54] The readiness of the courts not to make orders of costs in public interest cases has made it possible for NGOs to appear as interested parties without greatly fearing the burden of massive costs if they lose, though the possibility is never forgotten.

Few cases begin as judicial accountability cases. It is only on appeal that it is an issue. NGOs face funding difficulties, and perhaps a reluctance to commit to the long haul that appealing to the Court of Appeal and even the Supreme Court would involve. So a number of cases brought by NGOs that might have been worth appealing have petered out at first instance—in the trial court. No-one who is not a party to a case can appeal. There is public interest litigation but not public interest appeals. An *amicus curiae* is not a party and could not appeal.

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50 'Apologise or I sue, Supreme Court Judge Njoki Ndung'u tells businessman over tweets' *Standard*, February 5 2016 http://www.standardmedia.co.ke/article/2000190579/apologise-or-i-sue-supreme-court-judge-njoki-ndung-u-tells-businessman-over-tweets.

51 Trusted Society of Human Rights Alliance, International Commission of Jurists (and its CEO Samwel Mohochi), Katiba Institute (and Yash Pal Ghai), and Article 19 as amicus curiae.

52 *Trusted Society of Human Rights Alliance v Judicial Service Commission*.

53 Article 22(2).

54 Article 22(3)(e).

In the case of *Mumo Matemo*, a civil society organisation had taken the case to the High Court, challenging the appointment of the chair of the Ethics and Anti-Corruption Commission and won. The respondent appealed and won in the Court of Appeal.[55] The NGO filed an appeal with the Supreme Court, which resisted the argument that the deregistration of the NGO (along with many others) meant it could not continue with the appeal.[56] But then the NGO withdrew the appeal, making it impossible for anyone to appeal what many viewed as the very unsatisfactory decision of the Court of Appeal and try to get a 'better' ruling from the apex court. A two judge bench of the court permitted the withdrawal. Though the individual had resigned from the EACC, in at least one case a court had held that, in a public interest case, the case might continue though individuals had withdrawn,[57] but this approach was not applied by the Supreme Court.

The Supreme Court in the same case had refused the application of an NGO to be *amicus curiae*, on the basis that the NGO was not without an opinion on the issue,[58] a ruling that tends to rather restrict the possibility of an *amicus* playing a full part in the judicial accountability aspect of an appellate hearing, because it is not permitted to argue that the court below was wrong.

A final way the public may be involved is in Court Users Committees, which work under the National Council on the Administration of Justice. These have been described:

> [They] provide a platform for actors in the justice sector at the local or regional level, to consider improvements in the operations of the courts, coordinate functions of all agencies within the justice system and improve the interaction of these stakeholders.
>
> CUCs provide the Judiciary with an opportunity to make the justice system more participatory and inclusive since the public is represented by all arms of government, civil society organizations opinion leaders, representatives of women and youth, the clergy, and faith-based groups and the private sector.[59]

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55 *Mumo Matemo v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR http://kenyalaw.org/caselaw/cases/view/84167/.

56 *Mumo Matemo v Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/104403/.

57 *Musyoka v Permanent Secretary, Ministry of Energy* Constitutional Petition 305 of 2012 http://kenyalaw.org/caselaw/cases/view/95572/.

58 *Trusted Society of Human Rights Alliance v Mumo Matemo and 5 others* [2015] eKLR http://kenyalaw.org/caselaw/cases/view/110554/.

59 The NCAJ's *Strategic Plan 2012-2016* (available at http://tinyurl.com/hq68w5t) sets out "Guidelines for Court Users' Committees" from p. 41 – see 'Introduction' to these.

These involve individuals with particular connections with the court system and so are better viewed as involving stakeholders rather than the public at large.

In the *State of the Judiciary and the Administration of Justice Annual Report* 2014 – 2015,[60] there is a summary of CUCs reports that gives an indication of the sort of improvements that can be made, (here focussing on those that suggest improvement on the part of the judiciary as such). Efficient and/or timely delivering of justice (Garissa, Gatundu, Isiolo, Marsabit, Tawa); reduced case backlog (Garissa); fewer adjournments (Marsabit); reduction in number of people in custody (Nanyuki); no cases of missing files (Othaya) and increased collaboration by all the players in Criminal Justice System resulting in speedy dispensation of justice (Voi).

Conclusion

There is a wide variety of mechanisms and forces that may help keep the individual judge or magistrate in line with appropriate standards, and the institution focussed on service to the people. It is not at all clear how effective the mechanisms are, nor how much attention the judiciary pays to them. The fault is by no means all with the judiciary. There are sectors of civil society, as well as the academic lawyers who could do much more to critique the judiciary and its work in constructive ways.

[60] Annex 1.

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ICJ Kenya publishes an annual report, the Judiciary Watch Report, which documents and discusses contemporary issues about the rule of law, human rights and democracy in Kenya and around Africa. The report is part of ICJ Kenya's Access to Justice Programme whose overall objective is to promote access to justice by, among other ways, supporting judicial independence, accountability and efficiency, and promoting judicial support for human rights. In pursuit of this objective, ICJ Kenya has over the years embarked on initiatives such as publishing key information on access to justice. This year, the publication focussed on judicial accountability in the light of the new constitutional order.

Kenya's judiciary has had an unhappy history. That history was marred by lack of independence from government, and from pressures, financial and other, within society. It was one of the objectives of a new Constitution to have a new beginning for the judiciary—and to give it a major role in supporting and enforcing that Constitution.

With a new constitutional framework for an independent judiciary, with a vetting process (not discussed in detail in this book), and with a new will, "For the first time for many years, accountability of the judiciary, and of the individuals within it, could be thought about and focussed on." These are the words of Dr Willy Mutunga, until June 2016 the Chief Justice of Kenya, in his Foreword to this book.

So the focus of this book, by distinguished Kenyan authors, is accountability, of the institution and of the individual within it, in the context of judicial independence. It examines the internal mechanisms of the judicial system to ensure accountability, including the newly developed Code of Conduct and Ethics. And it looks at external forms of accountability: to the legislature, executive and the independent commissions, as well as at the role of the media, academia and the public in accountability. It also studies the important institution of the Judicial Service Commission.

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