

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**PERFORMANCE MANAGEMENT IN THE KENYAN JUDICIARY: A CRITICAL
ANALYSIS OF THE ADEQUACY OF THE LEGAL AND INSTITUTIONAL
FRAMEWORK**

By

**LUCY MWIHAKI NJUGUNA
REG. NO: G62/88546/2016**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LLM),
UNIVERSITY OF NAIROBI SCHOOL OF LAW**

23 NOVEMBER 2018

DECLARATION

I, Lucy Mwhaki Njuguna declare that the contents of this thesis are a result of my original contribution to the current body of knowledge in the field of “performance management in the Kenyan Judiciary and its Legal foundation: A critique of its effectiveness”, and that the same has not been presented for award of a degree in any other university.

.....
Lucy Mwhaki Njuguna

.....
Date

I, Professor Kiarie Mwaura, confirm that this thesis has been submitted for examination with my knowledge and approval as the university supervisor

.....
Professor Kiarie Mwaura

.....
Date

DEDICATION

This work is dedicated to my two lovely children, Eric Brian Njuguna and Sharon Mugure, for their prayers, unfailing love and encouragement.

ACKNOWLEDGMENTS

I must thank Professor Kiarie Mwaura, a lecturer and the Dean of the University of Nairobi School of Law, for his scholarly approach, advice, guidance, corrections and useful suggestions, on the entire document.

Completing this work would have been more difficult were it not for the support provided by the staff at the library, School of Law, University of Nairobi who provided the bulk of the relevant materials. I am indebted to them for their help.

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGMENTS	iii
TABLE OF STATUTES	vi
ABBREVIATIONS AND ACRONYMS	vii
ABSTRACT	viii
DEFINITION OF KEY TERMS	ix
CHAPTER ONE: INTRODUCTION	1
1.1 Background of the Study	1
1.2 Problem Statement	3
1.3 Research Question	4
1.4 Research Objectives	4
1.5 Hypothesis	5
1.6 Justification	5
1.7 Theoretical Framework	6
1.7.1 Rawls' Theory of Justice	6
1.7.2 Dicey's Rule of Law Conception	11
1.7.3 The A-Z Theory of Performance Management	14
1.8 Literature Review	15
1.9 Scope of the Study	20
1.10 Research Methodology	22
1.11 Chapter Breakdown	23
CHAPTER TWO: JUDICIAL PERFORMANCE MANAGEMENT IN CONTEXT	24
2.1 Introduction	24
2.2 Antecedents of Performance Management in the Kenyan Judiciary	24
2.3 Rationale for Introducing Judicial Performance Management in Kenya	28
2.4 Significance of Judicial Performance Management	32
2.5 Scope of Judicial Performance Management	35
2.6 Practical Implications of Performance Management	39
2.7 Conclusion	41
CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING JUDICIAL PERFORMANCE MANAGEMENT IN KENYA	42
3.1 Introduction	42
3.2 A Critical Analysis of the Current Regulatory Framework	43
3.2.1 Constitutional Provisions	43
3.2.2 Statutory Provisions Relating to Performance Management	45
3.2.3 Statutory Provisions Relating to Case Management	48
3.3 Administrative Measures Relating to Performance Management	53
3.3.1 Performance Appraisal and Reporting System	53
3.3.2 Evaluating the Quality of Justice	57

3.3.3 Rewards and Sanctions Scheme	59
3.3.4 Service Delivery Charters	60
3.4 Conclusion	62
CHAPTER FOUR: COUNTRY CASE STUDIES AND LESSONS FOR KENYA	64
4.1 Introduction	64
4.2 Republic of Bulgaria	65
4.2.1 Institutional Set Up	65
4.2.2 Appraisal Criteria	67
4.2.3 Evaluation Procedure	69
4.2.4 Best Practices	70
4.3 United States	71
4.3.1 Arizona	73
4.3.2 District of Columbia	75
4.3.3 Best Practices	76
4.4 Netherlands	77
4.4.1 Normative Framework	79
4.4.2 Measuring Instruments	79
4.4.3 Other Approaches	81
4.4.4 Best Practices	81
4.5 Finland	82
4.5.1 Best Practices	84
4.6 Conclusion	84
CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND GENERAL CONCLUSION	86
5.1 Introduction	86
5.2 Summary of the Findings	87
5.3 Recommendations	90
5.3.1 Performance Management Regulations/Legislation	90
5.3.2 Other Recommendations	91
5.4 Conclusion	92
BIBLIOGRAPHY	94
ANNEXES	98

TABLE OF STATUTES

Kenyan Legislation

Appellate Jurisdiction Act, Cap 9 Laws of Kenya

Constitution of Kenya 2010.

Court of Appeal (Organization and Administration) Act No 28 of 2015.

High Court (Organisation and Administration) (General) Rules 2016.

High Court (Organization and Administration) Act No 27 of 2015.

Judicial Service Act 2011.

Foreign Legislation

Arizona Constitution 1958.

Judicial Performance Review Rules 2010 (Arizona).

Judicial System Act, 2007.

ABBREVIATIONS AND ACRONYMS

COE Committee of Experts

DCRT Daily Court Returns Template

DPM	Directorate of Performance Management
IEC	Information Communication and Education Strategies
IPMAS	Integrated Performance Management and Accountability System
JPR	Judicial Performance Review
JSC	Judicial Service Commission
MCR	Monthly Court Returns
ODPP	Office of the Director of Public Prosecutions
PAS	Performance Appraisal System
PMMSC	Performance Management and Measurement Steering Committee
PMMU	Performance Management and Measurement Unit (PMMU)
SMS	Short Text Message
US	United States

ABSTRACT

Since the inception of the Constitution of Kenya 2010, the Judiciary has taken great strides in introducing robust systems that can restore public confidence. One of the initiatives was the successful launch of the performance management system in 2015 following numerous

attempts since 1992. The purpose of this study was to examine whether the existing legal and institutional framework adequately provide for judicial performance management and measurement. This was done through mixed methodology that comprised qualitative, doctrinal, case study and comparative approaches. It is argued that, despite the importance of the initiative in enhancing the delivery of justice, the enabling legal and institutional framework is inadequate. Though there exists a performance management clause in the High Court (Organization and Administration) Act 2015, as well as the Court of Appeal (Organization and Administration) Act 2015, the same applies only to judges. It excludes magistrates and the administrative staff that play a crucial role to support the work of the judges. The rules to operationalize the said Acts are also silent on the issue of performance management. Indeed, any judicial officer can challenge the legal basis upon which the initiative is applied to them particularly if sanctions were taken for poor performance. Other shortcomings identified in the study include the lack of clear indicators and principles, and setting up of uniform case clearance targets without considering the variation in simplicity and complexity of different cases. A key finding in this study is that, for judicial performance management and measurement to be effective, it must be anchored in a firm legal framework.

DEFINITION OF KEY TERMS

Judicial performance management and measurement - the process of holding the Judiciary accountable. It involves the analysis of quality attributes such as legal ability, impartiality, independence, integrity, temperament, and communication skills, as well as the evaluation of court and administrative performance, which is linked to case management.

Performance Management Principles: refers to principles that underpin judicial performance management and measurement, such as fairness, judicial independence, impartiality, integrity, equality and fairness. These principles exude from Rawls' theory of justice as well as Dicey's rule of law doctrine.

Performance Management Indicators: entails the key elements of judicial performance management and measurement such as quality of justice, case management (e.g. caseload per judge and case clearance targets), rewards and sanctions, performance contracting, periodical performance returns, service delivery charters, etc.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Since the inception of the Constitution of Kenya 2010, the Judiciary has undergone a myriad of reforms to enhance access to justice to all Kenyans regardless of status. Judicial authority is guided by the normative principles enshrined in Article 159(2) of the Constitution 2010, key of which is that justice should expeditiously be administered to all Kenyans irrespective of status and without undue regard to procedural technicalities. In light of this, the Judiciary adopted an integrated performance management framework in 2015 in order to enhance transparency, accountability and service delivery.¹

Similar attempts had been made in the past to address the huge backlog of cases and other factors that hampered access to justice.² One of the initiatives was the adoption of the Performance Appraisal System, which was perfunctorily administered.³ Service delivery charters and annual work plans were also implemented.⁴ However, the monitoring and follow-up action was *ad hoc*, making these performance management tools ineffective. Overall, the initiatives adopted were weak and without clearly delineated goals and targets. Efforts to reintroduce performance management were renewed in 2003, but the system was perceived as ineffective and inappropriate. Subsequently, the Judiciary established a number of taskforces and committees to enhance service delivery and accountability.⁵ All these proposed the implementation of performance standards in the Judiciary.

¹ The Judiciary, Republic of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, The Judiciary, April 2015) 1.

² *ibid.* Such factors included, among others, physical inaccessibility, unfriendly court procedures, high costs of litigation, and inadequate human resources.

³ *ibid.*

⁴ *ibid.*

⁵ The taskforces and committees included: the Integrity and Anti-corruption Committee; the 2005-2008 Strategic Plan; the Ethics and Governance Sub-Committee of 2005 (the Onyango Otieno Sub-Committee); the Ethics and Governance Committee 2008 Report (the Kihara Committee); and the Taskforce on Judicial Reforms 2008 (the Ouko Taskforce).

The proposals were later consolidated under the Judiciary Transformation Framework 2012-2016. The Framework has since been very instrumental in the reform of the Judiciary. Key Result Areas 4 and 5 of this Framework recommended the establishment of a modern management system that focuses on results and implementation of accountability, monitoring and evaluation standards.⁶ It further recommended the establishment of a Directorate of Performance Management (DPM) to lead the institutionalisation of performance management in the Judiciary.⁷ In light of these recommendations, the Chief Justice established the Performance Management and Measurement Steering Committee (PMMSC) in 2013 to establish an understanding of performance management system in the Judiciary, among other functions.⁸ This Committee represented all courts. As a result, the DPM was established to coordinate the implementation of performance management system in the Judiciary.⁹

It is imperative to note that, since its establishment, the DPM has progressively monitored case management and reporting in the Judiciary. During the first year of implementation, the DPM managed to up-scale the performance understanding to the extent of 207 units. This shows a positive trend in the ownership of performance management system. However, these achievements have only been realised at the court level. The Judicial Service Commission (JSC), tribunals, the National Council on the Administration of Justice and other key players in the justice system, have not been engaged. The system is also quantity-oriented and not quality-oriented. There are also other challenges, such as lack of ownership by the implementing units, and insufficient funds. The DPM participated in the enactment of the High Court (Organization and Administration) Act 2015 and the Court of Appeal (Organization and Administration) Act 2015. These statutes contain provisions that regulate

⁶ The Judiciary, *Judiciary Transformation Framework 2012-2016* (The Judiciary, Republic of Kenya, 2012) 15-16.

⁷ *ibid.*

⁸ The Judiciary, Republic of Kenya (n 1) 7.

⁹ *ibid.* 41.

case management, and performance management inspections and monitoring.¹⁰ However, the functioning of the DPM, tenure of office, funding of its activities, and other connected issues are not reflected in these Acts. This, together with the challenges highlighted above, prompted the researcher to undertake this study.

1.2 Problem Statement

The institutionalisation of performance management in the Kenyan Judiciary is a positive move towards enhancing the delivery of justice consistent with Article 159(2) of the Constitution. Some of the reasons for the adoption of the initiative were to establish a framework for effective tracking and reporting of progress in case clearance and determination, promote efficiency in court registries, and improve accessibility and affordability of judicial processes.¹¹ While it is acknowledged that the initiative has achieved some results,¹² the enabling legal, institutional and policy framework is weak and inadequate.

For instance, the High Court (Organization and Administration) Act 2015 and the Court of Appeal (Organization and Administration) Act 2015 only contain a few provisions relating to case management, performance management inspections and monitoring. These laws only focus on the judges of the High Court and the Court of Appeal to the exclusion of magistrates, Supreme Court judges and the administrative staff. The initiative also focuses on the number of cases with not particular consideration as to how the quality of judgements and rulings can be enhanced. There are no legal provisions clearly outlining the fundamental

¹⁰ See High Court (Organization and Administration) Act 2015, sections 27 and 29; Court of Appeal (Organization and Administration) Act 2015, sections 28 and 30.

¹¹ The Judiciary, Republic of Kenya (n 1) 8.

¹² For instance, the Judiciary has been able to reduce pending cases from over one million in 2010 to an average of 530,000 cases as at 31st December 2016. See The Judiciary, Republic of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021* (2017) 21

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> accessed 22 November 2018.

principles and indicators of performance management as well as the composition of the DPM, criteria for the appointment and removal of the DPM members, and their tenure of office.

In view of the foregoing, this study explores the adequacy of the current legal and institutional framework with a view to contributing towards a robust performance management framework based on international best practices.

1.3 Research Question

The main question in this study is whether the Kenyan legal and policy framework adequately provides for performance management in the Judiciary. In particular, the researcher sought to answer the following specific questions:

1. What are the underlying principles and indicators of judicial performance management?
2. How adequate is the current legal and institutional framework governing judicial performance management in Kenya?
3. What international best practices can be adopted to enhance the effectiveness of performance management in the Kenyan Judiciary?
4. How can the Kenyan judicial performance management system be improved to enhance access to justice and public confidence in the Judiciary?

1.4 Research Objectives

The study examines whether the current legal and institutional framework in Kenya adequately provides for judicial performance management. The specific objectives of the study include:

1. To identify the underlying principles and indicators of judicial performance management, including its history in Kenya.
2. To critically review the adequacy of the current legal and institutional framework governing judicial performance management in Kenya;
3. To identify international best practices that can be adopted to enhance the effectiveness of judicial performance management in Kenya; and
4. To provide, based on international best practices, recommendations towards enhancing the effectiveness of performance management in the Kenyan Judiciary.

1.5 Hypothesis

While it is acknowledged that judicial performance management is an important initiative in enhancing the delivery of justice in Kenya, the enabling legal and institutional framework is inadequate. The existing legal provisions¹³ focuses on the High Court and Court of Appeal judges to the exclusion of the Supreme Court judges, magistrates and other court staff. This, coupled with other inadequacies, mars the effectiveness of judicial performance management in Kenya.

1.6 Justification

Judicial performance management is a relatively new initiative in Kenya. Its purpose is to enhance the delivery of justice consistent with the Constitution of Kenya 2010. Article 159(2) of the Constitution provides for the principles of judicial authority, which include ensuring that justice is done to all irrespective of status, is not delayed and that it is administered without undue regard to procedural technicalities. The principles are meant to give effect to the right of all persons to access justice as guaranteed by Article 48 of the Constitution. This

¹³ See section 29 of the High Court (Organization and Administration) Act 2015 and section 31 of the Court of Appeal (Organization and Administration) Act 2015.

right is essential and the Judiciary, as one of the State organs and the custodian of justice, has the obligation to ‘observe, respect, protect, promote and fulfil’,¹⁴ it by all means, including by developing a robust performance management framework. Thus, this study is important as it critiques the adequacy of existing legal and institutional framework and identifies best practices that can be adopted to revamp this framework.

The study advances the aspirations of the Judiciary’s Service Delivery Agenda 2017-2021, which focuses on ‘enhancing service delivery through targeted improvement of work methods and prudent ethical and integrity systems emphasizing measurable performance standards.’¹⁵ The study is also in line with Vision 2030 as it underscores the up-scaling of the current performance management system so that rewards and sanctions are used to promote the delivery of quality services.¹⁶ Further, the findings generated in this study contribute additional literature for academic and research bodies, including policy-makers who are keen on enhancing public confidence in the Judiciary through performance management.

1.7 Theoretical Framework

This study is based on the following theories.

1.7.1 Rawls’ Theory of Justice

Rawls perceives justice as the fundamental value undergirding social institutions as truth is of systems of thought.¹⁷ According to him, justice is the basic structure of society, or more accurately a charter upon which the major institutions, such as the Judiciary, distribute fundamental rights and duties and determine the division of advantages from social

¹⁴ Constitution of Kenya, 2010, Article 21(1).

¹⁵ The Judiciary, Republic of Kenya, *A Service Delivery Agenda, 2017-2021* (n 12) 13.

¹⁶ The Government of the Republic of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (October 2007) 29.

¹⁷ John A Rawls, *A Theory of Justice* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1971) 3.

cooperation.¹⁸ Further, according to Rawls, justice is premised on the principle of ‘original position’ in which every person decides principles of justice from behind a veil of ignorance.¹⁹ The ‘veil’ in this case is a tool that blinds people to all facts about themselves which might affect how they perceive justice. What this means is that people will come up with institutions and principles which will govern their rights and duties in the society and how to distribute the gains of both. Rawls argues that ignorance of one’s social status or position in the society will lead to principles that are fair to all.²⁰ In other words, if a person is oblivious of how he will end up in his own conceived society, he is likely not to privilege any one class of people, but rather develop a scheme of justice that treats all fairly.

In advancing his set of principles, Rawls perceives justice as fairness.²¹ Conceptually, Omondi construes fairness as referring loosely to procedural fairness, equity and satisfaction by parties to a dispute.²² In the present study, the aspect of justice is construed to mean fidelity to the rule of law, procedural fairness, equal opportunities for all the parties in a case, distribution of opportunities based on merit, and treatment of like cases in the like manner. This definition is undoubtedly consistent with the arguments advanced by Rawls in relation to formal justice, procedural justice, and social justice. The idea of social justice is characterised by the principle of original position discussed above. Procedural justice is defined as the fairness of a process by which a decision is reached.²³ Rawls argues that procedural justice is guaranteed if there is a correct or fair procedure such that the outcome of the case is correct or fair, so long as the procedure has been properly followed.²⁴

¹⁸ *ibid* 6.

¹⁹ *ibid* 111.

²⁰ *ibid*.

²¹ *ibid* 52.

²² Scholastica Omondi, ‘Procedural Justice and Child Sexual Abuse Trial in Kenya’ (2014) 2 (5) *Journal of Research in Humanities and Social Science* 30.

²³ Rebecca Hollander-Blumoff and Tom R Tyler, ‘Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution’ (2011) 2011(1) *Journal of Dispute Resolution* 2-3.

²⁴ Rawls (n 20) 75.

In his discussion on the intersection between institutions and formal justice, Rawls defines formal justice as the impartial and consistent administration of laws and institutions.²⁵ He argues that an institution exists when its duties are performed in accordance with a public understanding that the system of rules defining it is to be impartially and consistently adhered to.²⁶ A person taking part in the institution should know what the rules demand of him and of others.²⁷ In practice, this requirement is not always met as some judges or magistrates act in disregard of what the rule of law demands of them. It may not be easy to measure whether a judge really acted in accordance with the rule of law especially if there are no clear standards against which the quality of judgments can be weighed. This is certainly the case with the current performance management framework in Kenya, which has no clear thresholds. According to Rawls, the publicity of an institution's rules in whatever form (legislation or other) ensures that the key players of justice in that institution know what limitations on conduct to expect of one another and what kinds of actions are permissible.²⁸ Rawls argues that, in a society that is effectively regulated by a shared conception of justice, the public also has its own perception of what is just and unjust.²⁹ Rawls, therefore, assumes that people decide on the principles of justice subject to the knowledge that they are to be public.³⁰

Importantly, Rawls advances two principles of justice: the equal liberty principle and the difference principle.³¹ The equal liberty principle means that the society is fair and just when everyone has equal opportunities as rights and liberties.³² In other words, justice is fairness resulting from equal distribution of rights and liberties to benefit everyone, poor or rich. According to Rawls, the role of the principle of fair opportunity is to ensure that the system

²⁵ *ibid* 51.

²⁶ *ibid* 48.

²⁷ *ibid*.

²⁸ *ibid* 49.

²⁹ *ibid*.

³⁰ *ibid*.

³¹ *ibid* 52.

³² *ibid*.

of cooperation is one of pure procedural justice.³³ In a judicial set up, this can be achieved only if all the parties are treated fairly in accordance with the substantive and procedural law regardless of their status in society. A judge should be informed by the law and the principles of justice and not the social class of the parties. In this regard, Rawls argues in relation to the difference principle that, unless there is another mode of distribution of socioeconomic inequalities that will make both parties better off, an equal distribution is preferable.³⁴ His perception is in this case egalitarian, with a proviso that equality cannot be achieved by worsening the position of the least advantaged.

Relevance of Rawls' Theory to this Study

Rawls' theory of justice is extensive. As such, it is important to narrow down to the relevance of the above principles to the study. Performance management in the Judiciary is all about integrity of the judges and magistrates, fidelity to the rule of law, and other attributes of justice. Thus, Rawls' theory of justice is relevant to this study. The theory was used in this study to identify the key principles that should inform an effective judicial performance management framework. As noted, the current legal and policy framework only focuses on the number of cases and there are no guidelines as to how quality should be measured. By advancing the principles of procedural fairness, equal opportunities and liberties, and fidelity to the law, Rawls sets out an important standard for measuring the quality of judgements and rulings to advance the delivery of justice.

In Arizona, judges are rated based on four criteria: integrity (e.g. fairness and impartiality and equal treatment of parties or their representatives); communication skills; judicial temperament; and administrative performance.³⁵ The performance management system is

³³ *ibid* 76.

³⁴ *ibid* 65-66.

³⁵ Arizona Rules of Procedure for Judicial Performance Review, 2010, Rule 6(b)).

required to consider the judges' legal ability, while trial judges are appraised on settlement activities.³⁶ Importantly, a common theme in these criteria is that they tend to test the fairness and legitimacy of the overall judicial system. In the Kenyan context, this aligns with Article 159(2) of the Constitution, 2010 which provides for the principles that should guide courts and tribunals, namely that justice shall be done to all, irrespective of status; justice shall not be delayed; and justice shall be administered without undue regard to procedural technicalities among others.

Overall, Rawls' principles constitute an adjudication toolkit that ensures the parties to a case are treated equally, that their case is decided by an independent person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide cogent evidence to support it. It is imperative to note that fidelity to the rule of law is closely allied to judicial accountability, which encompasses the manner in which case files are managed, vertical reporting, and other connected aspects. These are key tenets of a democratic society which have the potential of promoting access to justice.³⁷

Although the theory is critical in this study, it does not capture other aspects that underpin performance management. For instance, the relevance of the rewards and sanctions approach in enhancing the delivery of justice is not addressed. This gap is bridged using the A-Z theory explored below.

1.7.2 Dicey's Rule of Law Conception

³⁶ Rebecca White Berch and Erin Norris Bass, 'Judicial Performance Review in Arizona: A Critical Assessment' (2014) 4(5) *Oñati Socio-legal Series* 927, 933.

³⁷ European Commission for the Efficiency of Justice (CEPEJ), 'Monitoring and Evaluation of Court System: A Comparative Study' (8th meeting, 2007) 4
<https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf> accessed 21 November 2016.

The rule of law is not a legal theory but a set of principles of institutional morality by which any constitutional democracy may be judged.³⁸ Its use in this study is premised on the fact that the principles and values inherent in it provide a critical yardstick for evaluating judicial performance. As a constitutional doctrine, the rule of law displays, as basic tenets of democratic constitutionalism, the values of independence, consistency, legality, certainty, accountability, efficiency, due process, access to justice, and respect for human dignity.³⁹

According to Dicey, the rule of law comprises three fundamental principles: supremacy of the law; equality before the law; and the predominance of legal spirit. Supremacy of the law is a key tenet of common law, which means that regular law should be absolute and not informed by arbitrary or wide discretionary powers.⁴⁰ At its core, supremacy of law requires everyone to stick to the law. State officers, including judges and magistrates, must act within the powers conferred on them by the people in accordance with the Constitution. Their decisions must, thus, be legally authorised. Dicey argues that officials should not be allowed to wield wide discretionary as this will create room for arbitrariness. In this regard, Dicey seems to argue that discretion has no place in regular law. On the contrary, discretion is not inimical to regular law, but it must be exercised fairly and in a manner that is consistent with the purpose and objects of the authority conferred upon the decision-maker.⁴¹ As Dicey puts it, no offender should be punished or made to suffer except for a violation of an established legal rule proved before the ordinary courts of law.⁴²

³⁸ Paul P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) *Public Law* 2 <<http://weblaw.haifa.ac.il/en/JudgesAcademy/workshop3/Documents/A/A/PL-Craig.pdf>> accessed 19 January 2017.

³⁹ Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver QC FBA, *The Changing Constitution* (7th edn, Oxford University Press 2011) 24-25 <<http://hcrj.nic.in/joc2014/9.pdf>> accessed 20 January 2017.

⁴⁰ Michael L Principe, 'Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain' (2000) 22 *Loyola of Los Angeles International and Comparative Law Review* 359.

⁴¹ Jowell (n 46) 18.

⁴² *ibid* 13.

As for the principle of equality, all classes of people should be subject to the same law. No individual is above the law. Government officials, including judicial officers, must comply with the law and not shelter behind it to the detriment of the ordinary citizen. In common parlance, the concept of equality eschews class differentiation. In other words, all people, rich or poor, are equal before the law and deserve equal protection pursuant to Article 27(1) of the Constitution of Kenya 2010.

Dicey's third principle is based on the English legal system which lacks a constitutional code. He argues that rules that form part of a constitutional code in most states are not the source but the result of individual rights as defined and enforced by the courts.⁴³ This argument implies that human rights are not only ensured by the guarantees set down in a constitution but by the ordinary remedies available against those who unlawfully interfere with other peoples' liberty. Importantly, rules and procedures should be put in place to ensure that laws are used for the protection of rights and not just as a tool of legitimising the exercise of power.

For effective realisation of the rule of law, there must be proper mechanisms, such as an independent Judiciary, easy access to justice, and dependable enforcement agencies. According to Mbote and Akech, the rule of law should be perceived as a culture that mandates compliance with established principles and procedures.⁴⁴ Typical, law achieves its purpose and object by establishing the principles and procedures that should be followed by the targeted individuals. For instance, the rule of law doctrine requires police officers to remain within certain procedures and rules in carrying out their investigations and prosecuting offenders. In the same vein, judges and magistrates are required to adhere to the established rules and procedures, as well as the principles enshrined in article 159(2) of the

⁴³ Principe (n 47) 359.

⁴⁴ Patricia Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (Nairobi: The Open Society Initiative for Eastern Africa 2011) 23.

Constitution 2010. Failure to remain within the required principles and procedures attracts social ills, such as corruption and impartiality.

However, as Mbote and Akech argue, dogmatic observance of the rules and procedures may not necessarily lead to justice.⁴⁵ As such, the rules and procedures should be reviewed constantly to produce desirable outcomes in a manner that is efficient and fair.⁴⁶ It should be noted that if the public begins to view the rules and procedures as being too unyielding, they may begin to lose confidence in them. Public confidence that the law has been properly applied, or discretion objectively exercised, depends largely on the level of confidence in the procedures and the resultant decision.⁴⁷ The basic expression of public confidence emanates from the oft-cited principle that justice should not only be done, but should certainly be seen to be done. For this to be realised, judges and magistrates should adopt a culture of fidelity to the law so that its instrumental use does not affect the legitimacy of litigation. They should take into account the fact that if the law is unequally applied to the detriment of one segment of the society, the legitimacy and binding nature of the law may be compromised. Thus, a culture of restraint is necessary for the rule of law to be realised.

Relevance to the Study and Criticisms

Dicey's rule of law theory was used in this study to identify the basic principles that should inform an effective performance management framework. The current framework as it stands is selective to the High Court and Court of Appeal judges, and leaves out other key players in the Judiciary. This is inimical to Dicey's principle of equality, which stresses that all classes of people (such as judges, magistrates, administrative staff) should be subject to the same law regardless of their origin, race, age, gender, and political affiliation. However, Dicey's theory

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*

does not exhaustively provide for the guiding principles. The researcher addresses this gap using Rawls theory of justice.

1.7.3 The A-Z Theory of Performance Management

Although this is a legal study, the researcher applies the A-Z theory of performance management which is an economic theory. It is one of the ideal theories explaining performance management in a labour environment, but some of its principles form a good framework for judicial performance. This theory holds that effective performance should be carried out by assessing the employee using an A-Z scale, where the 'A' represents chronically substandard performance while the Z represents excellent performance.⁴⁸ The DPM in this case is required to know where all the judicial officers and staff are within the A-Z scale. This implies that information should be gathered about each employee's performance and then judgment is made.⁴⁹ Where it is clear, from the information gathered, that a judge is close to A, the Chief Justice should make sure that the judge moves from A to Z and never returns. This should apply to all judges, including the judicial staff and other players in the justice system. In other words, the A-Z theory constitutes a preventive performance management approach, in which excellent performers are prevented from going backwards.⁵⁰ The theory holds that the management should concentrate on the poor performers along with the excellent ones. As a rule, the employees are expected to be moving up the line in terms of improvement. Those who stagnate at the lower side of the continuum for a long time should be eliminated, in this context through a legal process.

Importantly, the theory recommends that higher performance can be achieved if the employees are clear of their job design and what is required of them in the performance

⁴⁸ Deirdre Kelly, 'The Effectiveness of Performance Management in the Retail Industry in Ireland' (Master of Arts Dissertation, National College of Ireland 2012) 29.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

management framework.⁵¹ This, therefore, implies that the performance framework should be unequivocal, defining the standards of management, the rewards and sanctions, as well as the institutional framework. All standards, including how quality will be measured, should be clearly reflected in the framework. Teamwork and goal setting are core parameters in the A-Z theory. Further, according to this theory, performance management systems should be based on the core values of shareholders. In the context of the Kenyan Judiciary, the values are clearly outlined in Articles 10 and 159(2) of the Constitution of Kenya.

1.8 Literature Review

Performance management and measurement is vital to the delivery of justice. According to Mbua and Sarisar, emphasis on performance management is based on its ostensible ability to unite stakeholders on a common objective and spur them towards the achievement of this objective.⁵² This hypothesis, in the authors' view, underpins managerial empowerment.⁵³ Further, performance management results to operational effectiveness, which comprises a number of practices that promote sustainable utilisation of resources.⁵⁴ One of such practices is performance contracting, which forms the central theme in the authors' work. This study, however, delves into the wider concept of performance management and measurement in the Kenyan Judiciary.

According to Gey and Rossi, performance management has a positive impact on behavioural incentives and institutions.⁵⁵ If stakeholders in an institution are measured or otherwise ranked on the basis of their performance using specific criteria, they will fine-tune their conduct in a way that places them in a more competitive position.⁵⁶ However, ambitious

⁵¹ *ibid* 30.

⁵² Paul Mbua and Joseph Ole Sarisar, 'Challenges in the Implementation of Performance Contracting Initiative in Kenya' (2013) 3(2) *Public Policy and Administration Research* 45.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ Steven G Gey and Jim Rossi, 'Empirical Measures of Judicial Performance: An Introduction to the Symposium (2005) 32 *Florida State University Law Review* 1011; see also Mbua and Sarisar (n 59) 45.

judicial officers are likely to engage in undesirable competition merely to increase their score.⁵⁷ While agreeing with this argument, this study focuses on the effectiveness of performance management in Kenya, and the adequacy of the Kenyan legal framework. It is important to note that Gey and Rossi only explore the accountability limb of performance management in the Judiciary, omitting other important limbs like dispensation of justice, quality judgments, and expeditious disposal of cases.

According to Mohr and Contini, accountability and authority are the core principles of performance management.⁵⁸ However, while these principles may be considered as representing the foundations of the legitimacy of the Judiciary and the executive, neither of them stands alone.⁵⁹ In the authors' view, courts cannot be measured using a single dimension.⁶⁰ While appreciating Mohr and Contini's work, this study centres on the legal perspective of performance management in the Kenyan Judiciary.

Lepore, Metallo and Agrifoglio argue that a managerial approach is very critical in monitoring the activities of courts, and improving court efficiency and effectiveness.⁶¹ It enhances the court's ability to provide quality and cost-effective services to the public.⁶² Accordingly, judges and magistrates should increasingly integrate performance management into the daily operations of the courts.⁶³ The authors' article provides important insight into this study particularly regarding the balanced scorecard framework, which characterises the Italian judicial system.⁶⁴ This study, however, focuses on the legal issues pertaining

⁵⁶ Gey and Rossi, *ibid.*

⁵⁷ *ibid.*

⁵⁸ Richard Mohr and Francesco Contini, 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries' (2007) 1(2) *European Journal of Legal Studies* 254, 257.

⁵⁹ *ibid.*

⁶⁰ *ibid.* 285.

⁶¹ Luigi Lepore, Concetta Metallo and Rocco Agrifoglio, 'Evaluating Court Performance: Findings from Two Italian Courts' (2012) *International Journal for Court Administration*, 1.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

performance management in Kenya, as well as the effectiveness of the system.

In his study, Wittrup explores how the system for evaluating judicial performance in Romania can be developed and monitored.⁶⁵ The author focuses on four aspects: individual evaluation of magistrates; the statistical system which supplies the data that may permit evaluation of court performance; how to apply surveys to gather information on judicial performance; and the identification of appropriate judicial performance indicators.⁶⁶ According to Wittrup, individual evaluation of magistrates is an on-going practice in Romania.⁶⁷ However, while most magistrates according to the evaluations are excellent performers, the public impression of the entire Judiciary remains negative.⁶⁸

Performance evaluation, argues Wittrup, is supposed to improve the magistrate's professional performance, increase efficiency in courts and prosecutorial offices, increase public confidence, and provide stakeholders and other actors with reliable information to enable them make better and accurate decisions.⁶⁹ However, according to his findings, the existing performance system in Romania does not meet any of these purposes. In this regard, Wittrup proposes the establishment of performance indicators in relation to case timeliness, workload and productivity, and internal and external assessment of quality and services.⁷⁰ As regards the standard of case timeliness, which is a major challenge in Kenya, Wittrup argues that courts should be aware of the fact that delay in the delivery of justice other than reasonably required is intolerable and should be discouraged.⁷¹ This study borrows the ideas advanced by Wittrup, though within the Kenyan legal context.

⁶⁵ Jesper Wittrup, 'Analysis of the System for Measuring and Monitoring Judicial Performance in Romania' (2011) 4 <http://www.csm1909.ro/csm/linkuri/14_02_2011__39242_ro.pdf> accessed on 23 November 2016.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.* 9.

⁷⁰ *ibid.*

⁷¹ *ibid.*; *see also* Pim Albers, 'Performance indicators and evaluation for judges and courts' *Council of Europe*, p.14 <http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf> accessed 18 November 2016.

Further, according to Albers, an assessment of the performance of a judge or court should not only be limited to efficiency and productivity.⁷² The aspect of quality should not be underestimated. Some of the jurisdictions where quality models of assessment are used are the US, Netherlands, and Finland.⁷³ For both efficiency and quality, a proper system of information must be implemented to ensure consistency of data. This assertion is very central to this study as the researcher also addresses the question whether judges are ready for quality-based performance management and measurement.

Wallace, Anleu and Mack argue that, although Australian courts traditionally value generalist judges who can deal with all types of cases brought before them, efficiency and fairness call for an assessment of their individual performance as part of workload allocation.⁷⁴ This assessment is often done by senior judicial officers or experienced court staff charged with caseload allocation.⁷⁵ They are generally made informally, based on secondary information as well as the direct knowledge of the judicial officers' experiences or preferences in relation to type or amount of work.⁷⁶ The authors argue that, while important for the flexibility of court operations, these informal evaluations can lead to some inefficiencies and unfairness.⁷⁷

In his article, Armytage reviews the process of monitoring judicial reforms in order to offer lessons for the implementation of Article 11 of the UN Convention against Corruption, 2003.⁷⁸ He argues that the broader experience of judicial reform is relevant for judiciaries of States Parties to the above Convention and interested donors.⁷⁹ The main lesson, according to

⁷² Albers (n 78)14.

⁷³ *ibid.*

⁷⁴ Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2014) 41(2) Monash University Law Review 446 <<http://www.austlii.edu.au/au/journals/MonashULawRw/2015/16.pdf>> accessed 5 May 2017.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ Livingston Armytage, 'Monitoring judicial integrity: Lessons for implementation of UNCAC Article 11' (200) U4 Anti-Corruption Resource Centre, Issue 12, 6 <<https://www.cmi.no/publications/file/3483-monitoring-judicial-integrity.pdf>> accessed 5 May 2017.

Armytage, concerns the need to develop a consensus on the definitions of corruption and judicial integrity at the domestic level and on the focus of specific performance indicators.⁸⁰

In other words, key stakeholders need to agree on what should be monitored, for what purpose, and how performance will be measured. While agreeing with Armytage's arguments, the scope of this study covers the wider concept of performance management and evaluation in the Kenyan Judiciary, including the aspect of judicial integrity as the one of the indicators of judicial performance.

Palumbo, Liupponi and Nunziata provide an analysis of various judicial systems and the factors that may help in explaining differences in performance, particularly trial length.⁸¹ The authors suggest that measures that are likely to reduce trial length can differ depending on whether poor performance emanates from inappropriate incentives on the demand or the supply side.⁸² Some countries with lengthy trials (such as Italy, Greece, and the Czech Republic) exhibit high litigation rates while others (such as Poland, Slovenia and Israel) have litigation rates akin to those of the best performers.⁸³ In the second category of countries, the authors argue that priority should be given to the policies that increase the capacity of the system to meet the demand for justice, such as increasing resources for computerisation, adopting more advanced case management techniques, or enhancing the level of court specialisation.⁸⁴ In countries that display high litigation rates, policies can revolve around reducing the number of disputes brought before courts, for instance, by expanding the use of case management techniques and enhancing the effectiveness and transparency of public policies in the design and implementation of laws and regulations.⁸⁵ This study agrees with

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ Giuliana Palumbo, Liulia Liupponi and Luca Nunziata, 'Judicial Performance and its Determinants: A Cross-Country Perspective' (2013) OECD Economic Policy Paper No 05, 33 <<https://www.oecd.org/eo/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>> accessed 5 May 2017.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*

the authors' findings, but argues that proper judicial performance management and evaluation has the ultimate impact of enhancing the effectiveness of litigation.

In a nutshell, there is no established study on whether the Kenya's legal framework adequately provides performance management and measurement in the Judiciary. In view of this lacuna, the study herein contributes additional knowledge for further research and academic writing.

1.9 Scope of the Study

The scope of this study is limited to effectiveness of the current judicial performance management and measurement system in Kenya. Best practices from other jurisdictions, United States (US), Netherlands, Finland, and Bulgaria inform the study's findings and recommendations. These jurisdictions have an extensive history on the implementation of performance management in the Judiciary and, therefore, will provide greater insight into this study. For instance, in the US, performance measurement in courts began in the 1970s when a set of principles were developed to reduce and avoid case delays.⁸⁶ However, the problem of inefficiency in courts had been identified in the 1900s, with the famous theorist Roscoe Pound raising concerns about the impact of case delays, uncertainties, and expenses.⁸⁷ Additionally, compared to Kenya, judicial performance evaluation in Bulgaria is entrenched in firm legal framework, the Judicial System Act, 2007. The Act provides for the establishment, powers, and composition of the Standing Commission on Proposals and Appraisal of Judges, Prosecutors and Investigating Magistrates. For instance, the Commission has powers to form sub-commissions or auxiliary appraisal commissions to assist it in carrying out periodic appraisals of judges, magistrates, prosecutors, administrative

⁸⁵ *ibid.*

⁸⁶ The Judiciary, Republic of Kenya (n 1) 12.

⁸⁷ *ibid.*

heads and deputies of administrative heads. Prosecutors are also evaluated in Bulgaria since their activities directly affect judicial performance. The criteria and procedure for evaluating judges, magistrates, and prosecutors among others are comprehensively provided for under Bulgaria's Judicial System Act, 2007. This is significant given that Kenya's judicial performance management is not adequately entrenched in law.

Finland's judicial system has a quality benchmark model that is aimed at ensuring fair trials, well-reasoned judgments and rulings and accessible judicial services. The Court Administration Unit of Finland is guided by the principle of stakeholder engagement where judges and courts play a role in setting up performance targets. As indicated above, the Unit undertakes annual negotiations, which form the bulk of its work. While Kenya's judicial performance management system is based on numerical scores, the Dutch system entails scrutinizing the value of specific verdicts to establish the quality of justice. Thus, legal quality dominates the Dutch judicial performance appraisal system.

1.10 Research Methodology

As noted above, the aim of this study was to examine whether the current legal and institutional framework in Kenya adequately provides for judicial performance management. In achieving this, the researcher used a mixed methods approach comprising qualitative methodology, doctrinal methodology, case study methodology and comparative methodology. Doctrinal methodology entailed looking at relevant laws and reports. The case study and comparative approaches were used to determine the best practices that Kenya can draw from other jurisdictions, particularly the US, Netherlands, Finland and Bulgaria. According to Cruz, a case study involves an explicit discourse of the rules or institutions of one or more jurisdictions in order to ascertain the similarities and differences.⁸⁸ The rationale

⁸⁸ P de Cruz, *Comparative law in a changing world* (2nd ed. London: Cavendish Publishing 1999) 10.

for selecting the four jurisdictions is stated in part 1.9 above.

Qualitative approaches comprised primary and secondary sources of data. The primary sources included the Constitution of Kenya 2010 and other written laws, case law, and key informants. Four key informants were interviewed in this study, namely 2 judges, 1 magistrate (who also serves as a Deputy Registrar), and the Deputy Director of Performance Management in the Judiciary. The researcher used purposive sampling technique in selecting these key informants. Primary data for the key informants was collected using interviews. This involved open-ended questions, which allowed the key informants to give wide-ranging responses. The responses were processed and analysed in accordance with the objectives of the study. Each key informant was issued with an informed consent form, which explained the nature of the study and reassured the respondents of the confidentiality of their responses.

Additional data was collected from relevant secondary sources, such as books, journal articles, reports, official records from the Judiciary, publications, and internet searches. Data processing entailed data entry, collation, data cleaning, coding, analysis and interpretation.

1.11 Chapter Breakdown

This study is divided into five chapters. Chapter one gives an overview of the study. Chapter two entails a historical background of performance management in the Kenyan Judiciary, the reasons why performance management was introduced, the scope of performance management, and the practical implications since its introduction in the Kenyan Judiciary.

Chapter three examines whether the existing legal and institutional framework adequately provides for performance management in the Kenyan Judiciary. It also identifies the various challenges that should be addressed to enhance the effectiveness of the system in accordance with the judicial transformation framework.

Chapter four provides a comparative analysis between performance management in the Kenyan Judiciary and other jurisdictions. As stated above, the countries to be compared include the US, Netherlands, Finland and Bulgaria.

Chapter five provides a summary of the study, findings, recommendations, and the general conclusion. The general conclusion explains whether the study has met the objectives set out hereinabove, including the research hypothesis.

CHAPTER TWO

JUDICIAL PERFORMANCE MANAGEMENT IN CONTEXT: HISTORY, JUSTIFICATION, PRINCIPLES, AND IMPLICATIONS

2.1 Introduction

While the Judiciary serves as an independent arm of government, Kenya's democratic system requires some degree of citizen oversight and accountability.⁸⁹ In the modern-day world, performance management has emerged as a very strategic and integrated approach to achieving accountability and productivity in the Judiciary.⁹⁰ It is a systematic approach that facilitates the setting of goals, performance standards, and performance reporting.⁹¹ Some of the indicators include, for instance, caseload per judge or magistrate, productivity, duration of proceedings, cost per case, case clearance rate, and the court budget. The implementation of performance management in the Judiciary is likely to promote accountability and transparency, expeditious disposal of cases, effective management of cases, the efficiency of

⁸⁹ Constitution of Kenya 2010, Article 10(1) (c).

⁹⁰ Yorokamu Bamwine, 'Performance Management and Judicial Productivity in the High Court' (Paper presented at the 14th Annual Judges' Conference, Commonwealth Resort, Munyonyo, 8th – 12th January, 2012) 2.

⁹¹ The Judiciary, Republic of Kenya (n 1) 8.

court registries, and public confidence.⁹² Based on the A-Z theory, Dicey's rule of law theory and Rawls' theory of justice, this chapter explores the context of judicial performance management in Kenya, its history, principles, implications, as well as the reasons for its introduction.

2.2 Antecedents of Performance Management in the Kenyan Judiciary

Judicial performance management in Kenya dates back to 1992 when a committee was formed to inquire into the terms and conditions of service of the Judiciary.⁹³ One of the reforms was the adoption of the Performance Appraisal System (PAS), which was ineffective because judges and judicial officers perceived it as a preserve of the headquarters. As such, the PAS was superficially administered at the court stations. The Judiciary also introduced service delivery charters and annual work plans. However, their monitoring and follow-up action was ad-hoc and not integrated, making them ineffective. Overall, the initiatives adopted were weak and without clearly delineated objectives and targets.

Efforts to reintroduce performance management initiatives were renewed in 2003 with the introduction of what was referred to as the "radical surgery", but this was perceived as ineffective and inappropriate in addressing the challenges that faced the Judiciary.⁹⁴ Despite this, the Judiciary undertook a number of taskforces and committees to restore its image by enhancing service delivery and accountability. The task forces and committees proposed the implementation of performance standards in the Judiciary. For instance, in 2003, the Judiciary established the Integrity and Anti-Corruption Committee (the Ringera Committee) to assess the effect of corruption on judicial performance and propose appropriate detection and preventive strategies. The Committee proposed, among others, that judges and

⁹² *ibid.*

⁹³ *ibid* 3.

⁹⁴ *ibid* 4.

magistrates who were guilty of unduly delaying justice would be individually sanctioned, taking into account the circumstances of each officer. For purposes of assessing whether the delay was undue, the Ringera Committee proposed that the timelines for writing judgments and rulings should be 45 days and 30 days respectively.

Additionally, the Judiciary's Strategic Plan 2005-2008 underscored the need for appropriate performance management initiatives as a means of improving judicial performance. It, therefore, recommended the development of departmental objectives and targets, which would be measured regularly.

In 2005, the Ethics and Governance Sub-Committee was appointed to review the state of the Judiciary, taking into account the findings of the 2003 Ringera Committee. The Sub-Committee proposed, among others, the creation of a special unit within the Judiciary to inspect the performance of various departments and the impact of judicial reforms on a continuous basis.⁹⁵ It also proposed the evaluation of the performance of individual judges, judicial officers and staff by peer committees.⁹⁶

In 2007, the Ethics and Governance Committee was appointed to consider and make appropriate proposals in respect of, among others, performance management standards and systems, measures for enhancing access to justices, and the implementation of previous committees' recommendations.⁹⁷ The Committee further considered the state of judicial administration, public relations and information and communication technology in the Judiciary. According to the Committee, there was need to implement performance management systems in the Judiciary to improve internal processes and the overall quality of judicial decisions. Notably, the Committee proposed the development of an evaluation

⁹⁵ Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance of the Judiciary* (Chaired by Hon Justice J W Onyango Otieno, The Judiciary, 13 January 2006) 87-88.

⁹⁶ *ibid* 88.

⁹⁷ The Judiciary, Republic of Kenya (n 1) 5.

program for judges, judicial officers and staff. The Committee noted that performance management is not contrary to judicial independence as traditionally perceived. Best practices from other jurisdictions clearly indicate that judicial work is capable of measurement if the merits are cautiously selected.⁹⁸ The Committee urged the Judiciary to develop standards and goals for judges, judicial officers, and staff. These proposed standards included, among others, access to courts, fairness, and case management. There was also need to have benchmarks to ensure consistency in the delivery of justice. Importantly, the Committee was of the view that, while the ultimate goal of performance management was to promote competence and judicial performance, linking it to a reward and sanction scheme would make the system more effective by encouraging a continuous quest for excellence.

In 2008, the Taskforce on Judicial Reforms was established to consider measures that would enhance judicial performance.⁹⁹ The Taskforce proposed the development of an effective and comprehensive performance management framework, incorporating measurable standards; the use of peer review to enhance judicial performance; the creation of public awareness on performance management; and the development of case management system that would track the productivity of judges and other court personnel to minimize cases of delayed justice. Importantly, the JSC was urged to design an internally-administered, performance-based reward scheme for judges, judicial officers, and staff.

The foregoing recommendations were reflected in the Judiciary Transformation Framework 2012-2016, which laid down ten Key Result Areas through which the Judiciary would be transformed. Specifically, Key Result Areas 4 and 5 of this Framework recommended the establishment of a modern performance management system that focuses on results and implementation of accountability, monitoring and evaluation standards.¹⁰⁰ This would entail

⁹⁸ See, e.g. Wittrup (n 72).

⁹⁹ The Judiciary, Republic of Kenya (n 1) 6.

transforming court procedures, organizational culture, performance evaluation and reporting systems to make them more responsive and efficient. The Framework also recommended the establishment of a DPM to lead the institutionalization of performance management in the Judiciary.¹⁰¹ It is in light of these recommendations that the Chief Justice established the Performance Management and Measurement Steering Committee in 2013 to establish an understanding of performance management system in the Judiciary, among other functions.¹⁰² This Committee represented all courts. As a result, the DPM was established to coordinate the implementation of performance management system in the Judiciary.¹⁰³

2.3 Rationale for Introducing Judicial Performance Management in Kenya

From a theoretical viewpoint, the essence of judicial performance management is to ensure access to justice by advancing the principles of procedural fairness, equal opportunities, and fidelity to the law. These principles, advanced by Rawls's theory of justice, constitute an adjudication toolkit that ensures the parties to a case are treated equally, that their case is decided without undue delay by an independent person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide cogent evidence to support it. How cases are managed right from inception forms part of judicial accountability. Further, based on Dicey's rule of law theory, public confidence that the law has been properly applied, or discretion objectively exercised, depends largely on the level of confidence in the procedures and the resultant decision. The basic expression of public confidence emanates from the oft-cited principle that justice should not only be done, but should certainly be seen to be done.

¹⁰⁰ The Judiciary (n 6) 15-16.

¹⁰¹ *ibid.*

¹⁰² The Judiciary, Republic of Kenya (n 1) 7.

¹⁰³ *ibid* 41.

Throughout the history of Kenya, the Judiciary has been seen as a flawed handmaiden of justice.¹⁰⁴ During the colonial era, the introduction of the western judicial system marginalized the local communities.¹⁰⁵ The communities were only allowed to access Native tribunals, while the formal courts presided by trained judicial officers served the white settlers. This discriminatory system denied the local communities' practices and customs recognition on the basis that they were repugnant to justice and morality. At independence, the Native tribunals and the judicial system were amalgamated into a modern judicial system. Although the Judiciary was accorded some form of independence by the Independence Constitution, it was designed to benefit the government.¹⁰⁶ As Mutua argues, the Judiciary was an institution whose members bent over backwards to accommodate the interests of the executive for personal gain.¹⁰⁷ Patronage and cronyism was ingrained in the Judiciary, but most of those appointed as judges and magistrates were utterly incompetent.¹⁰⁸ The Judiciary, therefore, lacked institutional independence, and the Chief Justice enjoyed enormous powers.

The advent of multi-party democracy in 1992 marked the genesis of the restoration of the credibility of the Judiciary.¹⁰⁹ Various reports and strategic plans pointed out a myriad of challenges affecting the Judiciary, but the recommendations provided were seldom implemented. According to the Report of the Task Force on Judicial Reforms 2010, there are many challenges that make the judiciary to be incapacitated as an efficient arbiter. One of the challenges that have faced the Kenyan Judiciary over time is the complexity of filling cases which characterized by lengthy procedures.¹¹⁰ Backlog of cases has also reduced public confidence in the Judiciary.¹¹¹ The accumulation of unresolved cases at the Judiciary has been

¹⁰⁴ The Judiciary (n 6) 9.

¹⁰⁵ *ibid.*

¹⁰⁶ The Judiciary (n 6) 10.

¹⁰⁷ Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(1) Human Rights Quarterly 96, 113.

¹⁰⁸ *ibid.*

¹⁰⁹ The Judiciary (n 6) 10.

¹¹⁰ The Judiciary, Republic of Kenya (n 1) 21.

partly attributed to insufficient financial resources which hamper the Judiciary from hiring enough judicial officers to handle the cases.¹¹² The other causes of case backlog are weak case management systems; inadequate number of courts and infrastructure; mechanical management of court records and proceedings; and inappropriate rules of procedure.¹¹³ The other pothole was inefficiency in terms of service delivery due to the manual and mechanical manner in which the systems at the Judiciary operated.¹¹⁴

Equally, judicial performance has over the years been affected by corruption and unethical conduct, which impede the fair and impartial dispensation of justice.¹¹⁵ The theory of justice requires judges and magistrates to act professionally and above reproach in dispensing justice. However, as Muthoni points out, lack of impartiality and independence has been one of the notable obstacles to the rule of law in the Kenyan Judiciary.¹¹⁶ Even in the present constitutional dispensation, the conduct of some of the judges has been questioned with some being accused of corruption and other unethical practices which affect the proper dispensation of justice and public confidence in the Judiciary.¹¹⁷

On the same note, the administrative structures at the Judiciary are weak which dents the proper administration of courts. In the past, the Judiciary had lacked autonomy and independence. Still, the judicial staff had poor terms of service which had made it hard to

¹¹¹ Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (Nairobi: Government Printer 2010) 33.

¹¹² Kagwiria Mbogori, 'Strengthening Judicial Reforms in Kenya: Performance indicators – Public Perceptions of the Court Divisions, Children's Court and the Anti-Corruption Court' (Kenyan Section of the International Commission of Jurists, 2007) <http://pdf.usaid.gov/pdf_docs/Pnacw007.pdf> accessed 14 February 2017.

¹¹³ Republic of Kenya, *Task Force on Judicial Reforms* (n 113) 33; see also P Kihara-Kariuki, 'Procedural Reforms/Innovations that Enhance Access to Justice and Ensure Protection of Rights in Kenya' (Paper presented during the Second African Union Judicial Dialogue, Arusha, Tanzania, 4-6 November 2015).

¹¹⁴ Ozonnia Ojielo, 'Judicial Integrity and the Vetting Process in Kenya' (2010) 1(6) *Amani Papers* 3 <http://www.ke.undp.org/content/dam/kenya/docs/Amani%20Papers/AP_Volume1_n6_Sept2010.pdf> accessed 17 February 2017.

¹¹⁵ *ibid.*

¹¹⁶ Wachira Letizia Muthoni, 'Corruption in the Kenyan Judiciary, Will the Vetting of Judges And Magistrates Solve this Problem?' (LLM Thesis, University of Nairobi 2013) 24.

¹¹⁷ Daudi Mwenda, 'Judicial corruption would throw Kenya into a major crisis' *The Star* (Nairobi, 6 February 2016) <http://www.the-star.co.ke/news/2016/02/06/judicial-corruption-would-throw-kenya-into-a-major-crisis_c1288137> accessed 9 March 2017.

retain the highly qualified and skilled staff within the Judiciary.¹¹⁸ Within the human resource department of the Judiciary, there have been accusations of lack of transparency in hiring, promotions, and transfers. It has been argued before that there is lack of public awareness of the procedures in the Judiciary making the institution to be full of mystery.

Moreover, the process of appointment of judges and magistrates has a significant bearing on the performance of the Judiciary. In their review of the working and functioning of the Judiciary, the Task Force on Judicial Reforms took issues with the process of appointment of judges.¹¹⁹ The Task Force noted that the process of appointment at JSC was not transparent and it was not based on any publicly known criteria of appointment; hence it was perceived to be non-competitive.¹²⁰ With this approach, most deserving Kenyans missed out on appointments to the Judiciary.¹²¹ Although the JSC began some vetting and consultations in appointments in 2002, these had not been institutionalized within JSC.

The findings of the Task Force pointed to a possibility of one being appointed as a judge when he/she was not qualified to serve in that position as a result of lack of an open merit-based appointment process.¹²² The Task Force equally took issue with judges being appointed on a contract basis and in some instances on acting basis.¹²³ These affected the independence and performance of the Judiciary, wore down the security of tenure and was against the international best practice.

With these challenges, public confidence in the Judiciary continued to deteriorate. Accordingly, judicial reforms dominated in the clamour for a new Constitution. This was amplified in 2010 when the new Constitution was promulgated. According to the Committee

The Judiciary, Republic of Kenya (n 1) 21.

¹¹⁹ Republic of Kenya, *Task Force on Judicial Reforms* (n 113) 23.

¹²⁰ *ibid* 24.

¹²¹ *ibid*.

¹²² *ibid* 26.

¹²³ *ibid*.

of Experts (COF) which was tasked with drafting the Constitution 2010, the memoranda they received showed that the public was interested in a total overhaul of the Judiciary. In their recommendation, COE proposed the vetting of all judges and magistrates over a given period in order to avoid throwing the working of the institution into disarray.¹²⁴ The COE also recommended that all serving judges should resign after the inception of the Constitution of Kenya 2010.¹²⁵ However, this proposal did not materialize as the new Constitution envisaged the establishment of a vetting board for judges and magistrates.¹²⁶ The purpose of the vetting process was to re-invent integrity in the administration of justice and enhance public confidence for the Judiciary. All these reforms were meant to give the Judiciary a new face of life.

Since 2010, some positive steps have been implemented, such as the introduction of specialized court, and the establishment of the National Council for Law Reporting and the Judicial Training Institute.¹²⁷ However, these isolated reforms have by themselves not been sufficient to restore public confidence in the Judiciary. Thus, the introduction of performance management and evaluation in the Judiciary was implemented to enhance access to justice and public confidence.

2.4 Significance of Judicial Performance Management

Judicial performance can be evaluated at different levels and platforms, such as national level, court level, a department of the court and at the individual level.¹²⁸ However, this depends on the institution that is tasked with implementation of the framework. In some countries, the task of performance management and evaluation is left to the Ministry of

¹²⁴ Jan van Zyl Smit, 'Restoring Confidence in the Judiciary: Kenya's Judicial Vetting Process, Constitutional Implementation and the Rule of Law' 7 <http://www.constitutionnet.org/files/kenyas_judicial_vetting_process.pdf> accessed 15 February 2017.

¹²⁵ *ibid* 7-8.

¹²⁶ See the Constitution of Kenya 2010, section 23(1) of Sixth Schedule.

¹²⁷ Ojielo (n 122) 3.

¹²⁸ Albers (78) 4.

Justice or a Council in the Judiciary.¹²⁹ Due to the need to ensure individual independence, the performance evaluation is limited to the performance of the courts and not the individual judges. Assessment of the performance of an individual judge is left to a superior judge who is a department member.¹³⁰

Judicial performance is a tricky issue partly because judges have a tendency of not comparing their work with the administrative work in other government agencies.¹³¹ The other critical issue relates the independence of judges. Independence of a judge means freedom to make decisions free from executive interference. Yet, judicial authority is derived from the people by virtue of Article 159(1) of the Constitution, and therefore judges ought to be accountable to the them.¹³²

Job performance evaluation is an acceptable management in both the private and public sector and learning institutions.¹³³ As Mbua and Sarisar argue, emphasis on performance management is based on its ostensible ability to unite stakeholders on a common objective and spur them towards the achievement of this objective.¹³⁴ Lepore and others also support this narrative by arguing that a managerial approach is very critical in monitoring the activities of courts, and improving court efficiency and effectiveness.¹³⁵ It enhances the court's ability to provide quality and cost-effective services to the public.¹³⁶ According to the A-Z theory, performance evaluation is aimed at enhancing the behaviour of judges in order for them to give more input towards their work and improve justice delivery.¹³⁷

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid* 5.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Mbua and Sarisar (59) 45.

¹³⁵ Lepore et al (n 68) 1.

¹³⁶ *ibid.*

¹³⁷ Joe McIntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4 (5) *Oñati Socio-legal Series* 904

An attempt to have more efficiency in courts has been somewhat successful in superior courts, which are better resourced. However, there is need to focus on the subordinate courts where majority of Kenyans seek justice.¹³⁸ The rationale for improving service delivery in the lower courts lies in the fact that these courts are accessed by a greater majority, hence it is here that the level of public confidence would be boosted to enhance access to justice. Focus should be on oversight, monitoring and evaluation of the performance of lower courts and relevant departments as they deliver justice to those seeking it.¹³⁹ It is also critical to focus on results, align objectives, programs and priorities to allocated resources while having the litigants as the ultimate beneficiary of improved services. Change of attitude and employee commitment is key in realizing the desired results.

Performance is achieved through quick disposal of cases hence clearing backlogs and improving the manner in which court users are handled by court staff, such as clerks and other staff.¹⁴⁰ Currently as constituted, there are weak systems for doing monitoring and evaluation within the lower courts. The oversight procedures available are inadequate and fundamentally ad hoc, and have no laid down policies or protocols. During the interviews, delays in typing of judgments were cited as a major contributor to case backlog. This was partly attributable to human resource capacity. Bearing in mind that most of the judges and magistrates have been issued with laptops, it is imperative that they be equipped with computer skills to type and process their own judgments.¹⁴¹

Ongoing implementation of performance in the public service has proved to be an effective tool in promoting structural efficiency and through-put.¹⁴² There has been improved economic

<<http://search.ror.unisa.edu.au/media/researcharchive/open/9916026867201831/53129359950001831>> accessed 14 February 2017.

¹³⁸ Albers (n 78) 6.

¹³⁹ *ibid.*

¹⁴⁰ The Judiciary, Republic of Kenya, *Judiciary Case Audit and Institutional Capacity Survey 2014* (Nairobi: Performance Management Directorate, 2014) 5.

¹⁴¹ *ibid.*

growth due to improved efficiency in the public service delivery and other government operations. Introduction of performance management in the Judiciary in 2003 was not successful owing to the unique nature of the underlying problems at the Judiciary. All the taskforces and committees formed had recommendations for the formation of performance standards.¹⁴³ The Kihara committee for instance recommended that evaluation should have both a reward and discipline component and ought not to be pegged on discipline alone. As such, underperforming staff can be subjected to a remedial process.

Performance management has significance of upholding accountability in the process of justice delivery.¹⁴⁴ Similarly it provides an effective mechanism through which achievement in clearing and determining cases is tracked and communicated. Through performance, it makes the process of linking planning and budget making process easier and effective.¹⁴⁵ On the same scale, it promotes efficiency within the court registries and offers the Judiciary an opportunity to focus their efforts towards handling matters that resonate well with the public.¹⁴⁶ Through performance management enhances the accessibility and affordability of judicial services as well as the efforts that are being undertaken to tame and eradicate corruption among judicial staff and the bar.

2.5 Scope of Judicial Performance Management

Ordinarily, performance management in the Judiciary takes many forms. There are various means and mechanisms through which legal accountability can be maintained.¹⁴⁷ From a formal justice viewpoint, each case should be determined individually applying facts and law consistently.¹⁴⁸ In the executive, however, officers are evaluated based on the fiscal policy and

¹⁴² The Judiciary, Republic of Kenya (n 1) 28.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid* 29.

¹⁴⁶ Mohr and Contini (n 65) 13.

¹⁴⁷ *ibid* 12.

accounting responsibility. In this case, various agencies and administration units are required to justify the use of resources allocated to them through rigorous accounting procedures and other complex methods of determination of outcomes against funding inputs.

As the A-Z theory recommends, higher performance can be achieved if the employees are clear of their job design and what is required of them in the performance management framework. Judicial evaluation must therefore be guided broadly by the principles of efficiency, democracy and fairness.¹⁴⁹ It is also not practically possible to evaluate the Judiciary or an individual judge without having predetermined goals. In this regard, therefore, the first step in performance management is setting up robust performance goals which are measurable at the organizational level, departmental level and then down to individuals. Importantly, there must be a general goal for the entire Judiciary upon which departmental and individual goals are anchored.¹⁵⁰ The Judicial Service Commission must set general goals and then cascade them down to departments and then to individual judicial officers.

Once measurable goals have been set, administrative staff members have to be managed by their superiors in line with performance management goals and coached towards achieving them. Equally, the staff members should be in a position to monitor and evaluate their performance. Because performance management entails measuring rational human beings, they tend to behave and respond with respect to how they have been rewarded or sanctioned. An effective performance management mechanism therefore is one that consistently rewards and sanctions.¹⁵¹ The rewards implied to here do not necessarily have to be monetary rewards; they can also include naming and shaming and/or raising and praising. Performance management system should be able to reward desirable behaviour or performance and

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ Ojielo (n 122) 5.

dishearten undesirable behaviour or performance. It should equally have proper mechanisms for capacity building.¹⁵²

Another performance assessment criterion is by looking at the court as a system in which there are inputs, outputs and throughput. In relation to input, there has to be a distinction between cases and resources. For a court, the resources are personnel, finances and infrastructure. Any influence on the three aspects would have an impact on the performance of the court as whole. For instance, lack of enough judges and judicial staff translates into low judicial performance due to increased length of proceedings and case backlog. Cases too form part of the input to a court system.¹⁵³ An increase in the number of cases without an increase in the amount of court resources would lead to prolonged court proceedings as well as more cases in the shelves. On the other hand, through-put is the process where cases that are brought in by court users are handled by the court leading to a final determination (output). The performance indicators of throughput include the length of proceedings and case backlogs.

Looking at the court as a system enables one to understand that court processes and functioning can be affected by external factors, such as budgeting and legislation.¹⁵⁴ Ideally, the assessment of the performance of a judge has to be subject to the reality that some external factors also do influence the decision of the judge.

In theory, six performance indicators do exist: caseload per judge; productivity, duration of proceedings; costing per case; rate of clearance; and court budgets.¹⁵⁵ The case load for each judge is determined by dividing the number of incoming and pending cases against the number of judges at the court. An increasing caseload is the basis upon which the Judiciary

¹⁵² *ibid* 6.

¹⁵³ Albers (n 78) 4.

¹⁵⁴ *ibid* 5.

¹⁵⁵ *ibid*.

would ask for a higher budget in order to prevent an impending future backlog.¹⁵⁶ Importantly, a distinction should be made between civil, commercial, criminal and administrative cases by creating specific case categories. The time needed for each category of cases is estimated, taking into account the level of complexity of each case. This categorization is important because a general description of caseload per judge is too broad and cannot reflect the real performance of a judge. As a matter of fact, some judges with a high caseload might be handling simple cases compared to those with a low caseload. Accordingly, it is important to use a more detailed caseload model.

Labour productivity is one of the most widely used indicators of performance. Here, cases are divided according to the number of personnel or the number of days they have spent working. It is an important tool to measure and communicate production delivered by judges and magistrates. However, recently there have been arguments against labour productivity with opponents proposing reliance on total court productivity as an indicator of performance.¹⁵⁷ The rationale is that labour productivity seems to ignore the aspect of quality with regards to the work being done by the courts.

As for the length of proceedings, the time can be calculated by factoring in the duration of trial and average unexpected delay between the actual and announced date of hearing. The length of each proceeding or trial depends on the judge and the complexity of the case at hand and resources available.¹⁵⁸ Even though the length of time for proceedings is an important performance indicator, other factors need to be considered on the same scale, such as working methods of the judges, his/her level of expertise as well as resource allocation and availability.

¹⁵⁶ *ibid* 4.

¹⁵⁷ *ibid* 5.

¹⁵⁸ *ibid* 5.

On costs for each case, it is important to look at how effectively have resources been used in each court case.¹⁵⁹ The total cost for each case is divided against the number of cases in a given period to obtain the average cost per case. However, there is a disadvantage in using such a method in the sense that, just like in the case with labour productivity, it fails to capture the aspect of quality. It is in light of this that clearance rate might be effective as it measures the percentage of outgoing cases against incoming cases.¹⁶⁰ Thus, an effective performance management process requires institutional leadership to determine where the entire system should be headed, and this must be pronounced in strong and succinct easy-to-follow terms through themes and general premeditated objectives.¹⁶¹ The themes and goals would then be cascaded across the different organisational levels and translated into the appropriate performance indicators for the various job roles.

2.6 Practical Implications of Performance Management

Monitoring is continuous while evaluation is systematic and objective.¹⁶² The major aspects in monitoring and evaluation are in the targets, timelines and indicators which form the basis of the A-Z theory. Monitoring and evaluation provide a feedback on the progress of implementation of programs and various activities. One of the most important aspects of performance is in the incentives that accrue to the people who are being assessed.¹⁶³ The Judiciary will have in place an efficient system that will see good performers getting rewarded and poor performers sanctioned in a timely manner.¹⁶⁴ The system should be vibrant, robust and objective enough in order to encourage and promote the culture of efficiency and effectiveness among all the Judiciary staff.

¹⁵⁹ *ibid* 5.

¹⁶⁰ *ibid* 6.

¹⁶¹ *ibid* 7.

¹⁶² *ibid* 8.

¹⁶³ Danladi Plang and Tolu Abari, 'Towards a Holistic Performance Management System for the Lower Courts in Nigeria: The J4A Model in Kaduna State' (2014) 12 <<https://ace-notebook.com/Holistic-performance-management-free-related-pdf.html>> accessed 14 February 2017.

¹⁶⁴ *ibid* 13.

While trying to ensure better performance within the Kenyan courts, it is important to note that there is still a shortage of judicial officers in most stations across the country leading to a backlog of cases.¹⁶⁵ Following the promulgation of the Constitution 2010 and the introduction of vetting, more judges and magistrates were recruited. The Judiciary staff also got better terms of service and there has been a reduction in the backlog of cases at the Judiciary. It therefore suffices to say that the fruits of performance management have been seen by court users.¹⁶⁶ The opening up of new court stations ensured there are more resources for the Judiciary, hence improving on performance.

Transfers and promotion of judicial staff was said to be shrouded in mystery and did not give the officers time to clear their cases before being transferred. Thus, a policy that would guide the transfer would better address the cases of backlog and delayed determination of cases. The policy would cover among other issues the duration a judge should stay at a duty station as well as proper timing of transfers. The implementation of performance management in the Judiciary is an ingredient of efficiency.¹⁶⁷ It would enhance service delivery and in general quick delivery of justice to the litigants. It is, however, important to have a provision for the quality of cases disposed since judges and magistrates might hurry to determine as many cases as possible without taking into account the quality of judgments given.

While being alive to the fact that implementation of performance management has been with many challenges such as setting of low targets, insufficient funds and staff lethargy, its continuation in the implementation is a step in the right direction in achieving expeditious delivery of justice.¹⁶⁸ Successful implementation of the performance management would depend on proper cooperation and coordination among stakeholders in the Judiciary.¹⁶⁹ As

¹⁶⁵ *ibid.*

¹⁶⁶ Kamari-Mbote and Akech (n 51) 7.

¹⁶⁷ *ibid.* 8.

¹⁶⁸ *ibid.*

such, it is important to have regular and continuous engagement with stakeholders so as to meet this target.

2.7 Conclusion

The Constitution of Kenya, 2010 has seen many reforms in the Judiciary geared towards enhancing access to justice. The whole process of getting the new Constitution was driven by the public. Through a consultative process, performance measures and targets for judges and magistrates have been set up. While those targets and measures are in line with previous committee and taskforce recommendations, they do not create an adequate framework upon which judicial performance can be evaluated and measured in Kenya. Through institutionalization of performance management and measurement in the Judiciary, all the courts are expected to provide and enhance access to justice that is dispensed expeditiously, efficiently, effectively and in a user-friendly environment. This will include entrenching the system in a firm policy and legal framework with clear indicators and principles, annual review and dissemination of critical tools, extensive capacity building, wide use of ICT, continuous research and sharing of innovative practices, use of data in decision-making and adequate consultations with all stakeholders. Professionalism, objectivity and fairness both in target setting and evaluation will enhance credibility of the system. The next chapter explores whether these attributes are adequately entrenched in the current legal and policy framework.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK REGARDING JUDICIAL PERFORMANCE MANAGEMENT IN KENYA

¹⁶⁹ *ibid* 9.

3.1 Introduction

As pointed out in Chapter Two above, the Constitution of Kenya, 2010, and the Judiciary Transformation Framework have been key reference points in the implementation of the Judiciary's mission, which is "to deliver justice fairly, impartially and expeditiously, promote equal access to justice, and advance local jurisprudence by upholding the rule of law."¹⁷⁰ Through a consultative process, the Judiciary has set up performance management measures, standards for judges and judicial officers to enhance transparency, accountability and improvement in service delivery. The main aim of this chapter is to examine whether the existing legal framework adequately provides for performance management in the Kenyan Judiciary. The chapter further identifies the various judicial performance management initiatives and the challenges that should be addressed to enhance the effectiveness of the tool in line with the judicial transformation framework. The researcher demonstrates that, even if much has been done to institutionalise performance management in the Judiciary, significant hurdles exist. The chapter, therefore, responds to the following two issues (as stated in chapter one): whether the Kenyan laws promote performance management in the Judiciary; and whether the current performance management system is effective in enhancing access to justice in the Kenyan courts.

3.2 A Critical Analysis of the Current Regulatory Framework

This section explores the constitutional provisions relating to access to justice and judicial performance, relevant statutory provisions, as well administrative measures relating to performance management and measurement in the Judiciary.

3.2.1 Constitutional Provisions

¹⁷⁰ Kihara-Kariuki (n 121) 5.

The Judiciary plays an important role in not only promoting and protecting the “essential values of human rights, equality, freedom, democracy, social justice and the rule of law” provided for in the preamble to the Constitution, 2010, but also in making them a living reality. These values, together with the supremacy of the law and the predominance of legal spirit, constitute Dicey’s rule of law theory. Further, according to Dicey, all classes of people should be subject to the same law. In other words, all people, rich or poor, are equal before the law and deserve equal protection pursuant to Article 27(1) of the Constitution of Kenya 2010. The Constitution of Kenya, 2010, guarantees equal protection of the law for all persons, which implies equal enjoyment of all fundamental rights including access to justice. Article 48 thereof provides that justice must be done to all irrespective of status. This right is essential and the Judiciary, as one of the State organs and the custodian of justice, has the obligation “to observe, respect, protect, promote and fulfil” this right by all means,¹⁷¹ including by developing a performance management system supported by a robust legal framework. Further, in fulfilling the right to equal protection of the law, the Judiciary must not only reduce barriers to access to justice, but also take effective measures to ensure its services are accessible to all those who seek its assistance. These include adopting appropriate case management measures, simplifying court procedures, and ensuring physical accessibility to courts.

Additionally, the exercise of judicial mandate is guided by the principles enshrined in Article 159(2) of the Constitution, key of which is the expeditious delivery of justice to all irrespective of status and without undue regard to technicalities. Similarly, the overriding objectives (also known as the “Oxygen Principle” or double O principle) under sections 1A and 1B of the Civil Procedure Act, 2010 and corresponding sections 3A and 3B of the Appellate Jurisdictions Act¹⁷² emphasise on the promotion of just, expeditious, proportionate

¹⁷¹ Constitution of Kenya, 2010, Article 21(1).

and affordable resolution of disputes. The Judiciary's duty is to give effect to these principles by ensuring just determination of proceedings, efficient use of the available judicial and administrative resources, expeditious and cost-effective disposal of the proceedings, and the use of appropriate technology.¹⁷³ To effectively achieve this, the Judiciary has gone through a number of administrative and structural reforms aimed at enhancing fairness, transparency, accountability and improvement of service delivery. These principles are essential in a democratic society that is founded on the rule of law and equal protection of the law.

In spite of this, the Judiciary is still characterised by inaccessibility and undue delays, leading to loss of public trust and confidence and huge case backlog.¹⁷⁴ It is within this setting that the PMMSC was established to institutionalise an integrated performance management and measurement system in the Judiciary. Other institutional measures taken to implement performance management in the Judiciary include the establishment of the DPM, and Performance Management Understandings. The Constitution therefore sets an adequate framework for the implementation of performance management and measurement in the Judiciary as a means of fulfilling the values and principles espoused therein.

3.2.2 Statutory Provisions Relating to Performance Management

The main statutory frameworks that expressly provide for judicial performance management and measurement are the High Court (Organisation and Administration) Act, 2015,¹⁷⁵ and the Court of Appeal (Organisation and Administration) Act, 2015.¹⁷⁶ These statutes also contain provisions on case management, which together with the various Practice Directions developed by the Judiciary, are aimed at enhancing the integrity and general performance of the Judiciary. This relevant statutory provisions and Practice Directions are discussed below.

¹⁷² Cap 9 Laws of Kenya.

¹⁷³ Appellate Jurisdiction Act Cap 9, section 3B.

¹⁷⁴ The Judiciary, Republic of Kenya (n 1) viii.

¹⁷⁵ High Court (Organization and Administration) Act, No 27 of 2015.

¹⁷⁶ Court of Appeal (Organization and Administration) Act No 28 of 2015.

One of the principles for enhancing access to justice in Kenya is a focus on individual accountability and institutional responsibility.¹⁷⁷ Based on the A-Z theory, individual judicial officers are expected to be moving up in the A-Z performance scale. Those who excel at the upper side of the scale should be motivated through an indicator-based reward and sanction system that is clearly defined in law. In trying to align with this philosophy, the Kenyan Judiciary's DPM influenced the inclusion of performance management provisions in the High Court (Organisation and Administration) Act, 2015. Section 29 of this Act requires the Principal Judge of the High Court, upon consultation with the JSC, to oversee the implementation of a performance management system comprising of performance contracting, appraisal and evaluation of the judges of the Court in the discharge of their mandate, in line with the provisions of the Constitution, 2010, this Act and any other law.

In the same vein, section 31 of the Court of Appeal (Organization and Administration) Act, 2015, requires the presiding judge, in consultation with the JSC, to oversee the implementation of a performance management system comprising of performance contracting, appraisal and evaluation of the judges of the Court in the discharge of their mandate, in accordance with the provisions of the Constitution, this Act and of other law. Section 32 of this Act provides for ethics and integrity. Every judge of the Court of Appeal is obliged to sign and ascribe to the Judicial Code of Conduct. The presiding judge is charged with monitoring compliance with the Judicial Code of Conduct by judges and judicial officers.

Section 38(1) of the Judicial Service Act, 2011 mandates the JSC and the Judiciary to cause an annual report to be prepared for each fiscal year. Under sub-section 3 thereof, the report shall contain, among others, information relating to disposal of cases; issues of access to justice; performance of the Judiciary and attendant challenges; and such other statistical

¹⁷⁷ The Judiciary, Republic of Kenya, *A Service Delivery Agenda, 2017-2021* (n 12) 13.

information as the JSC and the Judiciary considers appropriate relating to their functions and judicial activities.

While the above statutes create a firm legal basis for developing a robust performance appraisal for judges, it does not capture the mode of assessing individual judges, the performance indicators and standards for judges. According to Rawls' theory of justice, the publicity of an institution's rules in whatever form (legislation or other) ensures that the key players of justice in that institution know what limitations on conduct to expect of one another and what kinds of actions are permissible for justice to prevail.¹⁷⁸ Further, according to the A-Z theory, higher performance can be achieved if the employees (in this case judicial officers) are clear of their job design; and the performance evaluation framework applied is pegged on clear standards and indicators of management.¹⁷⁹ Gay and Rossi also argue that if stakeholders in an institution are measured or otherwise ranked on the basis of their performance using specific criteria, they will fine-tune their conduct in a way that places them in a more competitive position.¹⁸⁰

Contrary to these theoretical propositions, the DPM largely relies on the report that was launched by the PMMSC in 2015. While the report acts as a blueprint for performance management in the Judiciary, it does not contain effective policy guidelines for the appraisal of the performance of individual judges, magistrates and Judiciary staff, and their contribution to the entire Judiciary's achievement. It is within these gaps that this study proposes the development of regulations that should guide performance appraisal for all judicial officers, including staff. The 2015 Report states that performance appraisal system will apply to judges, judicial officers and staff with a view to improving the overall performance of the Judiciary. Yet, this has not been the case in practice. Commenting on the

¹⁷⁸ Rawls (n 24) 49.

¹⁷⁹ The Judiciary, Republic of Kenya (n 1) 30.

¹⁸⁰ Gey and Rossi (n 62) 45.

inclusiveness of the performance management system, Respondent III stated that the DPM had started engaging all judges and magistrates and now has extended its performance appraisal tool to court stations through spot-checks.¹⁸¹ It may, therefore, be argued, albeit speculatively, that the DPM has plans to evaluate all stakeholders who have direct influence in the performance of the Judiciary.

Based on the A-Z theory, the study posits that the scope of the performance appraisal tool should be defined under a clear regulatory framework and effectively implemented to enhance the delivery of judicial service. This argument is buttressed by section 47(2) of the Judicial Service Act, 2011 which requires the JSC to make regulations providing for, among other things, the performance appraisal system of the Judiciary. These regulations should cover all components of performance management, including performance evaluation of judges, magistrates, Judiciary staff, and other stakeholders whose mandate affects judicial performance. The current legal framework, as demonstrated above, only provide for the appraisal of High Court and Court of Appeal judges. It is, however, unfortunate that the JSC has not crafted regulations to give effect to section 47(2) above or caused the enactment of performance management legislation. Some employees of the Judiciary subscribe to Respondent II's argument that reducing performance management into legislation will allow politicians to intrude into the independence of the Judiciary.¹⁸² This argument holds no water since the regulations contemplated under section 47(2) of the Judicial Service Act, 2011 are required to be presented to the National Assembly for debate and approval before they take effect.¹⁸³ If it were to hold water, the drafter of the Judicial Service Act, 2011, should have foreseen this and preferred another approach than vesting the power to approve the regulations in the National Assembly.

¹⁸¹ Interview with Respondent III, Annex III, 27 June 2017.

¹⁸² Interview with Respondent II, Annex III, 27 June 2017.

¹⁸³ Judicial Service Act, 2011, section 47(3).

It should be noted that the DPM plays a very central role in the Judiciary. Yet, there are no clear legal provisions on its mandate and composition. According to the A-Z theory, performance management should be based on a clear framework outlining indicators or standards of evaluation. In light of this, this study posits that there is need to enact a firm legal framework containing all performance management aspects, including the criteria for the appointment of the DPM members, case weights and the parameters for measuring judges, judicial officers, staff, and court stations. This will ensure that the performance management system is based on clearly defined principles and procedures, which cannot be contravened.

3.2.3 Statutory Provisions Relating to Case Management

Case management is one of the indicators of performance management.¹⁸⁴ For many years, case backlogs and delays have remained a major barrier to justice in Kenya. Cases took eternity to complete with some files vanishing in the system. This affected judicial performance and public confidence in the Judiciary. In an interview with a Deputy Registrar who also acts as a magistrate, Respondent I, the problem of case backlog was attributed to the poor case management, inadequate judicial human resource, inadequate or poor infrastructure, and numerous adjournments by judges and magistrates themselves, or upon the request of advocates. According to Respondent IV,

There are situations where some Judges are simply lazy and admit adjournment requests when no good reason is given. So, in a way, Judges also do contribute to backlog.

The Office of the Director of Public Prosecutions (ODPP) also contributes to this, especially when it is not adequately prepared to proceed with a case, or when witnesses fail to appear in

¹⁸⁴ The Judiciary, Republic of Kenya (n 1) 10.

court. Further, according to Respondent I, there is no equity in the distribution of magistrates [and judges]. Some stations have more while others have very few magistrates despite the huge case lists.¹⁸⁵

The same sentiments were echoed by Respondent II, who stated as follows:

This challenge is mainly as a result of poor case management and shortage of personnel especially magistrates and judges. Litigants themselves control the trial process by applying delay tactics. The problem of missing or hidden files also contributes to case backlog. The litigants also influence the registry staff. Instead of files being properly listed, they are taken to other judges or magistrates who did not fix the matters for hearing.

Thus, proper case management is critical to the organisational effectiveness and efficiency of courts as well as the performance and integrity of the Judiciary. It enables courts to isolate real facts in issue upfront, sieve superfluous witnesses and sort preliminary issues, making it easy to fast-track cases and make the best use of the available resources.

The coming into effect of the Civil Procedure Act and Rules, 2010 created a basis for the adoption of case management in civil cases. Under section 27(1) of High Court (Organization and Administration) Act No 27 of 2015, the Principal Judge has the duty to develop measures to maintain the integrity of the registry and the work of each court station or division, including case management, automation of records and business processes of the Court; protection and sharing of information; and the promotion of the use of information communication technology. This provision is replicated under section 29(1) of the Court of Appeal (Organization and Administration) Act, 2015, which obliges the Presiding Judge to implement and promote measures to ensure integrity of the registry and the work of each

¹⁸⁵ Interview with Respondent I, Annex III, 27 June 2017.

Court of Appeal station or division including: case management; automation of records and business processes of the Court; protection and sharing of information; and the promotion of the use of information communication technology.

Further, the Chief Justice may make Rules to give effect to these provisions, including the role of Depute Registrars and registries in the management of caseloads, the disposal of urgent and priority matters during Court recess and disposal of matters within twelve months from the date the Court fixes the matters for hearing.¹⁸⁶ Crucially, Rule 24 of the High Court (Organization and Administration) (General) Rules, 2016 (herein “High Court Rules, 2016”), provides that, for purposes of ensuring proper management of cases, the Depute Registrars are designated as case managers and are in that capacity required to undergo regular training, ensure the use of information communication technology in the management of Registries, and give directions to ensure expeditious and efficient judicial proceedings.

Under Rule 26(1) of the High Court Rules, 2016, the Registrar shall, with a view to making proper use of the Court's time and avoiding unnecessary applications and adjournments, list all or part of the pending cases before a single judge for a case management conference. Rule 27(1) requires the Principal Judge to establish measures to ensure that matters are disposed of within one year from the date the Court first sets the matter down for hearing. The Principal Judge may for that purpose equitably assign cases among the judges in the division or station; oversee the equitable assignment of resources and equipment among the divisions and stations, in consultation with the Chief Justice and Chief Registrar; encourage the regular holding of call-over sessions for the cases on the daily cause-list for purposes of ascertaining their respective readiness for hearing and allocating time for the hearing; encourage judges to list for hearing only such number of cases that the Court can reasonably hear and determine

¹⁸⁶ High Court (Organization and Administration) Act No 27 of 2015, sections 27(2) and 39(2); Court of Appeal (Organization and Administration) Act No 28 of 2015, section 29(2).

in a given day, and as much as possible whose witnesses for the parties are certified ready and available; and encourage the use of alternative dispute resolution where necessary in line with Article 159(2) of the Constitution, 2010.¹⁸⁷ The Principal Judge should also ensure that priority is given to older cases, that the number of adjournments is limited after a matter has been fixed for hearing, that the judge's cause lists is reviewed regularly to establish manageable proportion of complex cases and the caseload and creating time for writing judgements and rulings.

All these provisions are aimed at ensuring expeditious disposal of cases as a means of enhancing judicial performance. They, therefore, establish an adequate legal framework for case management in order to reduce the huge case backlog that characterise Kenyan courts.

In order to give effect to the above legal provisions on case management, the Judiciary has successfully rolled out electronic ("e") case management system in some court stations. This system mechanically generates cause lists and its linkage to a mobile phone short text message (SMS) engine enables litigants to send a text message to ascertain the status of their respective cases. Moreover, the "P & A file tracker" tool is being implemented to assist in the management of file movements in some court divisions. It enables litigants to track the status of their petitions through SMS. The Judiciary has also crafted Practice Directions which provide for, among others, case management checklists and conferences in the Commercial and Admiralty Division.

Similar efforts are being explored to ensure effective case management in criminal cases. In particular, by virtue of the *Practice Directions for Active Case Management of Criminal Cases in Magistrate Courts and High Courts*, courts will have powers to conduct pre-trial case management and pre-trial conferences. The Practice Directions also ingrain active case

¹⁸⁷ High Court (Organisation and Administration) (General) Rules, 2016, Rule 27(2).

management throughout the trial process to ensure swift movement of cases. These measures are aimed at expediting the disposal of cases to meet the ends of justice.

In 2015, the Court of Appeal developed the *Court of Appeal Practice Directions on Civil Appeals and Applications* in order to give effect to section 3A and 3B of the Appellate Jurisdiction Act. The purpose of these Practice Directions is to enable litigants and lawyers to adhere with the provisions of the Court of Appeal Rules, 2010. The Rules also reduce unnecessary applications and adjournments by requiring the Court of Appeal to list all pending appeals before a single judge for a case management conference. The ultimate aim is to improve the performance of the Court of Appeal by ensuring little time is expended in the just determination of appeals.

Further, in June 2015, the Judiciary introduced Traffic Practice Directions to assist courts in managing traffic cases. Admittedly, courts take a considerable time to settle traffic cases, most of which are minor offences. The Practice Directions require traffic courts to process payment of fines in open court, which is an improvement from the previous practice. Additionally, traffic offenders will not necessarily be detained in cells without first being granted time and adequate facilities to pay fines and bail. These have been achieved by ensuring there is enough staff in the traffic courtrooms to receive remittances. The Chief Justice and the Inspector General of Police have signed an Understanding to ensure the Practice Directions are effectively complied with by the police and judicial officers. A pocket-size summary of the Directions has been developed to guide drivers and motorists. In a nutshell, the Traffic Practice Directions have had a positive impact in the management of the numerous traffic cases in traffic courts. With the increasing use of the mobile money transfer technology, the Practice Directions have considerably reduced corruption incidences and mitigated delays in traffic courts. This has improved service delivery in traffic courts as well as the general performance of the entire Judiciary.

3.3 Administrative Measures Relating to Performance Management

Pursuant to the constitutional and statutory provisions identified above, the Judiciary has implemented a number of administrative measures to enhance judicial performance and public confidence in the Judiciary. This section critically analyses the effectiveness of these initiatives under the following sub-headings: performance appraisal and reporting system; evaluating the quality of justice; rewards and sanction scheme; and service delivery charters.

3.3.1 Performance Appraisal and Reporting System

Performance appraisal is a component that focuses on the performance of individuals and their role in as far as the Judiciary's performance is concerned.¹⁸⁸ The thesis behind this system is to provide data necessary to improve the performance of individual judges, magistrates and staff as well as the entire Judiciary. It involves setting targets for individual employees, agreeing on an implementation strategy, assessment of achievement, providing for feedback and management of a reward and sanction scheme.¹⁸⁹

Indeed, regular data collection and management enhances judicial performance. It informs the court users on institutional and employee performance, making it easy to identify gaps for improvement. The DPM currently uses the Daily Court Returns Template (DCRT) to compile numerical scores for individual judges and magistrates.¹⁹⁰ The daily returns from magistrates and judges are used to fill Monthly Court Returns (MCR), which is sent to the DPM for analysis.

This tool has improved case management and considerably addressed case delays. Commenting on the effectiveness of performance management, Respondent III stated as follows:

¹⁸⁸ The Judiciary, Republic of Kenya (n 1) 10.

¹⁸⁹ *ibid.*

¹⁹⁰ Interview with Respondent III, Annex III, 27 June 2017.

The tool has had an impact on the dispensation of justice from our first evaluation. Courts are now focusing on results – there are clear indicators of high case clearance rate, backlog reduction, productivity, hearing of criminal and civil cases within one year, and hearing of urgent applications within a specified period. All these are focused on expeditious dispensation of justice. However, a short study needs to be undertaken after three years to ascertain the magnitude of effectiveness.

Moreover, case backlog was one of the reasons for the establishment of the DPM.¹⁹¹ Its original objective, therefore, centred on ascertaining the extent of the backlog as an essential prerequisite for solving the problem.¹⁹² To achieve this, the DPM devised the DCRT tool based on performance indicators. According to existing literature, and the opinion of Respondent III, the tool has reduced case backlog, with the total case load in the Judiciary declining from over one million cases in 2011 to less than 500,000 in 2016.¹⁹³ This, according to Respondent III, indicates a high case clearance rate.

The DPM intends to gradually harmonise the DCRT tool with an Integrated Performance Management and Accountability System (IPMAS) that is being developed to provide for real time reporting and production of performance reports.¹⁹⁴ The Office of the Registrar, High Court, is also making efforts to improve the usability of the tool. As reported by Respondent III, the DPM is working on a Judicial Performance Data Policy to guide it on how to share data and the levels of data sharing.

Despite the positive impacts of the DCRT tool, there are a number of shortcomings. First, according to Respondent I, the DCRT does not reflect the peculiarities of each court division. Secondly, there is no separation of cases when making numerical scores for judges and

¹⁹¹ The Judiciary, Republic of Kenya, *Service Delivery Agenda 2017-2021* (n 12) 19.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ The Judiciary, Republic of Kenya (n 1) 11.

magistrates.¹⁹⁵ Equally, in setting up targets for case clearance, there was need to take into consideration the fact that cases differ in nature. However, the DPM has not developed case weights to guide this process. During the interviews, Respondent IV stated as follows:

I am not satisfied [with the numerical scores]. This is so because all cases are different. Some take many months to conclude, while others take minutes, hours or days. Also, in some divisions and court stations, the weight of workload is not the same. So obviously, this numerical measurement is not just and will only create friction in the Judiciary.¹⁹⁶

Respondent III, who is part of the DPM, admitted that case weighting is very crucial in setting up proper parameters for the DCRT tool. While plans are underway to develop case weights, it will be important to include this under the performance management regulations envisaged under section 47(2) of the Judicial Service Act, 2011.

Thirdly, the DCRT does not capture the out-of-court work performed by Deputy Registrars who also act as magistrates. This puts them at a disadvantage when ranked together with those who serve as full-time magistrates.

Fourthly, Respondent III admitted that, when launching the performance management system, not all stakeholders were engaged. This is buttressed by Respondent II's sentiments that:

We have not fully been made to own the performance management system. Although judges were called upon to embrace the system, those who developed it only considered general principles of performance applying to corporations. If the PM system is made for judges to embrace and own it, its ultimate impact will be effective.

¹⁹⁵ Interview with Respondent I, Annex III, 27 June 2017.

¹⁹⁶ Interview with Respondent IV, Annex III, 27 June 2017.

At the moment, the system is inadequate as it uses numerical scores as the only standard of measuring judicial performance.

Fifthly, clerks do not consult adequately when filling monthly returns.¹⁹⁷ They have also not been trained adequately on how to fill the forms. Judges go out of their way to ensure the clerks have filled the forms properly. It is not clearly provided for in law or policy/guideline that judges and magistrates should fill the forms. The DPM assigned this role to the clerks and trained only a few to act as trainers. According to Respondent III, the DPM identified 250 clerks and trained them as trainers for other clerks. Despite this, there are a lot of anomalies in the DCRTs, including capturing wrong details. Respondent IV had this to say regarding the involvement of clerks:

I am rarely consulted. The system assumes that the clerk will do the right thing. Again, there is not much time for consultation. Otherwise it would create an altogether new bureaucracy which will hamper our work. Yet I am not satisfied with the involvement of clerks in this process. There is always a feeling that not all the relevant data is entered.

This study urges the DPM to train clerks adequately to do proper consultation when filling the DCRTs.

Finally, the system currently applies to judges and magistrates. It will be crucial to include the judicial staff in the performance appraisal process as they have a bearing on the general performance of the Judiciary as well. As pointed out by Respondent IV, prosecutors have their own performance system, but there should be periodical interaction between the Judiciary and the ODPP to appraise performance.¹⁹⁸

¹⁹⁷ Interview with Respondent I, Annex III, 27 June 2017.

¹⁹⁸ Interview with Respondent IV, Annex III, 27 June 2017.

3.3.2 Evaluating the Quality of Justice

The quality of justice is fundamental. Jurisdictions such as Bulgaria and Netherlands have established a system that evaluates the quality of justice based on the principles of fairness and fidelity to the law, which derive from Rawls' theory of justice. Whether this is the case in Kenya is a question to interrogate. In its report, the PMMSC proposed that the system will focus on standardisation of Judiciary management processes and operations to make them effective and efficient to deliver quality services.¹⁹⁹ Standardisation in this sense include documenting, auditing, reviewing and determining whether processes, services, or documents conform to the specified requirements of ISO 9001 quality management standards.²⁰⁰ Whether the term "quality services" includes the quality of justice is unclear.

Respondent II observed that the current performance appraisal system is centred only on numbers. He pointed out that, the DPM has not communicated on any plans to evaluate the quality of justice delivered by courts. The system does not, therefore, capture the quality of justice. Similar sentiments were echoed by Respondent I. However, according to Respondent III, all the judiciaries in the world concentrate on numbers; not quality. Others use the success rate of appeals. The DPM has started an annual study of quality of judgements, which involves sampling of court users, lawyers, accused persons, and employees and asking them about judgements and rulings.²⁰¹ If 80 percent of court users say they are satisfied with the work of a judge, this indicates high quality of justice. The DPM's focus is to let the court users assess the judicial work. According to Respondent III, this mode of assessing quality is different from the bar survey used in Washington, DC (US). They use parameters like temperament to assess the quality, and therefore make promotions based on the findings. This, according to respondent I, is very hard to implement in Kenya given the fear that some

¹⁹⁹ The Judiciary, Republic of Kenya (n 1) 10.

²⁰⁰ *ibid.*

²⁰¹ Interview with Respondent III, Annex III, 27 June 2017.

lawyers might be biased. Respondent III pointed out that data on court users is being analysed.

In the researcher's view, the method used by the DPM is a bit general and undefined in scope. The fact that no regulations have been made pursuant to section 47(2) of the Judicial Service Act, 2011 means that the current performance appraisal system is not explicitly guided, and that there are no clear parameters for assessing the quality of justice. Instead, the quality of justice can be measured through carefully selected stakeholders, namely opinions of retired judges, lawyers who can fairly and critically examine judgements and rulings and give objective views, and the Council of Law reporting (since they have enough personnel to analyse and critique judgements).²⁰² Other options can be deduced from the comment below:

The quality of Judgments/Rulings can... be determined by the consumers of the same or by an appellate court. As an appellate high court, I have occasionally come across very poorly done Judgments and Rulings from magistrate's courts. But these are few individualized cases. In the whole, magistrates need to be trained in Judgment writing skills to enhance quality.²⁰³

3.3.3 Rewards and Sanctions Scheme

In its report, the PMMSC considers rewards and sanctions as forming the basis for an incentives framework to reward excellent performance and sanction poor performance.²⁰⁴ The ultimate goal is to encouraging judges, judicial officers and staff to embrace a performance culture that is informed by results, excellence and professionalism.²⁰⁵

²⁰² Interview with Respondent II, Annex III, 27 June 2017.

²⁰³ Interview with Respondent IV, Annex III, 27 June 2017.

²⁰⁴ The Judiciary, Republic of Kenya (n 1) 10.

²⁰⁵ *ibid.*

As pointed out by respondent I, the current performance management system has not fully embraced the aspect of rewards and sanctions. In practice, the system encourages recognition and issuance of certificates to excelling court stations and divisions.²⁰⁶ As yet, it has not identified particular individuals for awards or sanctions.²⁰⁷ While acknowledging that the system is still at the infancy stage, there is need to come up with other incentives, such as promotions, tangible (or monetary) rewards, trips, and training to ensure sustainable judicial performance.²⁰⁸ In this regard, the DPM has introduced monetary award to the best court station. In 2017, the DPM awarded Kshs.500,000 to the best court station to undertake a project of its choice (e.g., refurbishing the court rooms).²⁰⁹

However, there is need to rethink this system of ranking court stations instead of individual judges and magistrates because some court stations have more judicial personnel than others.²¹⁰ Reportedly, the DPM did not create room for discussions with judges and magistrates before ranking court stations.²¹¹ Interestingly, the DPM ranked itself in the recent ranking that saw the recognition of some court stations.²¹²

The DPM has set up a sub-committee on rewards and sanctions, and is working towards having an effective incentive scheme. In connection to this, Respondent III stated that:

Our proposal is that we have the tool implemented in the 3rd year of the PM system. We are proposing the following rewards: certificates; 13th salary (one month salary over the 12 months); sponsorship for best performers to undertake studies in certain areas; credit to the best performing court station; study tours; promotions; medals; and recommendations for state awards. We however need budget allocation for all these.

²⁰⁶ Interview with Respondent IV, Annex III, 27 June 2017.

²⁰⁷ Interview with Respondent IV, Annex III, 27 June 2017.

²⁰⁸ Interview with Respondent II, Annex III, 27 June 2017.

²⁰⁹ Interview with Respondent III, Annex III, 27 June 2017.

²¹⁰ Interview with Respondent I, Annex III, 27 June 2017.

²¹¹ Interview with Respondent III, Annex III, 27 June 2017.

²¹² Interview with Respondent I, Annex III, 27 June 2017.

While this proposal is robust, it will be important to specify thresholds for each reward. This can be provided for under the regulations contemplated in section 47(2) of the Judicial Service Act, or a policy document.

In her argument about sanctions, it was observed that there is no adequate sanction scheme for poor performers apart from the disciplinary process provided under the Judicial Service Act, 2011. Respondent I stated that:

Some poorly performing judges are transferred to remote areas and accorded more benefits, such as hardship allowance, and assigned few cases. Those who work hard feel that their efforts have been short-changed. Instead, they are assigned more cases.²¹³

3.3.4 Service Delivery Charters

Service delivery charters form an important component of the performance management system. The Judiciary introduced a citizen's service delivery charter in 2013 to improve service delivery.²¹⁴ The service charter was cascaded down to the directorates and other departments. Each directorate or department was required to design and display their own tailor-made service charters to suit respective services offered to the citizens.²¹⁵ This charter is an information tool that informs the citizens about the services rendered by the Judiciary, delivery timelines, service delivery standards, their obligations to assess compliance with those standards, costs of services, if any, as well as a complaint mechanism. The introduction of this charter has enhanced judicial accountability.

Besides, the Judiciary's Service Delivery Agenda, 2017-2021 is predicated on the notion of individual accountability.²¹⁶ While this essentially implies appraisal of the performance of

²¹³ Interview with Respondent I, Annex III, 27 June 2017.

²¹⁴ Kihara-Kariuki (n 121) 21.

²¹⁵ *ibid.*

individual judges, court-based performance appraisal is also considered as a strong basis or approach for service delivery.²¹⁷ The Judiciary's Service Delivery Agenda 2017-2021 requires each court station to develop its service delivery charter containing a clear set of indices, namely timeliness in retrieval of files, duration for concluding civil and criminal matters, timeframes for writing of judgments and rulings; range and state of ICT services, duration for making typed proceedings available, case backlog reduction strategy, number and effect of Court Users Committee Meetings and Open Days held periodically, corruption and public complaints reduction strategy, among others.²¹⁸

The DPM, in consultation with the Performance Management and Measurement Unit (PMMU) Steering Committee, and the individual Court Stations are required to develop indicators for each station's Service Delivery Charter.²¹⁹ The Station Based Service Charters will be displayed prominently and clearly in each court and bi-annual reports submitted to the Chief Justice. Every year, the Chief Justice will pronounce the best and worst performing Court Station based on its Service Delivery Charter Commitments. These statistics will have an impact on employee promotions, though a reward and sanction mechanism is yet to be established.

It is worth noting that the DPM has started implementing the court-based evaluation approach, albeit through court station visits. During the key informant interviews, Respondent III stated as follows:

We [the DPM] recently adopted spot-checks or court station visits where we go to court stations to see what they are doing. We go with our files and this helps us to

²¹⁶ The Judiciary, Republic of Kenya, *A Service Delivery Agenda, 2017-2021* (n 12) 58.

²¹⁷ *ibid.*

²¹⁸ *ibid* 58-59.

²¹⁹ *ibid* 59.

evaluate the general performance of all players, including clerks. Initially, we had adopted central-place evaluation system.

However, this mode of assessing the performance of court stations may not provide a true reflection of judicial performance as it is based on a short time observation and the DPM's general conclusion, for instance, that Court Station A performed well than B. In the researcher's view, there should be an action plan or guideline on how court-based assessments should be done to generate accurate statistics reflecting on the real performance of court stations.

3.4 Conclusion

Based on the A-Z theory, Rawls' theory of justice and Dicey's rule of law, this chapter sets a case for improvement of the current performance management system in Kenya. First, while the DPM has introduced a number of administrative measures to give effect to the legal provisions envisaged under the High Court (Organisation and Administration) Act, 2015 and relevant Rules, the Court of Appeal (Organisation and Administration) Act, 2015, and the Judicial Service Act, 2011, there is no explicit regulatory framework to guide the implementation of the system. In particular, the above laws do not adequately provide for the evaluation of magistrates, the parameters that are being used to measure the performance of court stations, judges and magistrates, the various indicators of performance appraisal, case weighting, and other connected issues raised above. In light of these gaps, the next chapter uses a case study approach to explore best practices that can be borrowed from other jurisdictions, particularly Netherlands, Finland, Bulgaria, and the US.

CHAPTER FOUR

COUNTRY CASE STUDIES AND LESSONS FOR KENYA

4.1 Introduction

The promulgation of the Constitution of Kenya, 2010 marked an auspicious and historic moment for the country. The country had been yearning for an effective legal framework and on the same scale there was need to reform the Judiciary to make justice more accessible and restore public confidence.²²⁰ As indicated in Chapter Two, performance review was re-

²²⁰ Kihara-Kariuki (n 121) 3.

introduced in 2003 through what is commonly known as the radical surgery. However, this did not see the light of day owing to the fact that the process was seen as being ineffective and was not appropriate enough to address the various peculiar issues that affected the Judiciary at the time. The Constitution, 2010 therefore laid a foundation for the reform of the Judiciary through, for instance, the vetting of judges and magistrates and setting up of various task forces to streamline service delivery. Through a consultative process, performance measures and targets for judges and magistrates have been set up. While the targets and measures reflect some of the recommendations of the previous committees and taskforces, they do not create an adequate framework upon which judicial performance can be evaluated and measured in Kenya. This has explicitly been underscored in Chapter Three above based on the various theoretical propositions. This chapter explores best practices from other jurisdictions that can help the Judiciary of Kenya enhance its performance. Specifically, the chapter discusses the experience of Bulgaria, USA (Arizona and the District of Columbia), Netherlands and Finland.

4.2 Republic of Bulgaria

One impressive lesson that can be drawn from Bulgaria is that the appraisal system is comprehensively entrenched under the Judicial System Act, 2007,²²¹ which sets out the institutional framework as well as the criteria for the appraisal of judges, prosecutors, investigating magistrates, administrative heads and their deputies, among others. This aligns with the A-Z theory which recommends a performance framework that is based on clear indicators or standards of evaluation.

4.2.1 Institutional Set Up

²²¹ SG No. 64/7.08.2007.

Article 37(1) of the Judicial System Act, 2007 requires the Supreme Judicial Council of Bulgaria to establish from among its members a Standing Commission on Proposals and Appraisal of Judges, Prosecutors and Investigating Magistrates and a Standing Commission for Professional Ethics and Prevention of Corruption, and any other standing commission that shall assist its business. The two commissions comprise ten members each, and are required to elect a chairperson from among their members.²²² Further, in discharging its mandates, the Commission on Proposals and Appraisal is required to form from its membership two sub-commissions, one for judges and another for prosecutors and investigating magistrates.²²³

Article 39(1) of the Judicial System Act, 2007 mandates the Commission on Proposals and Appraisal to conduct the performance evaluation of judges, prosecutors and investigating magistrates, with the help of its auxiliary appraisal commissions at the Judiciary bodies/departments. Support performance appraisal commissions are established in all judicial system departments, and each commission comprises three judges, prosecutors or investigating magistrates designated by the administrative head of the respective department.²²⁴ Under sub-article 2, the Commission on Proposals and Appraisal is required to conduct: appraisals for acquiring tenure status by judges, prosecutors and investigating magistrates; periodic appraisal of the deputies of the administrative heads and of the judges at the Supreme Court of Cassation and the Supreme Administrative Court, of the deputies of the Prosecutor General and of the prosecutors at the supreme cassation prosecution office and the supreme administrative prosecution office and of the investigating magistrates at the National Investigating Service; and periodic appraisal of the administrative heads of Judiciary bodies,

²²² Republic of Bulgaria, Judicial System Act, Article 37(3).

²²³ *ibid* Article 37(4).

²²⁴ Vishvajeet Singh Rathore, *Performance Assessment System of Magistrates* (National University of Juridical Sciences, Kolkata), 9, <<http://www.nja.nic.in/3.%20pafn%20Vishvajeet%20Singh%20Rathore.pdf>> accessed 20 August 2017.

except for the Chairpersons of the Supreme Court of Cassation, the Supreme Administrative Court, and the Prosecutor General.

Further, the auxiliary commissions are elected by the respective Judiciary bodies or departments on a random selection principle to assist the Commission on Proposals and Appraisal in the conduct of periodic appraisals of judges, prosecutors and investigating magistrates and of deputies of administrative heads. The auxiliary commissions consist of three regular members and a substitute, but this may not include the administrative head. The auxiliary commission is required under the Judicial System Act to elect a chairperson from amongst its members. Article 39(6) of the Judicial System Act provides that:

No auxiliary appraisal commissions shall be elected at the district courts, at the administrative courts, at the district prosecution offices, at the regional investigation departments of the regional prosecution offices and at the investigation department of the specialised prosecution office.

4.2.2 Appraisal Criteria

Bulgaria's judicial appraisal system is twofold. First, the Commission on Proposals and Appraisal is required to carry out an appraisal for the purpose of acquiring tenure after one has completed a five year length of service as a judge, prosecutor, or investigating magistrate.²²⁵ This type of appraisal is informed by the results of the periodic appraisal and is focuses on the professional qualifications and the performance record of the judge, prosecutor, and investigating magistrate.²²⁶ It worth noting that a judge, prosecutor or investigating magistrate can only acquire tenure after completing a five-year term at the respective position and after receiving a positive aggregate evaluation from the appraisal.²²⁷

²²⁵ Republic of Bulgaria, Judicial System Act, 2007, Article 196(1).

²²⁶ *ibid* Article 197(1).

²²⁷ *ibid* Article 207.

Secondly, auxiliary appraisal commissions are mandated to conduct periodic appraisals every after four years until the judge, prosecutor, investigating magistrate, administrative head or deputy administrative head has attained the age of 60 years.²²⁸ This entails an assessment of the professional qualification and performance based on the criteria and indicators specified under the Judicial System Act and the Ordinance enacted by the Supreme Judicial Council (pursuant to Article 209a of the Judicial System Act). The Ordinance contemplated in this provision provides for indicators and procedures for conducting the appraisal as well as the criteria for determining the workload of the Judiciary bodies. The procedure for conducting periodic assessments is articulated under Article 204 of the Judicial System Act, 2007.

Bulgaria's judicial appraisal is done on the basis of both general and specific criteria. The general criteria comprise legal knowledge and skills; analytical skills regarding legally relevant facts; skills for optimal organisation of work; expedience and discipline.²²⁹ This takes into consideration compliance with terms, number of acts confirmed and repealed and the reasons therefore. It also takes into account the results of inspection conducted by the Inspectorate at the Supreme Council; the overall workload of the respective judicial division or body as well as the workload of the appraised judge, prosecutor, or investigating magistrates compared to other judges, prosecutors or investigating magistrates in the same judicial division or body.²³⁰ If the person being appraised is a junior judge or prosecutor, the appraisal of the judge or prosecutor mentoring him/her is also considered. There are incentives and sanctions during the performance appraisal period.

On the other hand, specific criteria cover the judge's compliance with the schedule of court hearings, the skills of conducting court hearings and drawing up records of proceedings.²³¹

²²⁸ *ibid* Article 204.

²²⁹ *ibid* Article 208(1).

²³⁰ *ibid* Article 208(2).

²³¹ *ibid* Article 199(1).

Prosecutors shall be appraised based on the skills for planning and adopting a structured approach at taking action in pre-trial and trial proceedings; the level of implementation of written instructions and personal orders of a higher-standing prosecutor, and organisational skills. As for the investigating magistrates, the specific criteria focus on the skills for planning and adopting a structured approach at taking action in the pre-trial process.

Under Article 200 of the Judicial System Act 2007, the evaluation of administrative heads and their deputies shall entail an assessment of their qualification as judges, prosecutors or investigating magistrates in addition to the assessment of their administrative role/position. Administrative heads are assessed based on the following parameters: ability to work in a team; ability to make correct management decisions; communication skills; and behaviour which enhances judicial authority.²³² When appraising the performance of administrative heads or their deputies includes, the performance of the judicial department they are heading is assessed as well and taken into account.

4.2.3 Evaluation Procedure

The decision to conduct judicial performance appraisal is made by the Commission on Proposals and Appraisal following a proposal made by the concerned judge, prosecutor, investigating magistrate, administrative head or his/her deputy, or by not less than one-fifth of the members of the Supreme Judicial Council.

When carrying out periodic assessments, the auxiliary appraisal commissions and the Commission on Proposals and Appraisal are obliged to inspect records, protocols of the procedural actions performed by the judges, prosecutors and investigating magistrates, including their acts during the appraisal period.²³³ The auxiliary commissions and the Commission on Proposals and Appraisal may hear the person(s) being appraised and gather

²³² *ibid* Article 201.

²³³ *ibid* Article 204a (1).

any additional information based on the existing performance appraisal indicators. At the end of the appraisal exercise, the Commission on Proposals and Appraisal draws up an aggregate evaluation, which may be positive or negative. The positive aggregate evaluations are graded as satisfactory, good or very good. The Commission is required to submit the aggregate evaluations together with appropriate recommendations to the appraised person, who may file within seven days written objections with the Supreme Judicial Council.²³⁴ If such an object is filed, the Supreme Judicial Council shall accord the appraised person a hearing and, if necessary, collate additional information. The Council must notify the person at least seven days prior to the hearing date. The Commission is then notified to draw up a new aggregate evaluation.

4.2.4 Best Practices

Kenya can borrow a number of lessons from Bulgaria. First, judicial performance evaluation in Bulgaria is entrenched in firm legal framework, the Judicial System Act, 2007. The Act provides for the establishment, powers, and composition of the Standing Commission on Proposals and Appraisal of Judges, Prosecutors and Investigating Magistrates. For instance, the Commission has powers to form sub-commissions or auxiliary appraisal commissions to assist it in carrying out periodic appraisals of judges, magistrates, prosecutors, administrative heads and deputies of administrative heads.

Secondly, interpreting the A-Z theory, the A-Z performance scale must include all parties who are likely to impact on the general performance of the institution in question. In Bulgaria, prosecutors are evaluated since their activities directly affect judicial performance. Kenya's performance management system does not cover prosecutors given that they

²³⁴ *ibid* Article 205(1).

contribute to the huge case backlog, which ultimately impact on the general performance of the Judiciary.

Thirdly, the criteria and procedure for evaluating judges, magistrates, and prosecutors among others are comprehensively provided for under the Judicial System Act, 2007. This is significant given that Kenya's judicial performance management is not adequately entrenched in law. While the High Court (Organisation and Administrative) Act, 2015, and the Court of Appeal (Organisation and Administration) Act, 2015 contain some provisions on case management and performance appraisal, there is need to enact legislation or regulations on the functioning of the DPM, its membership, collaboration with other stakeholders, criteria for evaluation of judges and magistrates, as well as case weighting. Kenya's Judicial Service Act, 2011 requires the JSC to make regulations providing for, inter alia, the performance appraisal system of the Judiciary. However, no such regulations have been made, and even if they do exist, it is highly probable that they do not adequately provide for performance appraisal. This exposition gains credence in Respondent III's sentiment that the DPM has proposed a Bill pursuant to section 47(2) (g) of the Judicial Service Act, 2011.

4.3 United States

In the US, judicial performance evaluation began in the 1970s with the development of a set of case management principles and approaches aimed at reducing and avoiding case delays. However, the challenge of case delays was identified in the early 1900s by Roscoe Pound, who identified inefficiency as the main cause of disappointment with American courts which had led to uncertainty, delay and high costs.²³⁵ The development of the general standards for evaluating judicial performance commenced in 1987.²³⁶ In the 1990s, the Commission on

²³⁵ The Judiciary, Republic of Kenya (n 1) 12.

²³⁶ Antti Savela, 'Evaluation of the Quality of Adjudication in Courts of Law: Principles and proposed Quality Benchmarks' (Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland, 2006) 28.

Trial Performance and Standards published Trial Courts Performance Standards with the aim of enabling general jurisdiction state trial courts to evaluate their ability to adjudicate and dispose of cases fairly and expeditiously.²³⁷ The US performance management system largely derives from the principles advanced by Rawls' theory of justice and Dicey's rule of law theory, namely justice as fairness (including procedural fairness), equality principle, and fidelity to the law and independence among others.

There are five performance indicators in the US, each comprising a number of detailed appraisal standards.²³⁸ These are:

- (1) Access to Justice: This performance area is focused on the accessibility and openness of courts. The factors considered here include the location of court stations, procedures and the courtesy of the court personnel. It involves five standards, namely public proceedings; safety, accessibility and convenience; effective participation; courtesy, responsiveness and respect; and cost-effectiveness (including time requirement of court proceedings).
- (2) Expedition and Timeliness: This involves three standards, such as case processing; compliance with schedules, and prompt implementation of law and procedure.
- (3) Equality, Fairness and Integrity: The leading principle in this area is that courts should provide equal justice to all pursuant to the US Constitution. This area comprises six standards, namely fair and reliable judicial process; jury function; court decisions and actions; clarity; responsibility for enforcement; and production and preservation of records.

²³⁷ The Judiciary, Republic of Kenya (n 1) 13.

²³⁸ Savela (n 244) 28-29.

- (4) Independence and accountability: There are five performance appraisal standards under this area. These are independence and comity; accountability for public resources; personnel practices and decisions; public education; and response to change.
- (5) Public Trust and Confidence: In this final category, there are three standards, namely accessibility; expeditious, fair, and reliable court functions; and judicial independence and accountability. While in the standards in above four areas are mainly evaluated from the viewpoint of the participants in the court proceedings, the fifth performance area takes a broader viewpoint covering the general public and future customers of the courts. The key premise is that justice should not only be done, but it must be seen to be done.

These standards are measured through observation, simulations, interviews, document review, and inspections, among others.²³⁹ The ensuing section explores select case studies from the US.

4.3.1 Arizona

Arizona's merit-based selection of justices and judges is based on Judicial Performance Review (JPR) system.²⁴⁰ This system commenced in 1992 upon the approval of the constitutional amendment that sought to establish a performance evaluation process, an oversight commission, and a public hearing for each judge who wanted to be retained in office. In particular, Article VI (42) of the Arizona Constitution, 1958 provides that:

The [Arizona] Supreme Court shall adopt, after public hearings, and administer for all justices and judges who file a declaration to be retained in office, a process, established by court rules for evaluating judicial performance.

²³⁹ *ibid.*

²⁴⁰ Berch and Bass (n 43) 927-952.

Pursuant to this constitutional provision, the Supreme Court adopted the Arizona Rules of Procedure for JPR in 1993 to implement the system. Under these Rules, the main objective of the JPR is to help voters in evaluating the performance of judges and justices who are seeking to be retained, facilitate self-improvement on the part of the judges and justices; promote appropriate judicial assignments; and assist in identifying necessary judicial training programs.²⁴¹ The Rules are also aimed at promoting the JPR's goals, which include protecting judicial independence while fostering public confidence in the Judiciary.²⁴²

The Supreme Court created a JPR Commission pursuant to Rule 2 of the JPR Rules to oversee the appraisal process. Commission comprises 30 members (18 representatives from the public, 6 attorney members, and 6 judges) appointed by the Supreme Court for a term of four years.²⁴³ The Commission is mandated to develop JPR standards and undertake periodic performance reviews of all judges seeking for retention. The current standards require judges to discharge their mandate of administering justice fairly, ethically, uniformly, promptly and efficiently; be free from personal bias when making decisions and decide cases based on the proper application of law; issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis; act with dignity, courtesy and patience; and effectively manage their courtrooms and the administrative responsibilities of their office. These standards conform to Dicey's rule of law values of consistency, legality, certainty, accountability, efficiency, due process, and access to justice, among others. These values form a strong basis for evaluating judicial performance and should strictly be pursued in a performance system that is destined to succeed.

The JPR is carried out in two phases: midterm and just before the retention election. It involves two main aspects: data collection and reporting; and direct engagement of judges to

²⁴¹ Arizona Rules of Procedure for Judicial Performance Review, 2010, Rule 1.

²⁴² *ibid.*

²⁴³ Arizona Rules of Procedure for Judicial Performance Review, 2010, Rule 2(a), (c).

facilitate self-evaluation and improvement.²⁴⁴ Under Rule 6(b) of the JPR Rules, the Commission is required to conduct anonymous surveys to collect data primarily from people who have had first-hand experience with judges during the evaluation period. Regarding superior court judges, the Commission is required to source data from attorneys, jurors, litigants, court staff and other judges.²⁴⁵ For the surveys, judges are rated based on four criteria: integrity (e.g. fairness and impartiality and equal treatment of parties or their representatives); communication skills; judicial temperament; and administrative performance.²⁴⁶ The attorney respondents are required to consider the judges' legal ability, while trial judges are appraised on settlement activities.²⁴⁷ Importantly, a common theme in these criteria is that they tend to test the fairness and legitimacy of the overall judicial system. The aspect of equal treatment of parties underscores Dicey's principle of equality, which stresses that all classes of people should be subject to the same law regardless of their origin, race, age, gender, and political affiliation.

Arizona uses an independent data centre to collate the survey responses and ensure integrity in the process.²⁴⁸ To avoid possible bias for or against a judge, the responses are coded in a manner that the Commission members are barred from knowing the identity of the judge whom they are reviewing.²⁴⁹ The Data Centre also protects those who comment on the responses.

One important lesson from this case study is public participation. Article VI (42) of the Arizona Constitution provides that the public shall be accorded a full and opportunity for participation in the evaluation process. Crucially, the evaluation results are mailed to each voter together with Judicial Performance Evaluation information.

²⁴⁴ *ibid* Rules 4, 6.

²⁴⁵ Berch and Bass (n 43) 932.

²⁴⁶ Arizona Rules of Procedure for Judicial Performance Review, 2010, Rule 6(b)).

²⁴⁷ Berch and Bass (n 43) 933.

²⁴⁸ Arizona Rules of Procedure for Judicial Performance Review, 2010 Rule 6(a).

²⁴⁹ *ibid* Rule 7.

4.3.2 District of Columbia

Judicial performance evaluation in the District of Columbia is conducted by an independent Judicial Performance Evaluation Commission. This Commission appraises the performance of judges on the basis of their temperament, understanding of the law and administration of court functions. The term of any non-performing judge is not renewed.

The District of Columbia develops four year performance evaluation strategic plans, which provides a clear implementation guideline for performance management programs. Although courts and Chief Judges have not signed or negotiated any performance agreements, the influence of Chief Judges on their peers is used to improve the performance of non-performing judges.

One of the outstanding themes in the District of Columbia is that Chief Judges are allowed to impose soft sanctions for less than satisfactory performance. These include conditional denial of leave of absence, a recommendation for reduction of pay, and a “name and shame” sheet published monthly to judges. The outcome of performance appraisal is also utilized during periodic reviews for promotion or demotion of judges. This system is consistent with the A-Z theory, which requires employees to be moving up the performance scale and those who stagnate at the lower side of the scale to be sanctioned through a legal process.

The other best practices include wide consultation with relevant stakeholders and outreach programs (including by use of the Information Communication and Education Strategies (IEC)), as well as capacity building of staff. Kenya has the Judiciary Training Institute for judges, but whether judicial support staff is also trained periodically is unclear. As revealed during this study, the DPM did not adequately engage all key stakeholders before launching the performance management system in Kenya.²⁵⁰

²⁵⁰ Interview with Respondent III, Annex III, 27 June 2017.

4.3.3 Best Practices

Several lessons emerge from Arizona and the District of Columbia. First, Arizona's JPR system is provided under the Constitution. The JPR Rules, 2010 are envisioned under Article 42 of the Arizona Constitution, which mandates the Supreme Court to adopt, after wide public engagement, a process, established by court rules, for appraising judicial performance. In other words, the JPR Rules, 2010 are a creature of the Arizona Constitution. Secondly, Arizona's Constitution expressly provides for public participation in JPR processes. To ensure judicial independence, the JPR Commission uses an independent data centre that collates surveys and imbues confidentiality and integrity in the JPR process, including anonymity of judges whose performance is being appraised. Thirdly, unlike in Kenya, the criteria and procedure for judicial performance evaluation, as well as the membership of the JPR Commission are clearly provided for under the JPR Rules, 2010. As indicated above, Arizona's JPR system is based on four standards or criteria: integrity; communication skills; judicial temperament; and administrative performance.

In addition, the District of Columbia presents two lessons for Kenya. First, the Judicial Performance Evaluation Commission appraises judges based on clear standards: temperament, understanding of the law and administration of court functions. Second, the State has a rewards and sanction scheme that involves promotions for excellent performers and the imposition of soft sanctions for less than satisfactory performance. Some of the sanctions include denial of leave, a recommendation for reduction of pay, demotions and a name and shame sheet published monthly to judges. Third, unlike in Kenya, the District of Columbia's Judicial Performance Evaluation Commission conducts wide stakeholder engagement through outreach programs and the IEC. There is also capacity building for non-performing judicial staff.

4.4 Netherlands

Judges form a very key component of the judicial systems in the Netherlands. As such, their role is no longer taken for granted. The country has been at the forefront pushing for a better justice system through demand for legal quality, speed, accessibility, integrity and legal unity.²⁵¹ In light of this, the judicial system was reformed in 2002, leading to the establishment of the Council for the Judiciary at the national level. The Council took over the mandate that was previously vested in the Minister for Justice, making the Judiciary more independent and strong.

Formed in 2002, the Council for the Judiciary is charged with ensuring that judges can discharge their duties in administering justice effectively.²⁵² The Council is tasked with coordination, initiation, facilitation, supervision and management of the Judiciary.²⁵³ One of the Council's core mandates under its regulations is promotion of legal quality and the uniform application of the law which entails scrutinising the value of the specific verdicts or that of separate judges. The Council establishes and maintains the quality system and promotes quality developments in the courts.²⁵⁴

Further, all courts in Netherlands are subject to the RechtspraakQ, which is a quality system that is aimed at ensuring improvement of the Judiciary's quality in a systematic way. At the core of the RechtspraakQ tool are the quality regulations and the judicial performance measuring system. The regulations prescribe key indicators constituting proper administration of justice.²⁵⁵ These include indicators that touch on both the quality of judicial performance and the quality of the Judiciary as an institution. The tool therefore describes how those

²⁵¹ Netherlands Council for the Judiciary, 'Quality of the Judicial System in the Netherlands' (The Hague, Netherlands: Judiciary Information Service 2008) 4.

²⁵² *ibid.*

²⁵³ Frans van Dijk and Rosanna Kouwenhoven, 'Judicial reform in the Netherlands: Change in broad outline' (2014) *Scientific Magazine for the Judiciary Organisation of the Netherlands* 18.

²⁵⁴ *ibid.*

²⁵⁵ Netherlands Council for the Judiciary (n 259) 5.

indicators can be evaluated, taking into account the unique nature of various court levels. In this regard therefore courts make use of visitation and customer evaluation studies in order to evaluate improvements in excellence. RechtspraakQ should, thus, be understood as a support system for promotion and assurance of the quality of justice.

RechtspraakQ model is made of three elements, namely normative framework (quality regulations and judicial performance measuring system); measuring instruments (court-wide position study, client evaluation survey, staff satisfaction survey, visitation, visitation, and audit); and other elements (such as complaints procedure and review).²⁵⁶

4.4.1 Normative Framework

The normative framework constitutes a quality management model that is founded on the INK model which heavily borrows from the European Foundation for Quality Management (EFQM) model.²⁵⁷

The model focuses on quality regulations and judicial performance measuring system. Under the component of quality regulations, every court and related divisions have their own set of quality regulations, which are at the centre of RechtspraakQ. They list the aspects that are considered by the courts and the Council of the Judiciary to be of importance to the quality of the judicial system and the additional justified requirements of direct stakeholders. The regulations lay down the responsibilities of the court management board and the sector management for the different areas of attention, both with respect to judicial performance and with regard to the Judiciary as an institution.²⁵⁸ In this way, they create a general image of what quality constitutes and provide a guideline for improving the quality of services. Each

²⁵⁶ *ibid* 6.

²⁵⁷ *ibid*.

²⁵⁸ *ibid* 7.

court division has its own sector management system that aligned with the Rechtspraak model.

Judicial performance measuring system is used to measure the performance of the courts, though this very abstract and broad. It is informed by the following critical indicators: impartiality and independence, expertise of judges, treatment of parties in court, timeliness of proceedings, and judicial quality.

4.4.2 Measuring Instruments

This component evaluates the performance of the judges based on a five-point scale comprising impartiality and integrity of judges, expertise of judges, personal interaction with litigants, unity of law, speed, and proceeding on time.²⁵⁹ Annual reports provide for the basis upon which the Court Management Board is to determine whether or not to make improvements.²⁶⁰ The Board appraises the quality in the courts through various instruments. The first one is court-wide position study, which involves an assessment of the court's position every two years. The Board generally analyses the court's progress in terms of performance especially in specific areas defined under the quality regulations. This lays a foundation for developing improvement plans.

Secondly, a customer evaluation survey is undertaken once every four years to evaluate the views of the court users so as to ensure the public has confidence in the system. During the survey the customers are queried on various service provision aspects of the courts such readability and comprehensibility of a decision, and whether the hearing process is expeditious.²⁶¹

²⁵⁹ The Judiciary, Republic of Kenya (n 1) 20.

²⁶⁰ Netherlands Council for the Judiciary (n 259) 8.

²⁶¹ *ibid* 10.

Thirdly, a staff satisfaction survey is conducted every four years to assess their satisfaction with the court's manner of service delivery. The findings form the basis upon which to undertake performance improvements in the courts. Courts also receive external visitors every four years, such as university professors, and the public prosecutor, to ensure that they are indeed accountable to the society.

A judicial audit is one of the most important instruments of measuring performance progress of the Judiciary in the Netherlands. This approach is intended to determine if the courts' performance appraisal model is being met.

4.4.3 Other Approaches

Other approaches being in the measurement of judicial performance in Netherlands are the peer review and the complaints procedure. In the peer review approach, colleagues such as judges and other officers of the court consult among themselves in order to gauge their performance. They, for instance, take time to watch a recorded hearing as part of the peer review process. The shortcoming of this approach is that the findings are not published. The complaints procedure on the other hand is meant to bring into light actions undertaken by judges and the support staff. The procedure is meant to streamline the handling of complaints. Annually, the complaints get published.

4.4.4 Best Practices

Like in Kenya, the Dutch government has for a long time pushed for a better justice system through demand for legal quality, expeditious disposal of cases, accessibility, integrity and legal unity. In achieving this, the Dutch Council of the Judiciary is mandated to promote legal quality and the uniform application of the law. While Kenya's judicial performance management system is based on numerical scores, the Dutch system entails scrutinizing the value of specific verdicts to establish the quality of justice. Thus, legal quality dominates the

Dutch judicial performance appraisal system. Central to this is the Rechtspraak tool, which comprises a set of quality appraisal regulations. These regulations prescribe key performance indicators and how these can be evaluated considering the unique nature of different court levels and divisions. One distinct issue in Kenya is that the ranking of court stations, which commenced recently, does not take into account the different circumstances of the various court stations ranked.

Further, based on the A-Z theory, the Rechtspraak tool uses a five-point scale to evaluate the performance of judges. This scale involves five indicators, namely impartiality/integrity and independence of judges, expertise of judges, treatment of litigants, expeditious disposal of cases, and judicial quality.

4.5 Finland

Finland has established a system that regularly evaluates the performance and output of each court. The country also has clear performance and quality indicators, which include length of proceedings, closed cases, pending cases and case backlogs, and productivity of judges and court staff.²⁶² There are no defined quantitative performance targets for each judge. Such targets are developed at the court level.²⁶³ All courts in Finland are required to maintain statistics regarding the number of incoming cases, the number of judgments and rulings, the number of adjournments, and the length of proceedings.²⁶⁴ The Court Administration Unit of the Ministry of Justice uses these statistics in its reporting system.

At the core of the Court Administration Unit is the performance-based management of the court system. The Unit undertakes annual negotiations with each court for the purpose of setting up performance targets and allocating operational resources. This role forms the bulk

²⁶² European Commission for the Efficiency of Justice (CEPEJ), *Study on the Functioning of Judicial Systems in the EU Member States* (Strasbourg, Council of Europe, 14 March 2014) 482.

²⁶³ *ibid.*

²⁶⁴ *ibid.*

of the work done by the Unit's officials, with the inherent principle being frequent collaboration with courts and their managers. The Unit also represents the interests of the State in court proceedings emanating from alleged judicial misconduct, among other administrative roles.

Further, the Finland judicial system has a quality benchmark model covering both criminal and civil cases. In the mid-1990s, the European countries' judicial systems were put on challenge by the public to embrace the quality benchmark model in order to improve service delivery and accountability to the public. During then, a benchmark model was conceptualized and first implemented in the Court of Appeal of Finland.²⁶⁵ A quality pilot project was undertaken in 2003 based on the realisation that the public wanted the courts to be efficient, cost-effective and produce quality judgments and rulings.²⁶⁶ This was to provide useful data that would form the basis for, inter alia, training judges (for instance, by pointing out their weaknesses) and evaluating courts from time to time. The model's goals were set by the courts themselves and are evaluated once between 3-5 years. The purpose of this model is to ensure fair trials, well-reasoned judgments and rulings, and that judicial services are accessible.²⁶⁷ The model consists of discussions among the judges and also between the judges and the stakeholders, for the purpose of improving the quality of adjudication.²⁶⁸

Besides, the Ministry of Justice of Finland has liaised with courts to come up with systems that are applicable to individual judges and at the national level. The system is meant to assess the courts performance based on the indicators of their economy, efficacy and productivity. These indicators are also applied in the annual meetings to enable the Ministry of Justice and the head of courts to define the necessary objectives to be met. The debate

²⁶⁵ The Judiciary, Republic of Kenya (n 1) 21.

²⁶⁶ *ibid.*

²⁶⁷ Savela (n 244) 54.

²⁶⁸ *ibid.*

revolving around the management of results has brought about different standpoints where some argue that officials' definition of objectives of the Ministry would have a negative effect on the independence of the Judiciary which is under the protection of the Constitution while others are of the opinion that management by results will make the attention of the judges to shift the number and processing time of cases, thus affecting the quality of the decision.

The Finnish Ministry of Justice has had a soft approach trying to avoid obvious conflicts between the Judiciary and the respective Executive. It is notable that the Executive's system of management by results emphasizes that the courts efficiency and productivity fosters the values that are administrative in nature. It is worth noting that systems put in place to ensure accountability and conformity to good practice and standards of law are understood to be very essential and desirable in the management of public institutions as well as justice. This puts the public in a better position to hold judges accountable for their decisions and actions.

4.5.1 Best Practices

Two lessons can be drawn from the Finnish model of judicial performance evaluation. First, unlike in Kenya, the Court Administration Unit of Finland is guided by the principle of stakeholder engagement where judges and courts play a role in setting up performance targets. As indicated above, the Unit undertakes annual negotiations, which form the bulk of its work. Secondly, Finland has a quality benchmark model that aimed at ensuring fair trials, well-reasoned judgments and rulings and accessible judicial services. The model also exhibits the principle of stakeholder engagement for the purposes of improving the quality of adjudication.

4.6 Conclusion

Dicey's rule of law doctrine requires the exercise of power to be within certain principles and procedures laid down under the law. Article 159(2) of the Constitution, 2010 provides for the principles that should guide courts and tribunals, namely that justice shall be done to all, irrespective of status; justice shall not be delayed; and justice shall be administered without undue regard to procedural technicalities among others. While the current judicial performance management in the Kenyan is geared towards achieving these principles, a number of best practices can be drawn from the foregoing case studies to revamp it. First, the USA jurisdiction provides three key performance indicators which would be necessary for Kenya: equality, fairness and integrity. The Arizona case provides a learning platform on how public participation would be incorporated into performance review of judges. Arizona has clear regulations on judicial performance evaluation, which are also reflected under the Arizona Constitution. In addition to the efficiency data, the District of Columbia has placed emphasis of consultation with relevant stakeholders and outreach programs (including by use of the IEC, as well as capacity building of staff. Although a Judiciary's Training Institute does exist in Kenya, it is not clear if the judicial staff is subjected to regular training as they should. As a matter of fact, the training of judges is not in any way informed by the numerical scores compiled by the DPM. As revealed by Respondent III, the scores are used to rank judges, magistrates, and court stations as opposed to forming a basis for regular training. In order to improve judicial performance, the next chapter provides practical recommendations based on the findings of the study.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND GENERAL CONCLUSION

5.1 Introduction

Since the promulgation of the Constitution, 2010, a number of judicial reforms have been undertaken to enhance access to justice and restore public confidence in the Judiciary. The Judiciary established the PMMSC in 2013 to establish an understanding of performance management system in the Judiciary, among other functions. This led to the establishment of the DPM to coordinate the implementation of performance management system. Since its establishment, the DPM has been instrumental in shaping judicial performance in Kenya. However, a number of challenges exist, which prompted an assessment of the effectiveness of the current judicial performance management in Kenya. The study, therefore, sought to examine whether the current judicial performance management system in Kenya is effective in enhancing access to justice, and whether it is adequately anchored in law.

The researcher hypothesised that, although the introduction of performance management system in the Kenyan Judiciary has remarkably improved service delivery and access to justice, its scope, procedures, standards and institutional structure are not adequately anchored in law. It was also hypothesised that the effectiveness of performance management is marred by a number of challenges, including its focus on quantity as opposed to quality, and lack of ownership by various stakeholders in the Judiciary.

In testing these hypotheses, the researcher employed a mixed methods approach comprising qualitative, doctrinal, case study and comparative methodologies. Four key informants gave informed responses which have widely been considered in developing this thesis. The researcher also undertook comparative analysis of Kenya's performance management system with that of Netherlands, US, Finland and Bulgaria. Based on this, this chapter provides a summary of the findings, recommendations in response to Question 3 in Chapter One, and the general conclusion.

5.2 Summary of the Findings

The study sought to answer four research questions:

1. What are the underlying principles and indicators of judicial performance management?
2. How adequate is the current legal and institutional framework governing judicial performance management in Kenya?
3. What international best practices can be adopted to enhance the effectiveness of performance management in the Kenyan judiciary?
4. How can the Kenyan judicial performance management system be improved to enhance access to justice and public confidence in the judiciary?

The first research question forms part of Chapter Two of this study, which identifies various principles and indicators of judicial performance management and measurement. The aspect of quality is also explored, based on the fact that judicial authority is derived from the people and that the judiciary must observe the principles outlined in Article 159(2) to enhance access to justice. It is unfortunate, as noted, that the current judicial performance management and measurement framework is focused on quantity as opposed to the quality of justice.

As to the second question, the researcher took cognisance of the fact that the Kenyan Judiciary has gone through a number of reforms since the inception of a new constitution, including the vetting of judges and magistrates, the introduction of numerous administrative measures,²⁶⁹ and the establishment of a judicial performance management system to enhance access to justice. Since its establishment, the DPM has introduced performance targets and measures aimed at ensuring improved case management and timely disposal of cases. However, this is not explicitly provided for under the existing laws. As pointed out in parts 3.2.2 and 3.2.3 above, the High Court (Organization and Administration) Act 2015 and the Court of Appeal (Organization and Administration) Act 2015 only contain a few provisions relating to case management, performance management inspections and monitoring. There are no legal provisions on the mandate and composition of the DPM, the criteria for the appointment and removal of the DPM members, evaluation procedures, case weights, and the standards for evaluating judges, judicial officers, staff, and court stations. Further, the above Acts are specific to the appraisal of High Court and Court of Appeal judges. It is also unfortunate that the JSC has not crafted regulations to give effect to section 47(2) (g) of the Judicial Service Act, 2011. Instead, the DPM relies on the report that was launched by the PMMSC in 2015, as well as the case management provisions identified in part 3.2.3 above. While the report acts as a blueprint for performance management in the Judiciary, it does not

²⁶⁹ See Part 3.2.3 above.

contain effective policy guidelines for the appraisal of the performance of individual judges, magistrates and Judiciary staff.

In addition, the study found that the current performance management is indeed fraught with myriad challenges which impinge on its effectiveness. It should be acknowledged that the DCRT currently being used by the DPM has improved case management and considerably addressed case delays. As stated in part 3.3.1 above, there are clear indicators of high case clearance rate, backlog reduction, productivity, hearing of criminal and civil cases within twelve months, and hearing of urgent applications within a specified period. All these are focused on timely dispensation of justice. It is laudable to note that the DPM is in the verge of harmonising the DCRT with the IPMAS to provide real time reporting and production of performance reports.

These developments are, however, not without challenges. First, the DCRT does not reflect the peculiarities of each court station when ranking them. A lesson should be drawn from the Dutch Rechtspraak tool, which takes into account the unique nature of different court levels and divisions in the appraisal process. Second, the DPM has not developed case weights to guide clerks when filling the DCRT. Thus, all cases are accorded the same weight when compiling numerical scores. Third, the DPM does not consider the out-of-courtroom work performed by Deputy Registrars who also serve the role of magistrates. Fourth, not many judges and judicial officers have owned the system. It was admitted by Respondent III, representing the DPM, that when launching the performance management system, not all stakeholders were engaged. Fifth, clerks do not consult adequately when filling the DCRT.²⁷⁰ They have also not been trained adequately on how to fill the template. Sixth, there is no consideration of quality issues, such as impartiality, integrity of judges and temperament, among others. The system is simply quantitative-oriented. Seventh, the system has not fully

²⁷⁰ Interview with Respondent I.

implemented the rewards and sanction scheme has envisaged in its 2015 report. Lastly, the performance management system currently applies principally to judges and magistrates without extending to court researchers, clerks, and other judicial staff members who have direct impact on the performance of judges and magistrates.

In relation to the third research question, a number of best practices were identified from the different jurisdictions explored in Chapter Four. First, the USA jurisdiction provides three key performance indicators for quality evaluation which would be necessary for Kenya: equality, fairness and integrity. The Arizona case provides a learning platform on how public participation would be incorporated into performance review of judges. Arizona has clear regulations on judicial performance evaluation, which are also reflected under the Arizona Constitution. In addition to the efficiency data, the District of Colombia has placed emphasis of consultation with relevant stakeholders and outreach programs (including by use of the IEC, as well as capacity building of staff. Although a Judiciary's Training Institute does exist in Kenya, it is not clear if the judicial staff is subjected to regular training as they should. These best practices are important. However, in order to avoid the direct importation and application, it might be first important to tailor them to specifically suit the Kenyan context.

5.3 Recommendations

In light of the foregoing findings, and taking into account the best practices identified in Chapter Four, this study makes the following recommendations for implementation by the DPM.

5.3.1 Performance Management Regulations/Legislation

The JSC should enact regulations pursuant to section 47(2) of the Judicial Service Act, 2011 covering all the issues identified in this provision, as well as the standards or criteria for

evaluating the performance of court stations, judges, judicial officers and staff, the criteria of appointment/removal of the DPM members, case weights, and an incentive scheme for judges and magistrates. In the alternative, the DPM should propose legislation and push for its enactment by Parliament. This will ensure that the performance management system is based on clearly defined principles and procedures, which cannot be contravened.

Lessons should be borrowed from Arizona, Bulgaria, and Netherlands. As for the incentive scheme, the District of Columbia provides important lessons as it has a rewards and sanction scheme that involves promotions for excellent performers and the imposition of soft sanctions for less than satisfactory performance. Some of the sanctions include denial of leave, a recommendation for reduction of pay, demotions and a “name and shame” sheet published monthly. Some of these mechanisms can be introduced in Kenya in addition to certificates (recently introduced for excellent performers) and regular training. The DPM is has set up a sub-committee on rewards and sanctions, but while this suggestion is robust, it will be meaningful to specify thresholds for each reward either in the regulations or a policy document.

5.3.2 Others

1. The DPM should take into account the peculiar circumstance of each court station when ranking them. In the researcher’s view, there should be a guideline on how court-based assessments should be done to generate accurate statistics reflecting on the real performance of court stations. A lesson should be drawn from the Dutch Rechtspraak tool, which considers the unique nature of different court levels and divisions in the appraisal process.
2. The study also urges the DPM to train clerks adequately to do proper consultation when filling the DCRTs. Otherwise, there should be a provision in the above suggested

regulations requiring judges and magistrates to fill the DCRTs themselves to avoid errors.

3. The DPM should device performance standards, targets and measures for legal researchers and court clerks given their direct impact in the general performance of the Judiciary and judges and magistrates in particular.
4. In addition to the numerical scores used for ranking of judges/magistrates and courts, DPM should consider introducing standards for evaluating quality, borrowing a leaf from the US, Netherlands, Bulgaria and Finland (as outlined in Chapter Four). The current system, as revealed above, concentrates on numerical scores, yet judicial performance also depends on the integrity of judges and judicial officers, impartiality, fairness, and fidelity to the law, which are key tenets of Rawls' Theory of Justice and Dicey's Rule of Law Theory.
5. In setting up targets for case clearance, it is important to be highly considerate of the fact that cases vary in nature and therefore clearance timelines should not be uniform.
6. One aspect that the DPM should introduce, albeit cautiously because of judicial independence, is stakeholder engagement in the evaluation of judges and magistrates. This approach can be used in assessing the quality of services delivered, including judgments and rulings (the aspects of fairness, integrity, understanding of the law, timeliness, temperament, etc). As demonstrated in Chapter Two, successful implementation of the performance management will depend on proper and regular cooperation and coordination among stakeholders in the Judiciary. The Arizona case provides a learning platform on how participation would be incorporated into performance review of judges. The District of Colombia also places emphasis of consultation with relevant stakeholders and outreach programs (including by use of the IEC).

5.4 Conclusion

In this study, it has been clearly discussed that Kenya has taken great strides in reforming the Judiciary to introduce robust systems that can restore public confidence. One of the reforms was the successful launch of the performance management system in 2015 following numerous attempts since 1992. Considering the need to have a firm legal foundation, the DPM successfully pushed for the inclusion of performance management provisions in the High Court (Organisation and Administration) Act, 2015 and the Court of Appeal (Organisation and Administration) Act, 2015, but only a few things were captured. The study vividly demonstrates that there was need to develop regulations or enact legislation that comprehensively provide for all aspects of performance management in the Judiciary based on the experience of Bulgaria and Arizona, as well as the principles advanced in part 2.5 of this study. It is notable that a number of measures have not been done to strengthen the current performance management system, namely adequate training of clerks; inclusion of clerks, legal researchers and other personnel that may affect the overall performance of the Judiciary; case weighting; development of rewards and sanctions or incentive scheme (like in the District of Columbia and Finland); and consideration of all circumstances when compiling numerical scores for judges and magistrates among others. With these gaps, it is conclusive to note that the study has met the objectives and hypotheses outlined in Chapter One. One overarching suggestion that can be derived from the above recommendations is that judicial performance management should be guided by clearly defined principles of efficiency, democracy and fairness, which inform Dicey's rule of law doctrine and Rawls justice theory.

BIBLIOGRAPHY

Books

Jowell J, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver QC FBA, *The Changing Constitution* (7th edn, Oxford University Press 2011) 24-25 <<http://hcraj.nic.in/joc2014/9.pdf>> accessed 20 January 2017.

Mbote P K and Akech M, *Kenya: Justice Sector and the Rule of Law* (Nairobi: The Open Society Initiative for Eastern Africa 2011).

Rawls J A, *A Theory of Justice* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1971).

Journals

Berch R W and Bass E N, 'Judicial Performance Review in Arizona: A Critical Assessment' (2014) 4(5) *Oñati Socio-legal Series* 927-952.

- Gey S G and Rossi J, 'Empirical Measures of Judicial Performance: An Introduction to the Symposium (2005) 32 *Florida State University Law Review* 1001-1014.
- Goelzhauser G, 'Accountability and Judicial Performance: Evidence from Case Dispositions' (2012) 33(3) *The Justice System Journal* 249-261.
- Korir S C R, Jacob Rotich and Joseph Bengat, 'Performance Management and Public Service Delivery in Kenya' (2015) 3 (4) *European Journal of Research and Reflection in Management Sciences* 42-54.
- Lepore L, Metallo C and Agrifoglio R, 'Evaluating Court Performance: Findings from Two Italian Courts' (2012) *International Journal for Court Administration*.
- Mbua P and Sarisar J O, 'Challenges in the Implementation of Performance Contracting Initiative in Kenya' (2013) 3(2) *Public Policy and Administration Research* 44-61.
- McIntyre J, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4 (5) *Oñati Socio-legal Series* 898-926
<<http://search.ror.unisa.edu.au/media/researcharchive/open/9916026867201831/53129359950001831>>.
- Mohr R and Contini F, 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries' (2007) 1(2) *European Journal of Legal Studies* 254-291.
- Mutua M, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96-118.
- Omondi S, 'Procedural Justice and Child Sexual Abuse Trial in Kenya' (2014) 2 (5) *Journal of Research in Humanities and Social Science* 30-56.
- Principe M L, 'Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain' (2000) 22 *Loyola of Los Angeles International and Comparative Law Review* 357-373.
- Wallace A, Anleu S R and Mack K, 'Evaluating Judicial Performance for Caseload Allocation' (2014) 41(2) *Monash University Law Review* 445-468, <<http://www.austlii.edu.au/au/journals/MonashULawRw/2015/16.pdf>>.

Reports

- Commission on Judicial Performance, *2016 Annual Report* (State of California: Commission on Judicial Performance, 2016).
- European Commission for the Efficiency of Justice (CEPEJ), 'Monitoring and Evaluation of Court System: A Comparative Study' (8th meeting, 2007). <https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf>.

Judiciary of Kenya, *Judiciary Transformation Framework 2012-2016* (2012).

The Judiciary, Republic of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, The Judiciary, April 2015).

Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (Nairobi: Government Printer 2010).

Republic of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, The Judiciary, April 2015).

Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance of the Judiciary* (Chaired by Hon Justice J W Onyango Otieno, The Judiciary, 13 January 2006).

The Government of the Republic of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (October 2007).

The Judiciary, Republic of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, The Judiciary, April 2015) 12-22.

The Judiciary, Republic of Kenya, *Judiciary Case Audit and Institutional Capacity Survey 2014* (Nairobi: Performance Management Directorate, 2014).

The Judiciary, Republic of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021* (Republic of Kenya, 2017) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf>.

Papers

Albers P, 'Performance indicators and evaluation for judges and courts' Council of Europe <http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.pdf> accessed 18 November 2016.

Bamwine Y, 'Performance Management and Judicial Productivity in the High Court (Paper presented at the 14th Annual Judges' Conference, Commonwealth Resort, Munyonyo, 8th – 12th January, 2012).

Kihara-Kariuki P, 'Procedural Reforms/Innovations that Enhance Access to Justice and Ensure Protection of Rights in Kenya' (Paper Presented During the Second African Union Judicial Dialogue, 4-6 November 2015 in Arusha, Tanzania, 2015).

Mbogori K, 'Strengthening Judicial Reforms in Kenya: Performance indicators – Public Perceptions of the Court Divisions, Children's Court and the Anti-Corruption Court'

- (Kenyan Section of the International Commission of Jurists, 2007)
 <http://pdf.usaid.gov/pdf_docs/Pnacw007.pdf> accessed 14 February 2017.
- Netherlands Council for the Judiciary, 'Quality of the Judicial System in the Netherlands' (The Hague, Netherlands: Judiciary Information Service 2008).
- Ojielo O, 'Judicial Integrity and the Vetting Process in Kenya' (2010) 1(6) Amani Papers
 <http://www.ke.undp.org/content/dam/kenya/docs/Amani%20Papers/AP_Volume1_n6_Sept2010.pdf> accessed 17 February 2017.
- Palumbo G, Liupponi L and Nunziata L, 'Judicial Performance and its Determinants: A Cross-Country Perspective' (2013) OECD Economic Policy Paper No 05,
 <<https://www.oecd.org/eo/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>> accessed 5 May 2017.
- Plang D and Abari T, 'Towards a Holistic Performance Management System for the Lower Courts in Nigeria: The J4A Model in Kaduna State' (2014) <<https://ace-notebook.com/Holistic-performance-management-free-related-pdf.html>> accessed 14 February 2017.
- Rathore V S, *Performance Assessment System of Magistrates* (National University of Juridical Sciences, Kolkata),
 <<http://www.nja.nic.in/3.%20pafn%20Vishvajeet%20Singh%20Rathore.pdf>>
 accessed 20 August 2017.
- Smit J Z, 'Restoring Confidence in the Judiciary: Kenya's Judicial Vetting Process, Constitutional Implementation and the Rule of Law'
 <http://www.constitutionnet.org/files/kenyas_judicial_vetting_process.pdf> accessed 15 February 2017.
- Wittrup J, 'Analysis of the System for Measuring and Monitoring Judicial Performance in Romania'
 <http://www.csm1909.ro/csm/linkuri/14_02_2011__39242_ro.pdf>
 accessed on 23 November 2016.

Theses

- Armstrong G C, *Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison*. (Master Thesis, University of Stellenbosch 2011).
- Kelly D, 'The Effectiveness of Performance Management in the Retail Industry in Ireland' (Master of Arts Dissertation, National College of Ireland 2012).
- Muthoni W L, 'Corruption in the Kenyan Judiciary, Will the Vetting of Judges And Magistrates Solve this Problem?' (LLM Thesis, University of Nairobi 2013).

Newspapers/Magazines

Dijk F and Kouwenhoven R, 'Judicial reform in the Netherlands: Change in broad outline' (2014) *Scientific Magazine for the Judiciary Organisation of the Netherlands* 7-44.

Mwenda D, 'Judicial corruption would throw Kenya into a major crisis' *The Star* (Nairobi, 6 February 2016) <http://www.the-star.co.ke/news/2016/02/06/judicial-corruption-would-throw-kenya-into-a-major-crisis_c1288137> accessed 9 March 2017.

ANNEXES

Annex I

CONSENT FORM FOR KEY INFORMANTS

Name of Researcher: LUCY MWIHAKI NJUGUNA
REG. NO: G62/88546/2016

Master of Laws (LLM)
School of Law
University of Nairobi
P.O Box 30197-00100, Nairobi

E-mail: mwihakinjuguna12@gmail.com

**TOPIC OF STUDY: PERFORMANCE MANAGEMENT IN THE KENYAN
JUDICIARY: A CRITIQUE OF ITS EFFECTIVENESS AND THE
LEGAL FOUNDATION**

Dear Participant,

I would like to have an interview with you on Performance Management and Measurement in the Kenyan Judiciary. Questions will focus on the current issues around judicial performance in Kenya especially the effectiveness of the system, as well as the legal framework. The interview will take approximately 10-30 minutes. The data (transcripts) obtained from this research will be used in my thesis although there may be occasions where aspects of it will be used for publication in academic journals, books, media reports or at conferences.

As a participant, you are given the choice of being anonymous or not. If you choose to be anonymous, your full name will only be required once, when you sign this consent form. You will have the right to refuse to answer any particular questions, withdraw participation at any time during the interview and up to two months from the date of the interview. You will also be entitled to ask any questions either during the discussion or at any other time. Further, I will be willing to send to you the interview transcripts and/or a summary of the results of the study, if you wish. Please consider the following:

1. "I would like to be identified in the data collected for this research project"

YES

NO (Please tick one)

2. "I would like to have a pseudonym"

YES

NO (Please tick one)

If YES, please indicate your chosen name

3. If you would like to receive a copy of the transcript of summary of the results of this study

please write your email address here:

"I have read and understood this information and I consent to take part in the study"

Name of Interviewee _____

Signed: _____ Date: _____

“I agree to abide by the above conditions”

Name of interviewer: _____

Signed: _____ Date: _____

Annex II

INTERVIEW SCHEDULE FOR THE KEY INFORMANTS

Judges

1. Is the current criterion for judicial appointment and promotion based on merit?
2. Are judicial decisions made without improper influence by litigants or other interested parties (advocates, politicians)? Does this have an impact on the general performance of the judges/magistrates/Judiciary?

3. How adequately are you consulted when clerks are compiling your numerical scores?
Are you satisfied with the involvement of clerks in this process?
4. Are promotions, transfers, removal, retention and/or reappointments of judges/magistrates based on publicised, transparent and objective criteria? Elaborate.
5. In your own view, what causes the huge case backlogs in our courts? Do judges contribute to this huge backlog?
6. How effective is the current performance management system? Has it reduced the huge backlog of cases in our courts, or improved the general performance of the judiciary? Does it reflect the true image of the Judiciary today?
7. Are you satisfied with the numerical measurement of judges? That is, using the number of cases as the main indicator of judicial performance? What difficulties are inherent in the assignment of numerical scores to judges/magistrates?
8. What is your opinion regarding the evaluation of the quality of judgments/rulings made by judges/magistrates? Does the current performance management system extend to the aspect of quality?
9. What is your opinion about rewards and sanctions as a standard for improving judicial performance?
10. Does the current performance measurement system include the standard of rewards and sanctions? How are excellent performers recognised and/or rewarded? What happens to poor performers? Are you aware of any disciplinary process for poorly performing judges/magistrates?
11. How do you rate public confidence over the judiciary today? Is there any link between public confidence over the judiciary and judicial performance management? That is, has performance management improved public confidence?

12. How inclusive is the current judicial performance management system? Is it only limited to judges? Does it extend to magistrates and prosecutors because they have an impact in the general performance of the judiciary, as well as public confidence? Do you think they should be included?
13. What challenges are you faced with in discharging your mandate as a judge? Do they touch on the general performance of the Judiciary? Is the Judiciary addressing them?
14. In your opinion, what general reform strategies would you recommend for improving the current judicial performance management system to enhance public confidence? What other criteria do you think should be considered in the evaluation of judges/magistrates? Are you aware of any best practices Kenya can borrow from other countries?

Magistrates

DPM

Annex III

LIST OF KEY INFORMANTS

PSEUDONYM	GENDE R	POSITION	DIVISION/INSTITUTION	DATE CONSULTED
Respondent I	F	Deputy Registrar	Milimani Commercial	27 June 2017
Respondent II	M	High Court Judge	Milimani Civil Division	27 June 2017
Respondent III	M	Deputy Director	Directorate of Performance Management	27 June 2017
Respondent IV	M	High Court Judge		27 June 2017