

**ENHANCING JUDICIAL ACCOUNTABILITY: AN ANALYSIS OF KENYA'S
LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK ON PERFORMANCE
MANAGEMENT**

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REG NO: G62/75137/2014

**A PROJECT PAPER SUBMITTED IN PARTIAL FULFILLMENT FOR THE
AWARD OF THE DEGREE OF MASTER OF LAWS**

SCHOOL OF LAW

UNIVERSITY OF NAIROBI

SEPTEMBER, 2018

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DECLARATION

I hereby declare that this thesis is my original work and a product of my own research, hard work and contribution by my supervisor and that to the best of my knowledge and information, this work has neither been accepted nor is it being concurrently submitted for any other degree of any university, or any other institution for any academic credit. All information obtained from other sources and used herein has been acknowledged.

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CERTIFICATE OF SUPERVISION

This Thesis has been submitted for examination with my approval as the university supervisor.

Signature

Prof Winifred Kamau

Date

DEDICATION

This work is dedicated to my parents, Mr. & Mrs. Kandet Ole Samu, for their daily prayers and believing in me.

ACKNOWLEDGEMENTS

I acknowledge and appreciate the invaluable guidance from my supervisor, Prof Winifred Kamau. Her thorough, diligent, firm but courteous approach made me focus on completing the work. Further, I appreciate the input of Dr. Elizabeth Muli and also that of Dr. Nancy Baraza, who was my reader. I appreciate all my unit lecturers for their contribution in the LLM coursework. I will not forget to thank Kevin and Faith, for their assistance in gathering the relevant material I needed for my research.

Last but not least, I appreciate my wife, Leah and our sons Jewel, Jason, Jaden and Jared for their love, encouragement and for accommodating my demanding schedule throughout my period of study.

I am truly indebted to all the above.

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LIST OF CONSTITUTIONS AND STATUTORY INSTRUMENTS

KENYA

Constitution of Kenya 2010

Court of Appeal (Organization and Administration) Act 2015

Employment and Labor Relations Court Act 2014

Environment and Land Court Act, 2011

High Court (Organization and Administration) Act 2015

Judicature Act, Cap 8, Laws of Kenya

Judicial Service Act, 2011

Leadership and Integrity Act, 2012

Magistrates Courts Act, 2015

Penal Code Cap 63, Laws of Kenya

Public Officers and Ethics Act, 2003

Supreme Court Act, 2011

Tribunals Bill 2015 (Draft)

AUSTRALIA

Constitution of Australia, 1901

Court Services Victoria Act, 2014

Courts Administration Legislation Amendment Act, 2016

Federal Court of Australia Act 1976

Productivity Commission Act of 1998

Public Governance, Performance and Accountability Act, 2013

Public Service Act 1999

UNITED STATES OF AMERICA

United States Constitution, 1787

The Civil Justice Reform Act, 1990

Judicial Conduct and Disability Act, 1980

LIST OF INTERNATIONAL INSTRUMENTS

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

Universal Declaration of Human Rights, adopted 10 December 1948.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993,

INTERNATIONAL DECLARATIONS AND GUIDELINES

Bangalore Principles on Judicial Conduct, 2002

Human Rights Committee General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

International Framework of Court Excellence, 2010

LIST OF CASES

Charles Omanga and 8 Others vs. Attorney General and Another, Petition No. 29 of 2014

Judges and Magistrates Vetting Board v. Centre for Human Rights and Democracy, eKLR
2014

LIST OF ACRONYMS AND ABBREVIATIONS

CJ	Chief Justice
COE	Committee of Experts
CRJ	Chief Registrar
DCJ	Deputy Chief Justice
ICT	Information & Communications Technology
JTF	Judiciary Transformation Framework
JTI	Judiciary Training Institute
KJSA	Kenya Judicial Staff Association
KMJA	Kenya Magistrates and Judges Association
KRA	Key Result Area
KWJA	Kenya Women Judges Association
NCAJ	National Council on the Administration of Justice
NCLR	National Council for Law Reporting
PCA	President of the Court of Appeal
PMD	Directorate of Performance Management
PMMSC	Performance Management and Measurement Steering Committee
PMMU	Performance Management and Measurement Understanding
PJ	Principal Judge

ABSTRACT

The Judiciary, an organ of government, is vested with judicial authority, to be exercised by courts and tribunals established by or under the Constitution. The Constitution further states the principles that guide the courts. This research reviews the principle of judicial accountability and how the same can be achieved through institutionalization of a performance management framework. The study seeks to examine the existing legal, policy and institutional framework governing performance management in the judiciary. While it is acknowledged that the Judiciary plays a vital role in governance and enhances democracy of a nation, it is further acknowledged that in order to so perform, the courts ought to be free from any interference. Thus, in their performance, judges and magistrates are free to perform their various judicial functions independently. However, with the Constitutional requirement of accountability, it behooves the institution of the judiciary to be answerable to the public in the performance of the obligations vested in it. On many occasions, it has been stated that the wheels of justice often grind too slowly. How then can there be assurance that the institution is discharging its constitutional mandate to the legitimate expectation of taxpayers?

As stated above, this paper seeks to focus on performance management in the Kenyan Judiciary. It starts with the premise that the concept of accountability can be enhanced through measurement of judicial work. In this regard the study will seek to evaluate performance management measures being applied in the judiciary. It also seeks to review jurisdictions that have employed performance management initiatives, with a view to borrowing from best practices. It will interrogate the measures that have been put in place to gauge judicial performance and whether the Kenyan judiciary needs to employ further and better techniques in gauging such performance. In this regard, the study will consider implementation of performance management and measurement strategies in the judiciaries of

Australia and the United States of America, with a view to drawing lessons and best practices.

The study also seeks to identify and examine challenges that impede effective implementation of performance management in the judiciary and make legal, policy and institutional interventions to help entrench performance management in the Kenyan judiciary.

CHAPTER ONE

INTRODUCTION

Accountability is the measure of a leader's height.

Jeffrey Benjamin

1.0.BACKGROUND TO THE PROBLEM

The principle of accountability runs through the Constitution of Kenya 2010 (the Constitution). State organs and state officers are called to be accountable to the people of Kenya while exercising powers bestowed upon them. Based on that background, the concept of performance management, particularly in the judiciary, has come into focus. Under the Constitution dictates and the need to be accountable to the people of Kenya, the Judiciary has embarked on implementing performance management measures in the dispensation of justice.

In the formative years, before passing of the Constitution, there was but one form of accountability for the Kenyan judiciary; to the executive.¹ This oppressive circumstance prevailed despite Kenya being a constitutional democracy, where the doctrines of judicial independence, the rule of law and a government based on separation of powers ought to have prevailed. This dissonance led to allegations of the principle of separation of powers having been substituted by the 'doctrine of concentration of powers'². The cry for judicial reforms rang loud and true during the Constitution-making process and led to a change in the makeup

¹ Jill Cottrell Ghai (ed) *Judicial Accountability in the New Constitutional Order* (ICJ 2016)xi

² Julie Ouma Oseko, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform' (University of Leicester 2011) 3 <<https://lra.le.ac.uk/bitstream/2381/27703/1/2012OsekojoPhd.pdf>> accessed 2 August 2018.

and functioning of the judiciary.³ The Constitution lays emphasis on national standards of ethics, values and governance that are applicable to all State organs, officers of the state, and to everyone.⁴ These include good governance, honesty, transparency and accountability.⁵

The judiciary is not the only institution that is taking up tools of performance measurement in Kenya. Vision 2030, which is Kenya's road map to development, has necessitated several ministries and sectors of the economy to apply these tools in order to meet the goals set out for the country. During the first Medium Term Plan which was from 2008 to 2012, several modifications and initiatives were commenced in the public sector including: institutionalization of Results Based Management (RBM) using a number of systems like Rapid Results Approach (RRA), Performance Contracting and Performance Appraisal Systems.⁶ In the Second Medium Term Plan, in line with the constitutional mandate, institutionalization of RBM in the Public Service would be decentralized to guarantee access to good services by citizens at county level.⁷

The judiciary has over time initiated internal mechanisms to address challenges of performance, accountability, case backlog, corruption, and poor work ethics among others. Various Task Forces and Committees have been established in the past to address the above challenges. Most of the recommendations made by these Committees focused on judicial reforms and performance management. For example, the Integrity and Anti-Corruption

³ Anita Nyanjong and Ochiel J Dudley, 'Rethinking Judicial Independence and Accountability under a Transformative Constitution: Kenya Post-2010' in Jill Cottrel Ghai (ed) *Judicial Accountability in the New Constitutional Order* (ICJ 2016)

⁴ Laws of Kenya, Constitution of Kenya 2010, Article 10 (1).

⁵ Ibid, Article 10(2)(c)

⁶ 'Vision 2030, Second Medium Term Plan, 2013-2017' (The Ministry of Devolution and Planning 2013) <<http://vision2030.go.ke/inc/uploads/2018/06/Second-Medium-Term-Plan-2013-2017.pdf>> accessed 31 August 2018.

⁷ *ibid.*

Committee of the Judiciary was set up in 2003 to consider the effect of corruption on the output of the judiciary.⁸ Its mandate was to investigate reasons for loss of confidence in the judiciary by the public together with denial and delay of justice. Further, in 2005, the Judiciary Sub-committee on Ethics and Governance was set up to examine matters of integrity and administration of justice in the Judiciary.⁹ Its recommendations focused on court performance. It recommended the introduction of monthly court returns for monitoring performance. Later, in 2007, the Committee on Ethics and Governance of the Judiciary was established to consider the possibility of setting up a system to measure the standards of the performance of the judiciary.¹⁰ The committee recommended for the establishment of ideals and goals for judges, magistrates and judiciary staff.

In 2009, a Task Force on Judicial Reforms was established by the Government with the mandate of considering actions essential for firming and boosting the performance of the judiciary.¹¹ The Task Force made recommendations to remedy case backlog along the above-mentioned parameters.¹²

⁸Report of the Integrity and Anti-Corruption Committee of the Judiciary 2003 Available at <http://eacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf>accessed on 10th September 2015

⁹Report of the Judiciary sub-committee on Ethics and Governance 2005.Available at <http://www.deontologiejudiciaire.umontreal.ca/en/textes%20int/documents/kenya_rapport_comite_000.pdf> Accessed on the 10th September 2015

¹⁰Report of the Judiciary sub-committee on Ethics and Governance 2005.Available at <http://www.deontologiejudiciaire.umontreal.ca/en/textes%20int/documents/kenya_rapport_comite_000.pdf> Accessed on the 10th September 2015

¹¹Report of the Task Force on Judicial Reforms. Available at <<https://www.google.com/search?q=Report+of+the+Integrity+and+AntiCorruption+Committee+of+the+Judiciary+2003&ie=utf-8&oe=utf-8#q=William+Ouko+led+Taskforce>> accessed on the 1st October 2015

¹²Ibid, pg 33-59.

Taking into account reports and recommendations made by the various committees as outlined above, an integrated Judiciary Transformation Framework (JTF) 2012-2016 was developed.¹³ This framework proposed for the establishment of the Performance Management Directorate to ensure that the judiciary institutionalised a result-based performance management framework. The framework was in force until 2016. The succeeding stage is based on the theme Sustaining Judiciary Transformation (SJT) for Service Delivery, 2017-2021.¹⁴ This stage emphasizes on provision of services through automation, digitization and enhancement of methods of work, operationalisation of expansion systems, enhancing personal and institutional responsibility, embedding performance measurement, monitoring and evaluation as well as to support strategies and guidelines already developed.

Against the above backdrop, the Performance Management and Measurement Steering Committee (PMMSC) was established on 11th March 2013. The Committee's report on Institutionalisation of Performance Management in the Judiciary was launched on 15th April 2015.¹⁵ The terms of reference for the committee were inter alia to develop indicators for performance measurement. The committee was also tasked to develop performance contracts for courts, registries and directorates as implementing units and a performance appraisal system for individual officers working in the judiciary. This was meant to enhance productivity, accountability and efficiency through an effective performance management system.

For the first time, Performance targets were negotiated and agreed upon in the Kenyan judiciary, during the financial year 2015/2016. This was done within the parameters of case

¹³The Judiciary Transformation Framework 2012-2016 pg. 13-17.

¹⁴ Sustaining Judiciary Transformation (SJT) A Service Delivery Agenda 207-2021

¹⁵ Institutionalizing performance management and measurement in the judiciary 2015

clearance rate, access to justice, expeditious disposal of cases, Judges productivity, customer and employee satisfaction, court file integrity and reduction of case backlog. These parameters were largely borrowed from the International Framework for Court Excellence (IFCE)¹⁶, an excellence administration structure designed to enhance improvement of court performance. The first cycle of performance management and measurement evaluation in the Kenyan judiciary was carried out and a report released in 2017.¹⁷ The second cycle covered the financial year 2016/2017 whose report was released in 2018.¹⁸

This paper will evaluate the legal, policy and institutional framework governing performance management in the judiciary. It shall delve into Article 232 of the Constitution which provides for ideals and values of public service, including excellent professional ethics, well-organized and operative use of public resources and public participation in policy formulation, accountability, transparency and timely delivery to the public of truthful information.¹⁹

On the legislative framework, this paper will consider the Judicial Service Act, 2011 that mandates the Chief Justice (CJ) to give a yearly account to the country on the state of the judiciary and delivery of justice to the people. It provides that the Judicial Service Commission shall facilitate a judiciary that is accountable to the people, and one that is committed to the expeditious determination of disputes.²⁰ It shall also consider the High Court (Organization and Administration) Act 2015²¹ and the Court of Appeal (Organization

¹⁶ 'International Framework for Court Excellence'

<https://www.ncsc.org/resources/~/_/media/microsites/files/icce/ifce-framework-v12.ashx> accessed 17 September 2018.

¹⁷ Performance Management and Measurement Understandings Evaluation Report, 2015/2016

¹⁸ Performance Management and Measurement Understandings Evaluation Report 2016/2017

¹⁹ Article 232 of the Constitution of Kenya 2010

²⁰ Laws of Kenya, Judicial Service Act, Section 3(a).

²¹ Section 29 of the High Court (Organization and Administration) Act, 2015

and Administration) Act 2015,²² respectively, which contain concepts of performance management for these courts.

The statutes constituting the Supreme Court, Courts established under Article 162(2) of the Constitution²³ and the Magistrates' courts have no provisions for performance management. The implication of the above is that there is no comprehensive legal framework covering all cadres of the courts, in relation to the execution of performance management in the Kenyan judiciary.

This paper will consider drawing lessons and learning from best practices from the judicial systems of the United States of America and Australia and their approach to performance management. The United States of America has utilized unique tools to institutionalise performance management in its judiciary, particularly through the Judiciary Performance Evaluation (JPE) programmes. In addition, the trial court performance standards are considered some of the most ambitious in the world, as they measure performance in the widest sense, from its qualitative nature to the traditional measurement of case clearance. While its court system is federal in nature, in contrast to the Kenyan hierarchical structure, there are several lessons to be learned from the American experience. The study will specifically consider the performance management model adopted by the judiciary in the state of New Jersey. This is for the reason that performance management in this jurisdiction considers both quantitative and qualitative measurement of judicial performance.

Australia also provides for a good study. It is a common law jurisdiction hence it shares a lot of judicial characteristics with Kenya. The courts in Australia are answerable to a number of agencies. Judicial reports focusing on productivity are made available to the Attorney

²² Section 31 of the Court of Appeal (Organization and Administration) Act, 2015

²³ Article 162(2) of the Constitution of Kenya 2010

General, Parliament and the media for scrutiny. The reports bear statistics on performance of courts and judges across the country.

1.1. CONCEPTUAL FRAMEWORK

Performance Management

Performance is regarded as a concept that is difficult to define.²⁴ Scholars generally agree that when conceptualizing performance, one must differentiate between the action aspect of performance and the outcome aspect which is the only behavior relevant for the organizational goals.²⁵ Thus, performance is not defined by the action itself but by judgmental and evaluative processes.

What then is performance management? According to David N. Ammons, it entails actions taken by an organization to apply unbiased data to administration and policy formulation in a bid to achieve better results.²⁶ It is a process approach to accountability and an essential tool for producing results that the public needs.

Performance Management is a” process for establishing shared understanding about what is to be achieved and how it is to be achieved, and an approach to managing and developing people that improves individual, team and organizational performance”.²⁷

Performance contracting on the other hand is a tool for measuring performance against agreed goals.²⁸ In Kenya, performance contracting is one of the government’s initiatives

²⁴ Mirela-Oana Pinte, ‘Performance - An Evolving Concept’ 12.

²⁵ Sabine Sonnentag (ed), ‘Performance Concepts and Performance Theory’, *Psychological Management of Individual Performance* (Wiley 2002).

²⁶ David N. Ammons, ed; *Leading performance in Local Government* (Washington, DC: ICMA Press, 2008), v, ix.

²⁷ Karwan Sherwani, ‘Development of Performance Management Concept in Higher Education Context. I’ (2015) | *International Journal of Social Sciences & Educational Studies*.

²⁸ Public Service Commission, ‘Human Resource Policies and Procedures Manual for the Public Service’ 110 <https://www.publicservice.go.ke/images/guidelines/PSC_HR_POLICIES_MAY_2016.pdf> accessed 1 August 2018.

aimed at performance improvement and enhanced service delivery to the community.²⁹ In the judiciary, it is administered through Performance Management and Measurement Understandings (PMMUs) signed by heads of courts and units with their immediate supervisors.

Judicial performance management seeks to use data to improve the administration of justice and enhance public confidence in the judiciary.³⁰ Performance of judicial systems comprise several dimensions including independence and fairness of adjudication.³¹

This research considers the efforts made to institutionalize performance management in the judiciary to enable it exercise its mandate under Article 159 of the Constitution of delivering justice to the people of Kenya.

Judicial Accountability

Accountability is built on the premise that absolute power corrupts absolutely. Bentham's principle, *'The more strictly we are watched, the better we behave'* perhaps best captures the idea behind the necessity of accountability.³² Generally, there are four characteristics of accountability: First there is an agent or institution who is to give an account; secondly, there is an area of responsibilities, or domain subject to accountability; Thirdly, there is an agent or institution to whom the agent/ institution is to give account and Fourthly, there is the right of the secondary institution to require the primary institution to inform and explain and or justify decisions with regard to its responsibilities and the right

²⁹ Navakholwe Linda Lukhale, 'Determinants of Implementation of Performance Contracting in the Kenyan Judiciary: A Case of Law Courts in Nairobi City County, Kenya' (2017, University of Nairobi) 75.

³⁰ 'Judicial Performance Evaluation | Federal Judicial Center' <<https://www.fjc.gov/content/260169/judicial-performance-evaluation-united-states-federal-courts>> accessed 30 October 2018.

³¹ Evans Gicheru, *Independence of the Judiciary: Accountability and Contempt of Court* <http://www.kenyalaw.org/Downloads_Other/gicheru_judiciary.pdf> accessed 26 June 2018.

³² Christopher Hood and others, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. (Oxford University Press 1999).

of the secondary institution to sanction the primary institution if it fails to inform and or explain/justify decisions.³³

Judicial accountability is the process by which the judiciary is responsible to the people on whose behalf it exercises judicial authority under the Constitution and the laws of the country. The question then arises as to whom the judiciary is to be accountable and the method or mechanism for accountability.³⁴ The duty falls on the judiciary itself to work out channels of accountability for its members. Performance management has been adopted as a policy to guide accountability and transparency by judges, magistrates and judiciary staff in their judicial duties.³⁵

Judicial accountability exists at the level of the institution as well as that of an individual judge. There is thus a need to develop strategies to entrench performance management as an accountability mechanism in the judiciary.

Judicial Independence

Judicial independence is defined as the freedom of a court to decide matters before it on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, and pressures, direct or indirect threats of interference from any quarters or for any reason.³⁶

The balance between judicial accountability and independence is a strenuous one. Judicial independence relates to external independence, which favors the freedom of judges and judicial officers from the influence of the other arms of government, and internal

³³ Staffan I Lindberg, 'Accountability: The Core Concept and Its Subtypes' 25.

³⁴ Gicheru (n 31).

³⁵ Cottrel (n 1)

³⁶ 'OHCHR | Basic Principles on the Independence of the Judiciary'
<<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>> accessed 30 October 2018 Article 2.

independence which refers to the independence of judges from the influence of each other.³⁷

Independence thus exists at an institutional and individual level.

Whereas judicial independence focuses on the freedom and ability to decide, judicial accountability is concerned with the obligation for the judiciary to justify its behavior or conduct in exercising that freedom.³⁸

Access to Justice

Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances, in compliance with human rights standards.³⁹ It is therefore critical to the establishment of the rule of law and thereby, to a democracy.

According to Cappelletti and Garth, the expression ‘access to justice’ serves to focus on two basic purposes of the legal system. First, the legal system must be accessible to all. The procedural rules and practicalities shaping the legal system, such as litigation costs, availability of legal aid, or access to legal representation, must not restrict the ability of plaintiffs, especially the poor and disadvantaged, to bring a claim. Secondly, access to justice means that the legal system must lead to results that are ‘individually and socially just’.⁴⁰

The institutionalization of performance management in the judiciary is aimed at enhancing access to justice for the average person in Kenya, oft referred to as ‘Wanjiku. This will be

³⁷ Antonina Peri, ‘Judicial Independence vs. Judicial Accountability: Judicial Selection Models for Constitutional Courts, A Comparative Study’ 3 *Comparative Law Review* 30.

³⁸ International Commission of Jurists (1952- and James Thuo Gathii, ‘The Kenyan Judiciary’s Accountability to Parliament and to Independent Commissions: 2010-2016’ in Jill Cottrell (ed), *Judicial accountability in the new constitutional order* (2016)., quoting Stefan Voigt, ‘The Economic Effects of Judicial Accountability: Cross Country Evidence’ (2008) 25 *European Journal of Economics* 95-123, 97

³⁹ ‘Necessary Condition: Access to Justice’ (*United States Institute of Peace*) <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> accessed 30 October 2018.

⁴⁰ Nathy Rass-Masson and Virginie Rouas, ‘Effective Access to Justice’ 166.

achieved by establishment of an efficient, just and affordable judicial system. Entrenching performance management in the judiciary will ensure timely dispensation of justice to citizens.

1.2. STATEMENT OF THE PROBLEM

The constitution envisages State organs that are answerable to the public in the exercise of authority given to them by the people.⁴¹ The judiciary, being a State organ that exercises judicial authority that emanates from the people⁴², ought to be accountable in the way it conducts its activities. In retrospect, the judiciary did not have a reliable mechanism to properly evaluate its internal working systems to enable it measure individual and institutional performance.⁴³ With the current constitutional dispensation, coupled with the policy leanings towards public accountability, the judiciary introduced, albeit belatedly, a performance management framework to measure productivity. However, concerns have emerged on whether evaluation of judges and judicial officers' performance, on the principle of accountability, would compromise on judicial independence. The current measures of court performance, particularly on reduction of case backlog is mainly quantitative. There are fears that the performance management tools in place have no mechanism of measuring the qualitative aspects of judicial decisions. Further, the judiciary currently lacks a comprehensive legal, institutional and policy framework to put all cadres of courts to performance management. This study seeks to examine the above loopholes as well as the legal and regulatory environment and gauge how the same encourages or hinders the implementation of performance management in the judiciary.

⁴¹ Article 10(2)(c)

⁴² Article 159(1)

⁴³ Stephen Mutula, Wilson K Muna and Geoffrey P Koma, 'Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency' (2013) 38 *The Journal of Social, Political and Economic Studies* 263.

1.3. JUSTIFICATION OF THE STUDY

This study comes at a time when the Judiciary, under the Judiciary Transformation Framework, 2012-2016 and Sustaining Judiciary Transformation (SJT), A Service Delivery Agenda 2017-2021⁴⁴, has adopted implementation of a performance management and measurement system. Given that performance management is a fairly novel idea in the judiciary, this study is important as it will assist in its conceptualization and understanding. The study will examine the shortcomings and gaps in the existing framework upon which performance management is based. The findings in this study will inform both legislative intervention and policy formulation to fully support performance management in the Kenyan judiciary. The study also seeks to contribute new knowledge in this field and fill gaps in the existing literature.

1.4. RESEARCH OBJECTIVES

The general objective of this study is to review the legal, policy and institutional framework governing performance management in the Kenyan judiciary

The specific objectives are:

- a) To critically assess the adequacy of the existing legal, policy and institutional framework governing performance management, as an accountability mechanism in the Kenyan judiciary;
- b) To identify challenges facing performance management as a mechanism of enforcing accountability in the Kenyan judiciary;
- c) To identify best practices from other jurisdictions that might provide lessons for Kenya on performance management

⁴⁴ This initiative seeks to further the gains made under the Judiciary Transformation Framework 2012-2016.

- d) To make recommendations on reforms necessary for enhancing performance management as an accountability mechanism in the Kenyan judiciary.

1.5. RESEARCH QUESTIONS

In pursuance of the above objectives, the study will seek to answer the following questions;

- a) How adequate is the current legal, policy and institutional framework governing performance management, as an accountability mechanism in the Kenyan judiciary?
- b) What are the legal, policy and institutional challenges, inhibiting effective implementation of performance management in the Kenyan judiciary?
- c) What lessons and best practices can be drawn from the American and Australian judicial systems on performance management?
- d) What reform measures should be put in place to enhance and strengthen performance management as an accountability mechanism in the Kenyan judiciary?

1.6. HYPOTHESIS

- a) The existing legal, policy and institutional framework governing performance management, as an accountability mechanism in the Kenyan judiciary is inadequate.
- b) Implementation of performance management strategies in the Kenyan judiciary is hindered by an inadequate legal, policy and institutional framework.

1.7. THEORETICAL FRAMEWORK

This study will rely on two theories, namely: the Goal setting theory and the Economic theory of law.

1.7.1. GOAL SETTING THEORY

The main proponents of the goal setting theory are Edwin Locke and Gary Latham. This theory which stems from the discipline of psychology, suggests that there is a relationship between goals and performance. Goals should be used to evaluate performance. Goals can influence the behavior of participants.⁴⁵ According to Locke and Latham, goals can inspire individuals to strategies and achieve the required goal levels. The theory suggests that goals should be specific, attainable and acceptable. The proponents argue that the impact of the goals of employees increases when they know that their performance will be assessed on how well they achieved the target. They further argue that deadlines improve the effectiveness of goals.⁴⁶

Locke shows that clear and precise goals do motivate employees and the ultimate result is improved performance. According to him, the more difficult and specific a task is, the more people tend to work hard to achieve it. ⁴⁷Gary Latham similarly studies the effect of goal setting in the work place.⁴⁸ The two scholars identified four goal setting principles which if implemented by people at the work place can greatly improve the chances of success, namely clarity, challenge, feedback, task complexity.

They posit that goals are easily achievable if they are a product of consultation. One should not impose goals on a team. If the team members are to commit to set goals, they must have

⁴⁵Locke, E. A., & Latham, G. P. 'Building a Practically Useful Theory of Goal Setting and Task Motivation' (2002) *American Psychologist*, 57(9), 705-717.

⁴⁶Locke, E. A., & Latham, G. P. *A theory of goal setting and task performance* Upper Saddle River, NJ: Prentice Hall (1990)

⁴⁷Edwin Locke, 'Towards a Theory of Task Motivating and Incentives' (1968) *Organisational Behaviour and Human Performance*, 3(2), 157-189.

⁴⁸Latham, G. P. (2003). Goal setting: A five-step Approach to Behaviour Change. *Organizational Dynamics*, 32(3), 309-318.

been part of the process of developing them. Team members must believe in the set goals.⁴⁹ The theory suggests that feedback is so important. ⁵⁰Once the goals have been set, it is important to gauge the feedback. It helps in evaluating progress and people's expectations.

In setting goals, it is necessary to gauge the level of task complexity. According to the theory, before goals are set, it is important to first weigh the nature of the task. Locke argues that if the task is complex, one needs to set more time. Complex goals should be broken into simpler goals that are achievable. In implementing Performance Contracting in the Judiciary, it is important to weigh cases and treat them differently. Cases do differ in terms of complexity and so the measuring standards should be varied accordingly. Some cases are more complex in nature as compared to others. They may require more time to adjudicate, make decisions and write judgments. Some cases are lighter. For example, traffic cases are dispensed with within minutes as compared to complex corruption cases that may have up to a hundred witnesses.

Locke and Latham argue that clear goals help to make results easily achievable. They further posit that goals that are vague are not easy to measure and do not thereby bring any sense of motivation. Further, individuals or organizations should develop specific metrics that will assist them in measuring goals. According to this theory, goals should be challenging. Goals that are challenging are more motivating compared to those that are easily achievable.⁵¹ However, they warn against setting goals that are unrealistic.

⁴⁹Herzberg, F. (2009). *One more time: How do you motivate employees?* Cambridge, MA: Harvard Business School Press.

⁵⁰Button, S., Mathieu, J., & Zajac, D. (1995). Goal orientation in organizational behaviour research. *Organizational Behaviour and Human Decision Processes*, 67, 26-48.

⁵¹Fred C. Lunenburg, 'Goal-Setting Theory of Motivation' Sam Houston State University' *International Journal of Management, Business, and Administration* Volume 15, Number 1, 2011

This theory is relevant to this study as the study seeks to examine the efficacy of the existing legal, institutional and policy framework in determining the output of judicial officers and staff based on set goals and targets.

1.7.2. ECONOMIC THEORY OF LAW

This theory suggests a relationship between the law and the economy. It is argued that there is a relationship between the efficiency of a legal and judicial system and economic development. The economic theory of law looks into law and its impact on economic efficiency.⁵²

One of the main proponents of this theory is Richard Posner. He argues that law can be used to improve economic efficiency.⁵³ The legal system much like the market is seen as a means that regulates allocation of resources. He further argues that the development of a functioning legal institution is underpinned by economic logic. Its operation is guided by principles of economic efficiency.⁵⁴ According to the economic theory of law, judicial independence and effective court systems generally lead to positive economic growth. The theory argues that when contracts and rights are enforced, they lead to improved confidence in the judiciary which encourage investment that is crucial for economic development.

This theory is in line with the study to the extent that an efficient judiciary is beneficial to the members of the public. This theory is relevant to this study to the extent that performance management aims to improve efficiency in the judiciary. The judiciary sets targets for judges, magistrates and staff as a way of enhancing performance. A poorly functioning judiciary leads to a country's economic inefficiency. It is important to note that the

⁵²Adam Smith, *Lectures on Jurisprudence* (1978), 528

⁵³Richard Posner, 'Values and Consequences: An Introduction to Economic Analysis of Law.' Available at <http://www.law.uchicago.edu/files/files/53.Posner.Values_0.pdf> accessed on 10th March 2016

⁵⁴Richard Posner (n 45).

Judiciary's capacity to perform in most cases spurs economic growth and development. The cost of enforcing contracts is minimal where judicial systems are efficient and where resources and technology are correctly applied.⁵⁵

A vulnerable and dependent judiciary would seriously affect commerce. As it were, development of business depends on consistent and firm enforcement of commercial contracts, resolution of employment and labour related disputes, laws and regulations related to zoning among others. Indeed, America's economy is thriving partly because there is an independent judiciary that ensures enforcement of laws. The last thing investors would do is to establish business in a country with a weak legal system that is controlled by the head of the executive. On the contrary, investors depend on a judiciary that applies laws equally and uniformly, guided by the rule of law and precedent.⁵⁶

Critiques have argued that the judiciary contributes to the countries financial burden by preferring custodial sentences in none deserving cases. The cost of maintaining prisoners is borne by taxpayers. As such, petty offenders should be put on probation and community service where the law provides for this remedy. This would go a long way in supporting the country's economic growth.

1.8. RESEARCH METHODOLOGY

Taking cognizance of primary research methods including interviews, surveys, observations and field studies, this study is solely based on secondary research and will draw information from primary and secondary sources. This is on the basis that there is available material on the reform initiatives adopted by the Kenyan judiciary for analysis. Primary material consist of the Constitution of Kenya 2010 and statutes. Secondary sources of information will

⁵⁵Armando Castelar Pinheiro, *Judicial Systems Performance and Economic Development*. Pg 21

⁵⁶ Penny J White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' 29 Fordham Urban Law Journal 27, 5.

include books, articles, journals, policy documents, reports and the internet. Although there is not much research done on performance management of the Kenyan judiciary, within the framework of the Constitution, there is wide availability of information on the general subject of judicial performance and accountability, locally and internationally, to satisfy the objective of this study with secondary research alone. This research will be seeking to draw from the best practices adopted by the United States of America and Australia on the matter of judicial performance management.

1.9. SCOPE OF THE STUDY

This study will consider the application of performance management measures within the court structure that includes the Supreme Court, the Court of Appeal, the High Court and courts of equal status, the magistrates and Kadhis' courts as well as the various court registries.

1.10. LITERATURE REVIEW

The general state of the literature relating to performance management in the judiciary points to the need to protect judicial independence while demanding accountability from judges, judicial officers and staff.⁵⁷ The literature however fails to adequately deal with problems involving the actual conduct of performance evaluation for judges and the role of administrative agencies to supervise judges. It also does not adequately address the legal framework to entrench performance management in the law. This research will endeavour to fill the identified knowledge gaps and make recommendations.

⁵⁷ Patricia Kameri-Mbote and Muriuki Muriungi, 'Internal Mechanisms for Ensuring Independence and Accountability in the Judiciary in Kenya', *Judiciary Watch Report: Judicial Accountability in the New Constitutional Order*, vol 12 (ICJ Kenya 2016).

1.10.1. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Gloppen, Gargarella and Skaar⁵⁸ opine that the judiciary should be accountable for the reason that if left to its own devices, it runs the risk of drowning in power and usurping the law, which would be an unpleasant outcome. Further support to judicial accountability was echoed by Mutunga (while he was the CJ) in his preface to the 2015 report by the Performance Management and Measurement Steering Committee where he observed that assessing and reporting on the judiciary's performance boosts the confidence of the public in the judiciary rather than undermine its independence.⁵⁹ Gloppen however does not caution against the dangers of loss of judicial independence in the quest for judicial accountability. There is thus the need to develop a system that protects the independence of the courts while keeping the judiciary in check

Nyanjong and Ochiel⁶⁰ discuss the principle of separation of powers as pitted against judicial accountability. They delve into a historical analysis of the status and performance of the judiciary and lay the basis for judicial accountability as envisaged in the current constitutional dispensation. Their publication will work as a key point of reference when discussing the subtle interaction of the competing concepts of independence and accountability.

Similar to Gloppen et al, Whitford,⁶¹ considers accountability to mean answerability or responsibility. He argues that the most important question should be to whom are judges

⁵⁸ Siri Gloppen, Roberto Gargarella and Elin Skaar, 'Introduction' in Siri Gloppen, Roberto Gargarella and Elin Skaar, *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass Publishers, 2004) 5.

⁵⁹ Performance Management and Measurement Steering Committee, 'Institutionalising Performance Management and Measurement in the Judiciary' (The Judiciary 2015) <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/PMMSC_Report.pdf> accessed 26 July 2018.

⁶⁰ Ibid (n 2).

⁶¹ Professor at the University of Wisconsin Law School faculty

answerable to. He further states that judges ought to be answerable to the rule of law and not the political establishment.⁶²

Schneider⁶³ argues that judges enjoy a fixed salary and are shielded from discipline. Performance management of judges is strictly pegged on institutional culture. Judges are therefore subject to different administrative rules in order to avoid interference with judicial independence. He further argues that this is buttressed by the fact that judicial independence is critical in executing judicial functions. Therefore, performance of a judicial officer can only be pegged and measured through professionalism endowed to the judges with a strong shared organizational culture.⁶⁴

As such, according to Schneider, the output of a judge and access to justice can be fostered and managed through their organizational culture. In essence, the performance of judges can be checked within a strong organizational culture. This is entailed in values and norms associated with a profession. He thus identifies values as the priorities of an organization and norms as expected behavior for a particular job.⁶⁵ Judges have sturdy organizational values since they are part of the same profession who may be viewed as a “professional community”.⁶⁶

Schneider thus advocates for self-management among judges who possess the power of expertise. However, the concept does not imply that agents who supervise judges should stop exercising such duties. They can be involved in performance management in an indirect way

⁶²William C. Whitford, *The Rule of Law*, 2000 Wis. L. REV. 723

⁶³ Schneider, Martin, Performance management by culture in the NLRB’s division of judges and the German labor courts of Appeal, IAAEG discussion paper series, No.2002/05(2002).

⁶⁴*Ibid.*

⁶⁵*Ibid* p.13

⁶⁶See also, Locke, Edwin A.: Gary P. Latham; Miriam Erez (1988), The Determinants of Goal Commitment. In: *Academy of Management Review* 13 (1988) 1:23-39.

through influencing organization values. The shortcoming of his study is that the main focus is on the concept of performance measurement vis a vis judicial independence. He does not interrogate the element of performance measurement indicators. He also does not recommend measures that should be used to gauge judicial officers.⁶⁷

Solomon⁶⁸ explores brief fundamental descriptions of elements that can assist in effective management and effective felony case management systems. She also lays down a methodology that can be used to assess how the system of management of a felony case by a court applies operative practice to ensure efficiency in courts⁶⁹. She acknowledges that effective management of cases in the criminal justice system is marked by supervision of courts in relation to the time and procedures pertaining to the movement of cases from inception to conclusion.⁷⁰

To her, adoption of such management system involves incorporation of nonstop judicial oversight on the case load. The system establishes one point of reference for use in making decisions that relate to case management in court. This would focus on strict adherence to timelines within the justice system thus inspiring lawyers to have a prompt observance of deadlines. She further adds that the judiciary also should commit to applying effective practices and assume an effective part in ensuring timely resolution of cases. Consequently, she advocates for guidance, timely and nonstop monitoring of cases, sincere hearing dates, adherence to set timelines as effective tools for case management.⁷¹

⁶⁷ Martin Schneider, 'Performance Management by Culture in the NLRB's Division of Judges and the German Labor Courts of Appeal' 17.

⁶⁸ Maureen Solomon, 'Conducting a Felony Case flow Management Review': A Practical Guide. Bureau of Justice Assistance (BJA), Criminal Courts Technical Assistance Project at American University, (Washington DC: 2010).

⁶⁹Ibid p. 2

⁷⁰Ibid.

⁷¹Ibid 13.

McBeath & Meezan ⁷² on the other hand argue that it is important to align contracts with financial incentives and maintain a link between performance and payment to reinforce the importance of achieving outcomes. They urge for a model of performance-based contracting in which contracts lay emphasis on measurement reporting and contract renewal to be pegged on performance rather than tying performance to compensation.⁷³ They do not, however, look into the measurement indicators of performance measurement in the judiciary.

Blasi⁷⁴ argues that non-performance does not always result to the termination of employees since there is an element of interdependence between the government and the worker. Blasi's justification for this is that it is quite difficult to terminate a contract for political reasons and that it involves high transaction costs to hire and train new personnel.⁷⁵

White contributed on the debate surrounding judicial independence versus accountability. She argues that a dependent judiciary can easily be subjected to the control of the other arms of government. Accordingly, this may lead to political pressures, threats and intimidation. She further notes that a judiciary that is subject to control by either the executive or legislature cannot meet its obligations.⁷⁶

White argues that those judges who are elected to serve for a particular period must account to those who elect them. This is tenable in places where judges are elected by the citizens. The case may vary in situations where the appointing authority is the executive or

⁷²McBeath, B., & Meezan, W. (2007). Inter-organizational Disparities in Social Service Provision. Paper to be presented at the 9th Public Management Research Association Research Conference, University of Arizona Eller College of Management.

⁷³Ibid.

⁷⁴ Blasi, G.J. (2002). Government Contracting and Performance Management in Human Resources. *International Journal of Public Administration* 25(4), 519-538.

⁷⁵ Ibid.

⁷⁶Penny J. White, Judging Judges: Securing Judicial Independence by use of Judicial Performance Evaluations. *Volume 29, Issue 3, Article 11, Fordham Urban Law Journal* (2001).

legislature.⁷⁷ This poses a challenge for such judges to account to such arms of government without necessarily impairing the independence of the judiciary from the other arms of government.

She concludes by noting that accountability and judicial independence are not necessarily conflicting principles. However, they are juxtaposed to one another. She argues that in order to maintain accountability, the citizens should participate in evaluating the performance of judges and magistrates. This can be done by gathering information about performance of judicial officers from them and passing their views to the judiciary.⁷⁸ This underscores the need for the judiciary to embrace performance contracts to boost judicial performance.⁷⁹ However, White does not suggest who exactly should conduct performance evaluation of the judges as will be evaluated in this study. Thus, she falls short of providing a solution to that extent.

As it were, independence and accountability highlight different sides of the judicial role with independence addressing lack of bias in decision making; and accountability speaking to the responsibility that judges have to society and the citizens. Indeed, judicial independence and accountability should be viewed as ensuring legitimate exercise of judicial power.⁸⁰ In that respect, judicial independence necessitates judicial accountability at both institutional and individual levels without which judiciaries can be de-linked from those they serve which would in turn erode respect for law and the legitimacy of the judiciary as has happened before in Kenya.⁸¹

⁷⁷Ibid p. 1056.

⁷⁸Ibid p. 1057.

⁷⁹Ibid p. 1059.

⁸⁰ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 73–74.

⁸¹ ibid 75.

There have been arguments that judicial independence and accountability are conflicting concepts that cannot work hand in hand. However, the supporters of independence as well as accountability have opined that despite the said arguments, independence and accountability of the judiciary continue to be fundamental principles in ensuring proper dispensation of justice. Accountability has also been termed as the use of different approaches to determine the standards that may be included in managerial decisions.⁸² Bodies the world over including the Kenyan judiciary has evolved various mechanisms to ensure the harmonious application of the two principles.⁸³ There are however concerns amongst the judicial officers that performance management will interfere with their ability to discharge their duties independently. It is therefore important to examine whether judicial accountability and judicial independence are conflicting principles.

1.10.3. PERFORMANCE MANAGEMENT

Kobia⁸⁴ posits that if reforms are institutionalized in the public sector, then there will be effective service delivery to citizens. Part of these broader reforms is performance contracting as one of the performance management tools. She defines performance contracting as a ‘freely negotiated agreement between a government, organization or an individual with the agency in charge of its implementation.

She discusses the history of performance management in the Public Service, focusing on contracting as a tool.⁸⁵ The concept originated in France in the 1960s. It was then embraced in

⁸² Francesco Contini and Richard Mohr, ‘Reconciling Independence and Accountability in Judicial Systems’ (2008) 3 Utrecht Law Review 30 <<http://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.46/>> accessed 30 July 2018.

⁸³ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 76.

⁸⁴ Margaret Kobia, ‘The Kenyan Experience with Performance Contracting: Towards an Effective Delivery of Service in Africa.’ African Association for Public Administration and Management, 28th Annual Conference, Tanzania (4th December-8th December 2006).

⁸⁵ Ibid.

several developing countries such as Gambia, Ghana, Nigeria and Kenya. She acknowledges that most African countries have lagged behind in terms of development because of inefficient service delivery from their governments.⁸⁶ In Africa, performance contracting has been used in over 30 countries. It was seen as the solution to Africa's problems. Its implementation, however, has yielded mixed results in different countries.⁸⁷

She highlights a few institutions in Kenya where Performance Contracting was put to test. A number of State Corporations have registered tremendous improvements in their service delivery. They include: Ken Gen, Kenya Power and Lightening Company Limited, Kenya Ports Authority, Kenya Utalii College and KICC.⁸⁸ Implementation of performance contracting has, however, failed terribly in other institutions. She attributes this failure to lack of political goodwill and lack of performance incentive systems as well as to certain external factors such as government policy, inflation and exchange rate fluctuations.⁸⁹ She also highlights the challenges in the implementation of Performance Contracting as a tool of performance management.

Kobia did not however consider implementation of performance management and performance contracting in the judiciary. While her contributions are beneficial to this discourse, they do not take into account the unique nature of the work that the courts and judges undertake.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Kobia (n 52) 14.

⁸⁹ Kobia (n 51).

Petrie⁹⁰ discusses the concept of performance contracting and its benefits to the public sector. He argues that depending on the nature of the contract adopted, performance contracting can be used as a tool for public sector reform in terms of service delivery. He further argues that performance contracting highlights what public agencies can accomplish, and still allow managers some avenues to organize resources to ensure optimum achievement of those goals. According to him, the efficacy and efficiency of the public sector can be enhanced by performance contracting as well as safeguarding accountability in the expenditure of public funds.⁹¹

He endeavors to highlight the importance of adopting performance contracting in the public sector but fails to critically consider the various levels of the public sector and their unique functions.⁹²

Stucker⁹³ adopts a critique of the theories surrounding performance contracting. He begins his analysis with the nature of contracts and narrows down to the types of contracts on performance.⁹⁴ This critique provides an important analysis of the concept needed for this study. While the author does not focus on the judiciary, his approach provides fundamental findings that form the basis of this study.

⁹⁰ Murray Petrie; A Framework for Public Sector Performance Contracting; Economics and Strategy Group, (New Zealand: 2002).

⁹¹ Ibid.

⁹² Ibid.

⁹³ James P. Stucker; The Performance Contracting Concept, Appendix; A critique of the Theory. Published by the Rand Corporation, May (1971).

⁹⁴ Ibid.

Obong'o argues that performance management is aimed at attainment of operative efficacy which broadly alludes to schemes that enhance better resource utilization by institutions.⁹⁵ In his view, in order to achieve productivity, improve the quality of service and ensure timely settlement of disputes in the judiciary, there ought to be a change in the management system and there should be bench marking from other states for better management techniques. The writer notes that the major thrust for reform agenda that Kenya has been pursuing inculcation of a raft of measures in the system with the intention of improving the delivery of services. Performance management is one among the many tools that can be used.⁹⁶

He further argues that in pursuit of performance improvement within the public sector, there is need to inculcate practices that have worked in the private sector into public institutions. Performance contracting as a private sector initiative is incorporated into the public sector and in this case the judiciary in order to boost performance.⁹⁷

1.11. CHAPTER BREAKDOWN

This study is divided into five chapters:

Chapter One provides an introduction and background to the study. It highlights the statement of the problem, justification, theoretical framework, objectives of the study, the hypothesis, research methodology, scope of the study and the literature review. The aim is to establish a strong basis upon which the rest of the study is carried out.

Chapter Two discusses the scope of performance management in the judiciary, the adequacy of the existing legal, policy and institutional framework governing performance management as an accountability mechanism in the Kenyan judiciary.

⁹⁵ Sylvester O. Obong'o 'Implementation of performance contracting in Kenya' (International Public Management Review: vol. 10 No. 2 (2009) <http://journals.sfu.ca/ipmr/index.php/ipmr/article/view/69> accessed 27th July, 2018

⁹⁶ Ibid.

⁹⁷ Ibid.

Chapter Three identifies and discusses challenges that hinder implementation of performance management in the Kenyan judiciary.

Chapter Four considers the performance management systems adopted by the judiciaries of the United States of America, (State of New Jersey) and Australia (Victoria) with a view to drawing lessons for Kenya from their experiences on the factors that will enhance or inhibit the implementation of performance management in the judiciary.

Chapter Five provides a summary of the key findings and makes recommendations on the way forward with a view to strengthening performance management in the Kenyan judiciary.

+CHAPTER TWO

THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK GOVERNING PERFORMANCE MANAGEMENT IN THE KENYAN JUDICIARY

*We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail.*⁹⁸

2.0 INTRODUCTION

The need to incorporate performance management into Kenya's judicial structure flows from concerted efforts to change the judiciary's perception in the eyes of the public. In *Judges and Magistrates Vetting Board v. Centre for Human Rights and Democracy*,⁹⁹ the Supreme Court recalled the way the judiciary, in the walk-up to the adoption of the Constitution on 27th August, 2010, was extensive public suspicion and mistrust. History has it that Kenya's courts had enormous backlogs and it has been standard for years to go by before litigants got hearing dates or judgments.¹⁰⁰ A culture of unaccountability stemming back to colonial times developed in the judiciary, as well as distance from the public and other institutions, static hierarchy, and opaqueness.¹⁰¹ This hazardous state of affairs has been linked to a restrictive interpretation of the principle of judicial independence which shelved the judiciary from any form of accountability.

⁹⁸ Chief Justice Willy Mutunga (October, 2011)

⁹⁹ [2014] eKLR

¹⁰⁰ Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015' 1 <https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG_OGP_Kenya.pdf> accessed 1 August 2018.

¹⁰¹ *ibid* 4.

Building on the general scope of the study, this chapter analyses the legal, policy and institutional, framework for performance management as a mechanism for judicial accountability.

2.1. SCOPE OF PERFORMANCE MANAGEMENT IN THE JUDICIARY

The Constitution, in giving a foundation of the Judiciary, state in Article 159(1) that the people of Kenya are the source of judicial authority, which is to be utilized by the courts and tribunals established under the Constitution.

Article 161(1) then defines the judiciary to consist of the judges of the superior courts, magistrates, other judicial officers and staff. Article 162 as read with Article 169 sets out the system of courts to include the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court (ELC) the Employment and Labour Relations Court (ELRC), and the subordinate courts, made up of the magistrates courts, Kadhis' courts, the courts martial and tribunals.

While the Constitution makes no express provision for performance management, it captures certain principles to safeguard and enforce judicial independence and accountability, both at the individual and institutional levels, including those set out in Article 10.

The analysis of the legal framework further established that the High Court¹⁰² and Court of Appeal Acts¹⁰³ are the only ones which contain the concept of performance management of the courts. The Acts that establish the Supreme Court, ELC, ELRC and all the subordinate courts do not contain performance management provisions.

With respect to incorporation of tribunals under the judicial performance management system, it should be noted that there are more than twenty independent tribunals each

¹⁰² Section 29 of the High Court (Organization and Administration) Act, 2015

¹⁰³ Section 31 of the Court of Appeal (Organization and Administration) Act, 2015

established by an independent Act of parliament. None of these laws make provision for performance management and due to the independent nature of the tribunals, there is no clarity as to an oversight authority that the tribunals could be accountable to. It is perhaps for this reason that the Tribunals Bill, 2015 is pending before Parliament. It intends to bring all tribunals under the umbrella of a Council of Tribunals, for the purpose of rationalizing and regulating tribunals as well as streamlining their governance and operations.¹⁰⁴ The enactment of this bill would fast-track the incorporation of tribunals into the judiciary's performance management system.

Despite the above legislative provisions, all courts have participated in the performance evaluation efforts, with the exception of the Courts Martial and tribunals. This is based on policies such as the Judiciary Transformation Framework 2012-2016, which successfully institutionalized performance management and the Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021, which seeks to protect the gains made under JTF.¹⁰⁵

2.2 LEGAL FRAMEWORK

Performance management in the judiciary, however well intended, cannot be conducted in a vacuum. It has to be based on some form of authorization, either by the court's direction, mandated by law, or conducted in obedience to administrative orders such as outlined below under the institutional framework.¹⁰⁶ This section will consider the international and local instruments that characterize the legal framework for performance management, as an accountability mechanism in the judiciary.

¹⁰⁴ 'Tribunals Bill 2015 (Draft) - Kenya Law Reform Commission (KLRC)'

<<http://www.klrc.go.ke/index.php/bills/568-draft-tribunals-bill-2015>> accessed 31 August 2018.

¹⁰⁵ 'Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021' (The Judiciary of Kenya 2017).

¹⁰⁶ White (n 56) 16.

2.3. INTERNATIONAL INSTRUMENTS

The need for an effective judiciary that enhances access to justice and expeditious resolution of disputes is recognized the world over. Focused on improving the quality of justice, groups, institutions from the continents of Australia, Asia, Europe and America joined forces to form the International Consortium for Court Excellence (“the Consortium”) in 2008.¹⁰⁷ The Consortium published the International Framework for Court Excellence (IFCE), a tool for measuring the court’s performance in comparison to seven areas of excellence and ten core values.¹⁰⁸ The IFCE is based on the concepts of management and measurement as the pillars of judicial excellence.¹⁰⁹ The Consortium has since attracted membership from throughout the world including Kenya which is represented by the Judicial Service Commission.¹¹⁰

The ten core values guiding the members of the Consortium include: transparency, fairness, equality before the law, integrity, timeliness, impartiality, competence, accessibility, certainty and independence of decision-making. The IFCE requires that these values be widely publicized and be embedded into the areas of excellence which are: proactive court leadership and management that enhances accountability; formulation and implementation of clear court policies; efficient and effective court proceedings; ensuring high level of public trust and confidence; assessing user satisfaction and improving where required; effective

¹⁰⁷ ‘International Framework for Court Excellence’ 4

<<https://www.ncsc.org/resources/~media/microsites/files/icce/ifce-framework-v12.ashx>> accessed 24 August 2018.

¹⁰⁸ The Australian Institute of Judicial Administration Incorporated, ‘International Consortium for Court Excellence’ 2–3 <http://www.courtexcellence.com/~media/Microsites/Files/ICCE/IFCE-Brochure_EN.ashx>.

¹⁰⁹ ‘International Framework for Court Excellence’ (n 84) 11.

¹¹⁰ National Centre for State Courts - USA, ‘Current Members’ (International Consortium for Court Excellence) <<http://www.courtexcellence.com/Members/Current-Members.aspx>> accessed 24 August 2018.

management of court resources; and ensuring that the court's services are affordable and attainable to the users.¹¹¹

The International Commission of Jurists in its Practitioner's guide No. 13 observed that international human rights law, humanitarian law, criminal law, and other global standards relevant to the rule of law, the administration of justice, and corruption, have provisions that place obligations on States parties to ensure access to a competent, independent, impartial and accountable judiciary.¹¹² For instance, the Preamble to the United Nations (UN) Human Rights Council resolution on Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, which was adopted in 2015, stresses in part, the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the UN Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards.¹¹³

Additionally, the Latimer House Guidelines adopted in 2003 in Abuja, Nigeria, by the Heads of Government of Commonwealth countries lay out accountability mechanisms and outline the association between the judiciary and other government branches.¹¹⁴ Essentially, the Guidelines require that judges adhere to the Constitution and to the law in the conduct of their duties. This in turn safeguards accountability to the public by the judges and judicial officers.

¹¹¹ 'International Framework for Court Excellence' (n 91).

¹¹² International Commission of Jurists, *Judicial Accountability: A Practitioners' Guide No. 13* (International Commission of Jurists 2016) 5 <<https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>> accessed 31 July 2018.

¹¹³ Human Rights Council, resolution 29/6 (2015) on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Preamble.

¹¹⁴ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 78.

The Bangalore Principles of Judicial Conduct also reinforce the principle of accountability of judges in the conduct of their duties. The last paragraph of the preamble section of the said principles expressly states appropriate institutions established to maintain judicial standards and to whom the judges are accountable to.¹¹⁵ Indeed, the first principle to be addressed by the Bangalore Principles is judicial independence which every judge is called upon to uphold and exemplify in order to enhance the rule of law and guarantee fair trial.¹¹⁶ An indication that judicial independence and accountability ought to go hand in hand is the need to implore judges to exercise independence in their judicial functions and at the same time acknowledges that they are accountable to relevant institutions.

The 6th principle on competence and diligence requires judges to dedicate their professional activity to judicial duties and ensure that they deliver decisions efficiently, fairly and promptly.¹¹⁷ In order to ensure that the principles are applied by judiciaries, there is a short section on "Implementation" that states:-

“By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions”.

Elaboration of this provision came in 2010, when the Judicial Integrity Group, the body responsible for the Bangalore Principles, adopted the "Bangalore Implementation Measures".¹¹⁸ Furthermore, adoption of mechanisms like performance management in Kenya which are aimed at measuring the output of judges and magistrates is a form of implementing the Bangalore principles on judicial accountability, efficiency and promptness in rendering of decisions.

¹¹⁵ 'The Bangalore Principles of Judicial Conduct, 2002' 11, 2.

¹¹⁶ *ibid* 3.

¹¹⁷ *Ibid* 7.

¹¹⁸ International Commission of Jurists (n 132) 33.

2.3.1 DOMESTIC LEGAL FRAMEWORK

2.3.1.2 CONSTITUTION OF KENYA, 2010

Article 10(2) of the Constitution outlines values and principles of governance which are binding to all State officers, State organs, public officers and all persons.¹¹⁹ The Judiciary, judges, and judicial officers fall squarely under this provision and are bound by it. Of importance to this study are the principles stated under article 10(2) (c), that is, integrity, good governance, accountability and transparency. The need to enforce these values and principles is what has led the judiciary to formulate methods like performance management which are aimed at enhancing accountability of judges and magistrates to the public.

Being public officers, it automatically ensues that judges and magistrates are governed by public service values and principles itemized under Article 232. Indeed, Article 232 (2) (a) specifically provides that public service values and principles apply to all State organs in both government levels. The judiciary being one of the State organs is therefore expressly covered by this provision. These values include accountability for administrative acts; effective responsive, impartial, prompt and equitable provision of services, and high standards of professional ethics among others contained in Article 232 (1).

Article 50 (2) (e) on the right to fair hearing stipulates that accused persons have the right to a fair trial which comprises the right to have trial begin and end without unreasonable delay. This article directly addresses the diligence and dedication of judges and magistrates to their judicial duties in order to ensure expeditious disposal of disputes brought before them. Performance management and measurement tools take into account the number of cases resolved by individual judges and magistrates; and they estimate the time to be taken on each

¹¹⁹ Constitution of Kenya, Article 10 (1)

individual case from filing to conclusion.¹²⁰ This goes in line with the requirements of article 50 (2) (e).

Chapter Six of the Constitution provides general insights on leadership and ethics encompassing the responsibility and conduct of state officers. Specificity, accountability is captured under Article 73(2) (d) which requires State officers to be guided by concepts of leadership and integrity which include being accountable to the public for the decisions they make and actions they do.

Chapter Ten of the Constitution begins by stating that all judicial authority to be exercised by tribunals and the courts is derived from the people.¹²¹ Consequently, judges and judicial officers ought to be accountable to the people.¹²²

The Constitution speaks of judicial independence under Article 160 (1) which states that the judiciary is only subject to the Constitution and statute, not to the direction or control of any person. Through the establishment of JSC by the Constitution and giving it power to hire and fire judges, this action cured the direct exercise of executive power by the President against the judiciary.¹²³ The JSC, under article 172 (1) of the constitution is mandated to facilitate and promote the judiciary's accountability and independence. Judicial accountability is therefore an aspect that is inescapable for both judges and magistrates.

In furtherance of the spirit of judicial independence, the Judiciary Fund is established by Article 173. It is to be controlled and managed by the Judiciary's Chief Registrar and is to be employed towards administrative costs to enable the courts exercise their functions. The law implementing this constitutional provision is however yet to be enacted. Meanwhile, there

¹²⁰ Performance Management and Measurement Steering Committee (n 59) 57–114.

¹²¹ The Constitution of Kenya 2010 152 Article 159.

¹²² Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 87.

¹²³ Ibid (n 1) Article 171.

have been frequent budgetary cuts in judiciary funding which is a threat to the judiciary's optimum operation and its independence. For instance, after the Supreme Court nullified the 8th August, 2017 presidential elections, the treasury slashed the judiciary's budget in the guise of raising funds for the repeat elections.¹²⁴ Despite the judiciary's request for Kshs. 31 billion, treasury only allocated it Kshs. 17 billion, which would stall more than 70 construction projects and suspension of mobile courts¹²⁵ The budgetary cuts came when the Judiciary needed funds to enhance fluid electoral dispute resolution in the High Court and Magistrates courts, where 388 election petitions had been filed. G.G Chidyausiku once observed that as long as control of the judicial budget remains vested in the Executive, judicial independence shall always be threatened.¹²⁶

In 2015, the Judiciary's budget was slashed by KShs. 500 million when JSC Commissioners declined to appear before the National Assembly Committee on Justice and Legal Affairs.¹²⁷ In the financial year 2018/2019 the judiciary submitted a budget of KShs. 31.2 billion but the National Government's Budgetary Policy Statement capped the judiciary's budget at KShs17.3 billion.¹²⁸ The CJ has outlined the difficulty that will be faced in implementing judiciary projects and performance management goals due to the inadequate budgetary allocations.

¹²⁴ 'Treasury CS raids Judiciary coffers to fund presidential poll' *Daily Nation* (Nairobi, 1 October 2017) <https://www.nation.co.ke/news/Treasury-CS-raids-Judiciary-coffers-to-fund-election/1056-4119008-e5wttec/index.html> accessed 1 August, 2018.

¹²⁵ David K. Maraga, 'Judiciary Statement on Drastic Cut in Budget Allocations' (*Business Daily*) <<https://www.businessdailyafrica.com/releases/Judiciary-statement-on-drastic-cut-in-budget-allocations/1941082-4679328-pu3f7j/index.html>> accessed 2 August 2018.

¹²⁶ G.G Chidyausiku, "Modern Challenges to the Independence of the Judiciary" (Conference and annual General Meeting of the Southern African Chief Justice's Forum, Johannesburg, August 2010) 12 www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf accessed 1 August, 2018.

¹²⁷ Kabathi Antony Gathitu, 'Separation of Powers under the 2010 Constitution: an Analysis of the Emerging Tensions between Parliament and the Judiciary' (LLM Thesis, University of Nairobi 2016) 41

¹²⁸ David K. Maraga (n 145).

2.3.1.3. LEGISLATIVE FRAMEWORK

a) The Leadership and Integrity Act No. 19 of 2012

This act was enacted as a derivative statute to operationalise Chapter Six of the Constitution. In *Charles Omanga and 8 Others vs. AG and Another*, Petition No. 29/ 2014, Majanja J. noted that: -

“[29] The Leadership and Integrity Act is legislation enacted to, inter alia, establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution.”

This Act sets out the principles of leadership and ethics and being accountable to the people for determinations and steps taken.¹²⁹ The Act under section 3(1) sets out its primary purpose as that of making sure that all public officers respect the principles, values, and requirements of the Constitution. Being state officers, Judges and Magistrates are therefore covered by the Leadership and Integrity Act. State officers are required to perform their duties efficiently, honestly, transparently and in an accountable way as stated in Section 10 of the Leadership and Integrity Act. It is therefore arguable that performance management is a means of gauging whether judges and magistrates fulfill their responsibilities per the requirements of the Leadership and Integrity Act.

Establishment of specific leadership and integrity codes for each public entity is set out in Section 37 (1). In that regard, the Judiciary has its judicial code of conduct which binds both Judges and Magistrates. Even then, these codes must comprise the general code contained within the Act.¹³⁰ Furthermore, the Act automatically applies the provisions of Chapter Six on integrity and leadership. Accountability is a consistent principle running through the

¹²⁹ Leadership and Integrity Act No. 19 of 2012, section 3.

¹³⁰ Ibid (section 37 (2))

Constitution and the Act. Breach of the code, section 41 (2) of the Act envisions, amounts to misconduct that may attract disciplinary action to the concerned State officer. Accountability being a key component of the code of conduct, it therefore emerges that negligence in fulfilling the requirements thereof results in breach of the leadership and integrity code which on its part may result to disciplinary action. Performance management in the judiciary is therefore well anchored in as much as it purposes to hold judges and magistrates accountable.

b) The Public Officer Ethics Act No. 4 of 2003

This Statute enforces an ethics and conduct code for all State officers, judges, judicial officers and staff included, who are under the responsibility of the Judicial Service Commission (JSC).¹³¹ Section 5 mandates JSC to establish a specific Ethics and Conduct Code for judicial officers that it oversees. JSC published its code of Conduct through Legal Notice No. 132 of 2016.

Section 26 mandates judges, judicial officers and staff biennially to surrender to JSC a wealth declaration of themselves, their spouse/s and their dependent children. This is to guard against corruption and improper enrichment.

Section 35 empowers JSC to investigate whether a judicial staff or officer has breached the Code of integrity, and if the investigation discloses that the officer is guilty, section 36 mandates JSC to take disciplinary measures. Section 38 also grants JSC leeway to refer the matter for criminal or civil proceedings if it deems it fit.

JSC is therefore a key institution in judicial accountability, having the mandate to set guidelines, investigate and enforce measures where necessary.

c) The Judicial Service Act No. 1 of 2011

¹³¹ Public Officers Ethics Act No. 4 of 2003, 3 Section 2.

One of the objects of this Act as outlined under section 3 is to ensure that the JSC preside over an independent and accountable organization. Section 38 thereof mandates the judiciary and the JSC to present a yearly report to the country on the judiciary's state and administration of justice. This report should cover finance statements of JSC and the judiciary as well as give an explanation of their ventures, information relating to disposal of cases and issues on access to justice, brief of the efforts made in the course of the year in identification and appointment of judicial officers and information relating to the performance of the judiciary, among other key information.¹³² This kind of information required in the annual report, it has been observed, points to accountability requirements for the judiciary.¹³³

The judiciary and the JSC are mandated to facilitate the publication of the annual report in the Kenya Gazette and also send copies to both Senate and National Assembly.¹³⁴ The publication of the annual report in the Kenya Gazette ensures that the operations of the judiciary and the JSC are available and accessible by the entire public since the Kenya Gazette can be accessed by anyone. It also captures the performance of the courts and acts as a tool to ensure accountability to the citizenry.

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

From the onset, this Act sets out principles that shall guide the exercise of its authority as encompassing the principles and values in Article 10; the principles of judicial authority in Article 159; and public service values and principles captured in Article 232(1) (c), (e) and (f) of the Constitution. Flowing from this discussion of the said constitutional provisions, it emerges that judicial accountability is captured as one of the guiding principles for the High Court's exercise of its judicial authority.

¹³² Judicial Service Act No. 1 of 2011, section 38.

¹³³ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 82.

¹³⁴ Judicial Service Act, Section 38 (4).

Section 29 of the said Act specifically speaks on performance management and provides:-

The Principal Judge shall, upon consultation with the Commission, 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 any other law.

This is a clear indicator of the requirement to measure the performance of judges in order to ascertain whether they are adhering to the principles rooted in the Constitution and statutes.

e) The Court of Appeal (Organization and Administration) Act, 2015

Like the provision touching on Performance Management in the High Court, Section 31 of this Act provides:-

The presiding judge shall upon consultation with the Commission 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.

While the High Court and the Court of Appeal Acts provide for performance management, the Acts establishing the Supreme Court, the Environment & Land Court and the Employment & Labour Relations Court and the Magistrates' Courts have no similar provisions. The closest the Magistrates' Courts Act 2015 comes to enshrining accountability in its provision is under the guiding principles provided for at section 3. The guiding principles include those provided for under Articles 10, 159 (2) and 232 of the constitution.

The discussion of the constitution has revealed the specific articles quoted by the Magistrate's Act to contain accountability as one of the principles under focus.

It therefore emerges that there is no complete legal framework covering all cadres of courts. As will be discussed as a challenge under Chapter 3, there is potential of this incomplete statutory framework impeding smooth implementation of performance management in the Judiciary.

2.4. POLICY FRAMEWORK

The Kenyan Judiciary's performance management system is based on a strong policy foundation, with efforts dating back to 1992. This section shall consider the development of this policy framework and specifically look at the Strategic plans, the Judiciary Transformation Framework 2012-2016 and Sustaining Judiciary Transformation 2017-2021 and their contributions to the development and implementation of a PM system within the judiciary.

2.4.1 DEVELOPMENT OF THE POLICY FRAMEWORK

In 1992, the judiciary established a committee to evaluate terms and conditions of service which was to among other things, implement the Performance Appraisal System (PAS).¹³⁵ The Administration of Justice Committee (1998) observed that this system proved futile as it was perceived that it was serving the interests of a few people at the top.¹³⁶ This caused weak

¹³⁵ Performance Management and Measurement Steering Committee (n 59) 3.

¹³⁶ George Mbogo Ochilo Ayacko, 'Transformational Leadership Style and Its Influence on Performance of Judicial Staff in Kenya' (Doctorate in Business Administration, United States International University - Africa 2017) 8

<<http://erepo.usiu.ac.ke/bitstream/handle/11732/3651/GEORGE%20MBOGO%20OCHILO%20AYACKO%20DBA%202017.pdf?sequence=1&isAllowed=y>> accessed 28 July 2018.

performance management in the Judiciary because of the absence of specific goals, measurement and targets.¹³⁷

Further efforts were made through annual work plans and service delivery charters, but these too were not effective because they were not integrated.¹³⁸ Renewed efforts in 2003 led to the formation of the retired Judge Ringera's Integrity and Anti-corruption Committee. The Committee reported on the effect of corruption on the Judiciary's operation and made recommendations of approaches to discover and prevent corruption.¹³⁹ It has been observed that the re-introduction of performance management system in the Judiciary in 2003 faced numerous implementation challenges due to the failure to tackle matters that were unique to performance improvement needs at the time.¹⁴⁰

There followed the 2005-2008 Strategic Plan which advocated for the innovation and incorporation of appropriate performance systems including goals, targets and objectives which were to be measured regularly.¹⁴¹ In retrospect, Economic Recovery Strategy (ERS) 2003-2007 introduced strategic planning in the public sector as a way of enhancing economic recovery. The judiciary has since adopted and incorporated strategic planning. The present strategic plan for the years 2014-2018, is based on the Judiciary Transformation Framework (JTF) discussed below. The plan builds on the strides made in judiciary transformation and provides mechanisms of sustaining and broadening the transformation.¹⁴²

¹³⁷ *ibid.*

¹³⁸ Performance Management and Measurement Steering Committee (n 59) 3.

¹³⁹ *ibid.* 4.

¹⁴⁰ Ayacko (n 156) 8.

¹⁴¹ Judiciary Strategic Plan 2005 – 2008 (2005)

¹⁴² 'Strategic Plan 2014-2018 Building on the Foundations of Judiciary Transformation' The Judiciary of Kenya(2014)

In order to investigate the findings of the 2003 Integrity and Anti-Corruption Committee, the 2005 Ethics and Governance Sub-Committee was established. Among the recommendations made by the 2005 Ethics and Governance Sub-Committee was that peer committees review and evaluate the performance of judges, judicial officers and judiciary staff.¹⁴³ The Ethics and Governance Committee was appointed in 2007 to deliberate and recommend the standard and structures for performance measurement and also assess the enactment of the recommendations of past integrity committees. It churned out a report in 2008 recommending that performance measurement be linked with the disciplinary process to provide an avenue for sanctioning non-performing officers; and that there be enticements to inspire quality in the judiciary.¹⁴⁴

In the same vein, the Taskforce on Judicial Reforms 2008 was established for the purpose of considering among others, methods of boosting and amplifying the performance of the Judiciary.¹⁴⁵ The Task Force noted that the judiciary was not part of the performance contracting programme for the public service.

2.4.2. STRATEGIC PLANS

The Judiciary adopted the use of strategic plans in 2005 in order to deliver quality justice, with the first strategic plan being from the period between 2005 and 2008.¹⁴⁶ This initial plan was anchored on Kenya's previous Development Blue-prints i.e. the Poverty Reduction Strategy Paper 2001 and the Economic Recovery Strategy for Wealth and Employment Creation (ERS) 2003–2007 which gave credence the rule of law and access to justice as the

¹⁴³ 'The Judiciary Ethics and Governance Sub - Committee Report' The Judiciary of Kenya (2005).

¹⁴⁴ 'The Judiciary Ethics and Governance Committee Report, 2008' The Judiciary of Kenya (2008).

¹⁴⁵ Performance Management and Measurement Steering Committee (n 59) 6.

¹⁴⁶ Kimwele Muneeni, 'Challenges Faced by the Judiciary in the Implementation of Its Strategic Plans in Kenya' (MBA, University of Nairobi 2011).

solution to stability in the country.¹⁴⁷ Despite its lofty aims to improve case flow management systems and to mainstream monitoring and evaluation activities within judiciary, this strategic plan was not able to achieve these goals.

The Judiciary Strategic Plan 2008-2012 aligned itself with the Kenya's Vision 2030 and the First Medium Term Plan 2008-2012 under Vision 2030, and aimed at enhancing judicial independence; building capacity in human resources and management, improve institutional structures. It notably provided a strategy for designing an appropriate performance management system that has a rewards and penalties framework while magnifying lacuna and setting up a system that sets standards for performance evaluation.¹⁴⁸ This is yet to be put in place.

The Strategic Plan 2014-2018, places a premium on performance management as it recognizes that institutionalizing strong measures that will enhance accountability, transparency, and performance measurement will empower the Judiciary's leadership and management to effectively and accountably make informed decisions.¹⁴⁹ It plans to achieve transparency and accountability by setting up strategy on Anti-corruption and a policy addressing values, ethics and integrity.

It also highlights entrenching performance management as a key result area, under the strategic issue of governance. The 2014/2018 Plan seeks to institutionalize accountability through mainstreaming performance management and accountability in Judiciary,

¹⁴⁷ 'Judiciary Strategic Plan, 2009-2012' (The Judiciary of Kenya)

<<https://ia802606.us.archive.org/26/items/KenyaJudiciaryStrategicPlan2009-2012/JudiciaryStrategicPlan.pdf>> accessed 3 September 2018.

¹⁴⁸ *ibid* 33.

¹⁴⁹ 'Judiciary Strategic Plan, 2014-2018' (Judiciary of Kenya 2014) 23

<<https://www.judiciary.go.ke/download/judiciary-strategic-plan-2014-2018/>> accessed 2 September 2018.

strengthening the framework on monitoring and evaluation, as well as entrenching Quality Management Systems.¹⁵⁰

2.4.3 JUDICIARY TRANSFORMATION FRAMEWORK (JTF) 2012-2016

JTF which was launched on 31st May 2012 for the purposes of ensuring accountability, improvement and transparency, set out the necessity for an integrated performance management system.¹⁵¹ JTF sought to entrench performance management and measurement in judiciary's operations through setting up a Directorate of Performance Management as well as introducing performance contracting to ensure that judiciary staff is highly competitive and professional.¹⁵²

One of the measures it sought to establish was an Integrated Performance Management and Accountability System (IPMAS) which includes performance factors, criteria, weighting and scoring. This was to be linked to a Planning and Budgeting System for performance-based programmes. JTF also sought to establish regular public, litigant and staff surveys on Judiciary performance and areas for improvement.

Suffice it to say that the judiciary had over the years resisted performance management measures on the basis that they would interfere with judicial independence.¹⁵³ However, the blueprint laid out by JTF assuaged these fears through the establishment of offices within the judiciary to oversee the setting up and evaluation of the performance management system. These are the Performance Management and Measurement Steering Committee (PMMSC)

¹⁵⁰ *ibid* 24.

¹⁵¹ 'Judiciary Transformation Framework 2012-2016' (2012)

<<http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>> accessed 2 August 2018.

¹⁵² *ibid*.

¹⁵³ Kenya National Assembly, Official Record (Hansard), Wednesday, 7th April, 2010, p. 14

established in January, 2013 and the Performance Management Directorate, discussed in the institutional framework below.

2.4.4. SUSTAINING JUDICIARY TRANSFORMATION (SJT): A SERVICE DELIVERY AGENDA, 2017-2021

Sustaining Judiciary Transformation for Service Delivery, 2017-2021 (SJT) is the current transformation policy guiding the Judiciary's activities, with programs to escalate accountability and transparency including automation of revenue receipting and accounting; enacting the Regulations on the Judiciary Fund; finalizing job descriptions and the institutional organizational structure; strengthening of the Performance Management and Measurement Understandings (PMMUs) and Performance Appraisal (PAS) and preparations of a Service Delivery Charter by each court station on which basis its performance shall be evaluated.¹⁵⁴

SJT seeks to enhance accountability of individual Judicial Officers and Judiciary Staff in order to enhance productivity and service delivery through enforcing evaluations as well as introducing clear incentives and penalties for individual performance.

To address case backlog, SJT recommends the adoption of a strategy to clear back log, which is to be implemented at the station level, which shall institutionalize performance management and measurement through monthly reports to be prepared by the Directorate of Performance Management on the courts' performance which information shall be circulated among all Judges and Magistrates. The PMD shall also develop a tool to measure the task performance of Court Administrators, including Executive Offices and Registry staff to ensure efficiency and effectiveness.

¹⁵⁴ Sustaining Judiciary Transformation(SJT) A Service Delivery Agenda 2017-2021

SJT set an ambitious goal to have Performance Management and Appraisal being automated by June 2017 and indeed is yet to achieve this target, more than a year later. As the performance management system is still in its early stages, with only some court stations, registries and departments being implementing units, as well as implementation of technology lagging behind due to lack of internet connectivity in some stations, the judiciary still has a long way to go in automation of performance management.

Another ambitious goal was to launch an internet technology based filing system at the Commercial Division of the High Court by March 2017 then roll out the same to other stations by December 2018. Due to the challenge that some court stations do not have access to internet, the achievement of this strategy may happen well beyond 2018.

SJT is closely aligned to the performance agreements that have already been signed and as a result, the Directorate of Performance Management (PMD) and the Performance Management and Measurement Steering Committee (PMMSC) shall provide the necessary technical support to the SJT Implementation Monitoring and Reporting Committee (SIMRC), which was established to oversee the implementation of this vision.¹⁵⁵

2.5 INSTITUTIONAL FRAMEWORK

The Institutional framework of performance management in the judiciary is comprised of several separate offices including the Chief Justice, the Performance Measurement and Management Steering Committee, the Judicial Service Commission, the Performance Management Directorate and the Directorate of Human Resource and Administration. Their establishment and various roles are captured below.

¹⁵⁵ 'Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021' (n 125) 66.

2.5.1. OFFICE OF THE CHIEF JUSTICE

This office is established by Article 161(2) (a) as head of the judiciary. It is therefore central to the performance management system, as all directorates, committees and court stations ultimately report to the Chief Justice, thus incorporation of performance management into the fabric of the judiciary lies with the Chief Justice.¹⁵⁶ On their part, the Chief Registrar of the Judiciary is to ascertain that the good practice of performance management is entrenched in all operations of the Judiciary.

The CJ is the chairperson of JSC, the body obligated to promote the judiciary's independence and accountability as elucidated below. The committee for the implementation of the Sustainable Judicial Transformation, the chair of SJT Implementation, Monitoring and Reporting Committee (SIMRC), is also to report to the CJ on the implementation of this policy document. With respect to the Performance Measurement and Management Understandings (PMMUs), they are to be executed as between the Chief Justice and the implementing units.

The office of the Chief Justice thus carries out oversight over all performance management activities within the judiciary, a task shared with JSC.

2.5.2. THE JUDICIAL SERVICE COMMISSION (JSC)

Even though Kenya has settled on the PMMSC as the body tasked with conducting performance management in the judiciary, other bodies such as independent tribunals, Parliaments, judicial councils, anti-corruption bodies, the civil society, national human rights institutions and professional associations among others are some of the institutions identified by the International Commission of Jurists as actors that could promote judicial

¹⁵⁶ 'Human Resource Policies and Procedures Manual' (The Judiciary, Republic of Kenya 2014) 33
<<https://www.judiciary.go.ke/download/human-resource-policies-and-procedures-manual/>> accessed 30 August 2018.

accountability.¹⁵⁷ This has been implemented in Australia as these bodies fulfill a role in its judicial accountability model.¹⁵⁸

With specific focus on Kenya, the Constitution establishes the JSC under Article 171 (1) and mandated it to promote and facilitate judiciary's accountability and independence as outlined under Article 172 (2). To achieve this goal, the Constitution envisions the JSC as an independent and accountable constitutional commission.¹⁵⁹The JSC is composed of eleven commissioners who are chiefly participants in the justice sector. ¹⁶⁰ The Chief Justice is one of the members and is the chairperson. The other members include: one judge from each level of court and each appointed by the relevant court or body of magistrates. Other members include two advocates, elected by the members of the Law Society of Kenya, the Attorney-General,¹⁶¹ one person nominated by the Public Service Commission and two non-lawyer members of the public, appointed by the president with the approval of the National Assembly.¹⁶² With the exception of the offices of the Attorney-General and the Chief Justice, other members are in office for a five year term, which is only renewable once, if still qualified.¹⁶³ Article 252 grants the JSC the general functions and power to conduct investigations on its motion or on a complaint by a citizen relating to a judge or judicial officer.¹⁶⁴

¹⁵⁷ International Commission of Jurists (n 132) 33–34.

¹⁵⁸ Roslyn G. Atkinson, 'Judicial Accountability: An Australian Perspective' 6
<<http://www5.austlii.edu.au/au/journals/QldJSchol/2016/20.pdf>> accessed 31 July 2018.

¹⁵⁹ Walter Khobe Ochieng, 'The Composition, Functions and Accountability of the Judicial Service Commission from a Comparative Perspective', *Judiciary Watch Report: Judicial Accountability in the New Constitutional Order*, vol 12 (ICJ Kenya 2016) 47.

¹⁶⁰ Article 171(2)

¹⁶¹ Article (167)

¹⁶² Article (171(2)

¹⁶³ Article 171(4)

¹⁶⁴ Walter Khobe Ochieng (n 179) 59.

Even though there is need to rethink the constitution of the body that conducts performance management in the Kenyan Judiciary in order to alleviate any fears of bias, regard must be had to the possible argument that the conduct of performance management by outsiders would infringe on judicial independence. Considering the overall constitution of the JSC as having members who are not part of the judiciary, if it were to be left to conduct performance management, the fears of infringement on judicial independence would increase.

JSC exercises oversight of the judiciary in the implementation of performance management, as well as the constitutional mandate to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary. It is also to implement a clear incentives and penalties framework to motivate judges, judicial officers and staff to implement the PMS.

2.5.3. PERFORMANCE MEASUREMENT AND MANAGEMENT STEERING

COMMITTEE (PMMSC)

The PMMSC comprises of representatives all levels of the judiciary including from Chief Justice's office and the Chief Registrar's Office.¹⁶⁵ The PMMSC's terms of reference are: - establish an understanding of performance management systems in courts; establish an understanding of performance indicators, targets and measures by judicial officers and staff; establish an understanding of foundations for sound performance measurement by judicial officers and staff; and develop implementation plan for performance negotiation, vetting, monitoring and evaluation and reporting.¹⁶⁶

The Committee's report on Institutionalization of Performance Management in the Judiciary was launched on 15th April 2015.¹⁶⁷ This was meant to enhance productivity, accountability

¹⁶⁵ Performance Management and Measurement Steering Committee (n 59) 7.

¹⁶⁶ *ibid.*

¹⁶⁷ Institutionalizing performance management and measurement in the judiciary 2015

and efficiency through an effective performance management system. Accordingly, judges and magistrates signed performance contracts in the 2015-2016 fiscal year and they were required to submit a daily court return template (DCRT) to the PMD which would then analyze it to generate a court's productivity index.¹⁶⁸

In their concluding remarks, Kameri-Mbote and Muriungi opine that:-

Having reviewed the internal mechanisms of ensuring independence and accountability in the Kenyan judiciary, we conclude that adequate normative, procedural and institutional mechanisms exist; are anchored in the Constitution and laws of Kenya; and are aligned to international best practice.¹⁶⁹

Whether this statement can be adopted as gospel truth is a subject of contemplation. For starters, the internal mechanism for assessment of performance management ignores the *nemo iudex in causa sua* principle of natural justice. This principle simply means that no one should be made judge in his own cause. Looking at the composition of the PMMSC however, it emerges that the members are involved in evaluating the performance of bodies of which they are affiliates. Even though the basis of a sound evaluation system is that those conducting evaluation are familiar with the evaluated,¹⁷⁰ the question still remains whether the evaluation process is objective or whether it might be skewed to favour particular court stations whose members form part of the PMMSC. Further discussion of this dilemma is delved into under chapter 3 on challenges.

The rule against bias notwithstanding, there are authors who opine that any measures of accountability be confined to self-regulation by the judiciary itself for fear of adoption of

¹⁶⁸ The Judiciary of Kenya, Institutionalising Performance Management and Measurement in the Judiciary (April 2015) 40-41

¹⁶⁹ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 88.

¹⁷⁰ White (n 56) 14.

mechanisms that would cause interference with judicial independence.¹⁷¹ In their view, in open democracies where almost all cases are heard in open court, where the media is free to report on such proceedings, where academic commentators are free to critic court decisions, and where the decisions are open to review through available channels of appeal, then the demand for accountability is satisfied *ab initio*.¹⁷² In this regard, the judges and judicial officers are already as accountable as they need to be, on their own terms, and thus it would be irrelevant to subject them to other forms of managerial accountability.

The International Commission of Jurists (ICJ) Guide recommends that commissions ought to be comprised with absolutely all or a majority of judges, with room for a minority representation of the lawyers or legal academics, but to the absolute exclusion of any representatives of the political branches of government.¹⁷³ The Kenyan PMMSC fits this requirement.

However, the disadvantage faced by PMMSC is the lack of ability to assess a judge or judicial officer with regard to their decisions, in a neutral manner. Neutral criteria ought to be employed to assess the care with which a judge interprets the law, manages the workload, conducts court business as a public administrator, interacts with people in the courtroom, and handles other responsibilities.¹⁷⁴ Ideally, PMMSC is supposed to measure judicial performance prospects to gauge individual judge and judicial officer performances against established benchmarks.¹⁷⁵

¹⁷¹ Contini and Mohr (n 88) 28.

¹⁷² *ibid*.

¹⁷³ International Commission of Jurists (n 132).

¹⁷⁴ Institute for the Advancement of the American Legal System [IAALS], 2006.

¹⁷⁵ Sharon Paynter and Richard C Kearney, 'Who Watches the Watchmen?: Evaluating Judicial Performance in the American States' (2010) 41 *Administration & Society* 923, 9.

2.5.4 PERFORMANCE MANAGEMENT DIRECTORATE (PMD)

The Performance Management Directorate was established in 2012, for the initial purpose of ascertaining the extent of case backlog within the judiciary in order to solve the backlog problem.¹⁷⁶ It is mandated to collect data through the Daily Court Returns Template (DCRT), analyse it and publish monthly, quarterly and annual evaluation reports on performance management.

The DCRT data has gone further and has been widely used in resource allocation, promotions of judicial officers and deployment of judicial officers and staff.¹⁷⁷

In addition, under SJT, PMD is mandated to monitor the progress of implementation of each court station's action plan, which is to be submitted by December 2018, and to submit reports on the progress to the Chief Justice.¹⁷⁸ For purposes of effectively meeting the challenge of individual accountability for better service delivery, PMD is to functionally report directly to the Office of the Chief Justice and operationally to the Office of the Chief Registrar.¹⁷⁹ Further, PMD is also to conduct monitoring, evaluation and reporting of the Strategic Plan 2014-2018.

2.5.5 DIRECTORATE OF HUMAN RESOURCES AND ADMINISTRATION (DHR&A)

DHRA is the directorate mandated to cater for employee planning and resourcing, staff welfare and mobility, to ensure a conducive work environment for all staff and clients and to organize for training and development.

¹⁷⁶ 'Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021' (n 125) 19.

¹⁷⁷ 'Performance Management and Measurement Understandings Evaluation Report, 2016/2017' The Judiciary of Kenya, (2018) 70.

¹⁷⁸ Performance Management and Measurement Steering Committee (n 59) 23.

¹⁷⁹ 'Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021' (n 125) 60.

It is also responsible for the generation of the annual performance appraisal reports, which are to be submitted to the Chief Justice, Chief Registrar and the Judicial Service Commission.

2.6. PERFORMANCE MANAGEMENT MEASURES AND TOOLS IN THE KENYAN JUDICIARY

It is on the basis of JTF that the Report on Institutionalizing Performance Management and Measurement at the Judiciary was launched in 2015. This was a Report by the PMMSC established in January 2013 with the mandate of institutionalizing performance management and measurement in the Judiciary.¹⁸⁰ The Committee considered the International Framework of Court Excellence (IFCE) and proposed progressive implementation of the following measures: Expeditious Disposal of Cases; Trial and Delivery Date Certainty; Access to Justice; Remand Custody; Court File Integrity; workload and productivity; Case Clearance Rate; Case Backlog and Court User and Employee Satisfaction.¹⁸¹

These measures were to be integrated into the following Performance Management and Measurement tools: Strategic Plans, Annual Work Plans, PMMU, Citizens Service Delivery Charters and Standards, Quality Management Standards, Performance Appraisals, performance reporting tools and surveys.¹⁸²

2.6.1. PERFORMANCE MANAGEMENT AND MEASUREMENT UNDERSTANDINGS (PMMUs)

As was defined in Chapter 1, performance contracting is an agreement entered into between two parties after a series of negotiations, which sets out expectations and appropriate

¹⁸⁰ Performance Management and Measurement Steering Committee, 'Institutionalising Performance Management and Measurement in the Judiciary' (2015).

¹⁸¹ *ibid.*

¹⁸² *ibid.*

responsibility for involved parties with the aim of attaining set targets.¹⁸³ Within the judiciary performance management system, Performance Management and Measurement Understandings are an annual performance contract negotiated and agreed within the judiciary structure flowing from the Chief Justice, the President of the Court of Appeal, the Principle Judge of the High Court, Presiding Judges of each court station, Registrars of various courts and the heads of subordinate courts.¹⁸⁴ This was predicated on the need to adopt performance management practices that would enhance continuous evaluation and ongoing development of the judiciary in order to deliver on its objectives.¹⁸⁵ This would in turn be used to track the achievement of various measures set on course by JTF.

As noted above, the first Performance Management and Measurement Understandings (PMMUs) in the Judiciary were signed in the fiscal year 2015/2016. The second PMMUs were signed in the 2016/2017. The 2018 Evaluation report notes that whereas 227 implementing units signed in the 2015/2016 cycle, there was a 13.22% increase in the 2016/2017 cycle with 257 units signing PMMUS.¹⁸⁶ The 257 units comprised of the Supreme Court, 5 Courts of Appeal Stations, 41 High Courts and Divisions, 14 Environment and Land Courts, 6 Employment and Labour Relations Courts, 123 Magistrates' Courts, 46 Kadhis' Courts, Office of the Chief Registrar, 6 Offices of Registrars, 10 Directorates, Judicial Training Institute, the National Council for Law Reporting, Office of the Judiciary Ombudsperson and National Council on Administration of Justice.¹⁸⁷ The increase in the

¹⁸³ Lukhale (n 29) 3.

¹⁸⁴ Performance Management and Measurement Steering Committee (n 59) 43.

¹⁸⁵ Manchester Metropolitan University, 'Performance Management An Introduction' 3

<https://www2.mmu.ac.uk/media/mmuacuk/content/documents/human-resources/a-z/guidance-procedures-and-handbooks/Performance_Management_Guide.pdf> accessed 8 August 2018.

¹⁸⁶ 'Performance Management and Measurement Understandings Evaluation Report, 2016/2017' The Judiciary of Kenya (n 164) xiii.

¹⁸⁷ *ibid* 1.

number of implementing units is an indication that performance management is becoming more acceptable in the judiciary.

On each of these performance indicators listed above, targets were negotiated and agreed between the PMMSC and the implementing units. Furthermore, the PMMSC had already set minimum standards expected from each cadre of courts as outlined in its 2015 report.¹⁸⁸ The following is an exposition of minimum targets as outlined in the 2015 report and achievements thereafter.

Supreme Court: The court to hear and determine petitions (except presidential election petitions which have a constitutional timeline of 15 days) and appeals from the Court of Appeal to be determined within 90 days from the date of filing. The Supreme Court achieved a backlog reduction rate of 59% as opposed to the 2015/2016 period where no reduction in case backlog was achieved. The overall performance of the Court was fair with a score of 51.92% in the negotiated performance indicators.¹⁸⁹

Court of Appeal: Court to determine average of 2,500 cases annually; with each bench of judges to handle 12 cases per week. The Court however did not meet this target as it determined a total of 1,103 cases in the 2016/2017 cycle.¹⁹⁰ That notwithstanding, the Court of appeal was shown to have achieved an overall case clearance rate of 64% recording a court user satisfaction index of 65%. The Court also reduced case backlog by 21%.¹⁹¹

High Court: Each judge to deliver a minimum of 10 judgments/ rulings every month excluding plea of guilty in criminal cases and settlements in civil cases. This translates to at

¹⁸⁸ Performance Management and Measurement Steering Committee (n 59) 31–33.

¹⁸⁹ ‘Performance Management and Measurement Understandings Evaluation Report, 2016/2017’ The Judiciary of Kenya (n 164) 5–6.

¹⁹⁰ *ibid* 10.

¹⁹¹ *ibid*.

least 110 judgments/rulings to be delivered by a judge each year. The High Court attained good performance in some of the key performance indicators. For instance, the court had a case clearance rate of 136% in the 2016/2017 as opposed to 33% in the 2015/2016 period.¹⁹² On average, each judge in the High Court concluded 311 cases as pitted against the 110 minimum targets.¹⁹³ In relation to case backlog reduction, the High Court was found to have reduced its backlog by 6% from 100,872 cases to 94,578 cases.¹⁹⁴ Court User Satisfaction Survey on the other hand showed that the High Court had a court user satisfaction index of 65%.¹⁹⁵

The Employment and Labour Relations Court (ELRC) had the same targets set for it as the High Court. The Court accomplished a case clearance rate 60% in the 2016/2017 period as opposed to 30% realized in the 2015/2016 period.¹⁹⁶ The ELRC judges' productivity increased from 153 cases in 2015/2016 to 300 cases in 2016/2017.¹⁹⁷ This is an upward trajectory if pitted against the 110 minimum target set by the 2015 report. The Court User Satisfaction Survey indicated that the court had a court user satisfaction index of 62%. However, the court was not able to achieve a positive result on case backlog as it increased by 11%.¹⁹⁸

The Environment & Land Court (ELC) just like the ELRC had the same minimum targets as those of the High Court. On case clearance, the rate in the ELC increased from 45% 2015/2016 to 65% in 2016/2017.¹⁹⁹ Case backlog was reduced by 31% in the same period. In

¹⁹² *ibid* 11.

¹⁹³ *ibid*.

¹⁹⁴ *ibid*.

¹⁹⁵ *ibid*.

¹⁹⁶ *ibid* 22.

¹⁹⁷ *ibid*.

¹⁹⁸ *ibid*.

¹⁹⁹ *ibid* 25.

relation to productivity, the court recorded a judges' productivity of 180 cases against 150 cases the previous year and the minimum 110 cases set in the 2015 report.²⁰⁰ Results from the Court User Satisfaction Survey show that the court achieved a court user satisfaction index of 64%.²⁰¹

Magistrates' Courts required each magistrate to deliver a minimum of 20 judgments and rulings per month, excluding plea of guilty in criminal cases and settlements in civil cases. This translates to at least 220 judgments/rulings to be delivered by a magistrate every year. The report indicated good performance for the Magistrates' courts. For instance, case clearance rate was found to have improved from 42% in 2015/2016 to 87% in 2016/2017. Case backlog was reduced by 9% and productivity of judicial officers was an average 672 cases as compared to the 220 targeted in the 2015 report.²⁰²

Data collection tools used in the process of performance evaluation includes the Daily Court Returns Template (DCRT), submitted by each court which contains information on the tasks that have been completed each day. The DCRTs are submitted to the Performance Management Directorate (PMD), which then analyses the data on a monthly, quarterly and annual basis.

2.6.2. PERFORMANCE APPRAISALS SYSTEM (PAS)

This was implemented with the objective of improving overall performance of the Judiciary through measuring and improving the performance of individual judges, magistrates, Kadhis and judicial staff.²⁰³

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² *ibid* 29.

²⁰³ 'Human Resource Policies and Procedures Manual' (n 176).

Performance agreements are signed between the Court of Appeal President, Principle Judge of the High court, and CRJ with the Chief Justice. Individual Judges are also to sign with the Heads of their Courts, with each heads of division, court station, Directorate, and functional units additionally signing an annual performance contract with the CRJ, and the functional units will consequently sign performance agreements with each officer/staff under their jurisdiction at the beginning of the financial year using the approved performance form.²⁰⁴

These agreements are binding on the judges, officers and functional units.

The process of assessment is that a judge or judicial officer shall first assess themselves and thereafter jointly review their assessment with their supervisor. These assessments are then submitted to the Directorate of Human Resource and Administration, which has oversight of the PAS system, and publishes annual reports on the same.

Unfortunately, while JSC is mandated to institutionalize an incentives and penalties framework in order to encourage participation in performance management, they have yet to do so.

2.6.3. SERVICE DELIVERY CHARTERS (SDC)

PMMSC, in its inaugural 2015 Report recognized service delivery charters as an important part of a performance management system as it is an interface with the citizens to improve the services of the Judiciary.²⁰⁵ The Charters are to be station based and should contain a comprehensive set of indices including range and state of ICT services; timeliness in retrieval of files, number and effect of Court Users Committee Meetings and Open Days held periodically; duration for concluding civil and criminal matters,; case backlog reduction strategy duration for making typed proceedings available; corruption and public complaints

²⁰⁴ *ibid.*

²⁰⁵ Performance Management and Measurement Steering Committee (n 59) 10.

reduction strategy and timeframes for writing of judgments and rulings among others.²⁰⁶ These indices are to be developed by PMD, PMMSC and the individual court stations. It is not clear what the distinct roles of these two institutions shall be in this endeavor thus there is an overlap of oversight.

The Charters shall be displayed in a prominent part of the court station and at the end of the year, the Chief Justice is to recognize the best and worst performing court stations based on their commitments.

While it is intended that the court station's performances shall have a bearing on employee promotions, it is not indicated how the station's obligations shall be linked to the employee's obligations. There is thus a need to link the service charter to the performance agreements signed between judges, judicial officers/staff and their supervisors.

2.7. CONCLUSION

The institutionalization of performance management, reorganization of the institution and the putting in place of policies to guide administration, human and financial management, are great strides in the right direction.²⁰⁷

This Study finds that performance management covers all superior courts including the specialized Environment and Land Court and the Employment and Labour Court, through the policy instruments that have been employed by the judiciary. It also covers the magistrate's courts and the Kadhis' courts, but not the Courts Martial and tribunals. As the latter courts still constitute the judiciary, there is the need to bring tribunals and court Martial into the performance management system.

²⁰⁶ 'Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021' (n 125) 58.

²⁰⁷ Patricia Kameri-Mbote and Muriuki Muriungi (n 57) 101.

This study also finds that the international framework for performance management in the Kenyan judiciary is founded on soft law, which unless adopted into Kenya's internal statutory framework, will only remain of persuasive effect.

The analysis of the Constitution and legislation has shown that while there are several provisions upholding the ideal of judicial accountability, there is a gap with respect to specific statutory provisions that would enable implementation of performance management as the tool chosen for measuring judicial accountability, as only the acts with relation to the Court of Appeal and High Court provide for performance management. This is to the exclusion of the larger part of the Judiciary including the Supreme Court, the Environment and Land Court, the Employment and Labour Relations Court, the magistrate's court, the Kadhis' court, court Martial and tribunals.

There is however a robust policy framework on performance management, which has evolved over time and responded to the various challenges involved in the institutionalization of performance management

The institutional framework is characterized by a multiplicity of agents, carrying out various duties. While there is clarity with respect to the ultimate reporting channel being to the Chief Justice, these agencies need to be rationalized to ensure synergy in the Judiciary's Performance Management System.

Certain measures have been put in place through consultative efforts of the PMMSC, which are to be enforced through the performance management tools, which include the Performance Measurement and Management Understandings, the Performance Appraisal Systems, Service Delivery Charters and the Daily Court Returns Template.

CHAPTER THREE

CHALLENGES IN IMPLEMENTATION OF PERFORMANCE MANAGEMENT IN KENYAN JUDICIARY

3.0 INTRODUCTION

This chapter will consider the challenges faced in implementing performance management and enhancing judicial accountability as highlighted in the 2015 Report on Institutionalizing Performance Management and Measurement at the Judiciary, Performance Management and Measurement Understandings, and the Evaluation Reports for the 2015/2016 and the 2016/2017 fiscal years . It shall also consider other challenges which though are not highlighted in the Evaluation Reports, are a hindrance to the effective implementation of performance management in the judiciary.

3.1 LACK OF ADEQUATE NUMBER OF JUDGES, JUDICIAL OFFICERS AND STAFF

This is a challenge that has persisted within the judiciary and has been flagged as one of the causes of corruption.²⁰⁸ The performance measure of rate of clearance of cases is affected by few judges and staff as the rate drops and results in backlog. Corruption is then fostered where judicial staff or judges take advantage of case backlog and delayed court services to obtain an illegal benefit through fast tracking some bureaucratic processes or drafting an illegitimate decision to a party's advantage. In the second cycle, it was reported that shortage of staff results in magistrates courts being burdened with a high case load, with the situation

²⁰⁸ Research and Transformation Department, 'A Study on Corruption and Ethics in the Judicial Sector, 2014' (Ethics and Anti-Corruption Commission 2014) <<http://www.eacc.go.ke/docs/Judicial%20study%20-%20Full.pdf>> accessed 7 August 2018; 'Performance Management and Measurement Understandings Evaluation Report, 2016/2017' The Judiciary of Kenya (n 164) 71 paragraph 3.

being made worse by the expanded jurisdiction of the magistrates thus matters previously before the High Court are now before the lower court.²⁰⁹

Thereby an urgent need persists to add to the numbers of judges, magistrates, kadhis and judicial staff to ensure that all court stations and directorates are working optimally. While the Service Delivery Agenda highlighted the goal of determining the optimal staffing levels across the country and thereafter filling all vacant positions by February, 2018, this is yet to be achieved as at August 2018, there are still several vacancies at the Court of Appeal bench resulting in an overworked bench.

In the meantime, judges and judicial officers need to employ innovative methods to ensure that the judiciary works efficiently. One of these tools has been the Service Week, organized by individual court stations which bring together judges from different stations to clear the case backlog of an individual court station. This has been a successful measure.

This needs to be addressed as customer satisfaction substantially increases with improved efficient performance.

3.2 BUDGETARY CONSTRAINTS

This was highlighted in the first performance management cycle as a direct impediment to the implementation of the activities set out in the work plan.²¹⁰ Court stations that used initiatives such as service weeks and Justice@Last Initiatives were found to do well in backlog reduction and case clearance rates, while those that did not take up these efforts struggled to reach their targets.²¹¹

²⁰⁹ Judiciary Service Commission, ‘Statement on the State of the Judiciary in Light of Drastic Cuts in Budgetary Allocations’ (Supreme Court of Kenya, 24 July 2018) 72 <<https://www.judiciary.go.ke/download/statement-on-the-state-of-the-judiciary-in-light-of-drastic-cuts-in-budgetary-allocations/>>.

²¹⁰ ‘Institutionalising Performance Management and Measurement in the Judiciary’ (n 167) 58 paragraph 2.

²¹¹ ‘Sustaining Judicial Transformation: A Service Delivery Agenda, 2017-2021’ (n 125).

Other innovative efforts that have been employed include entrenching alternative dispute resolutions and alternative justice systems (AJS) and mobile courts. Lodwar Law Courts is heralded for having a strong AJS with significant proportions of cases being resolved through AJS. These efforts have gone a long to enhance performance of the courts and without the requisite budgetary support, they will not be maintained.

While budgetary constraints were not highlighted as an impending factor in the second cycle, it is likely to arise as a significant challenge in this third cycle due to the drastic cuts to the Judiciary's budget in the 2018/2019 financial year.²¹² Unless further allocations are allotted: efforts to increase court facilities shall stall, with 70 construction projects coming to a halt; 50 mobile courts will cease operations; movement of judges and magistrates to help stations with heavy backlog during service weeks will not be possible; ICT programmes and modernization of court systems will grind to a halt and JSC's activities will be hampered.²¹³ This will result in significantly poorer performance in the different implementing units. While this situation was foreseen by the Constitution, which sought to grant financial autonomy to the judiciary through the establishment of the Judiciary Fund under Article 173 of the Constitution, the Fund is yet to be a reality, almost a decade since the Constitution's implementation.

Despite the financial constraint, the judiciary needs to put in place austerity measures as well as to seal off gaps such as corruption and loss of revenue through under collection of court fees. In the course of 2018, the courts have been implicated in several corruption allegations

²¹² Judiciary Service Commission (n 230).

²¹³ *ibid.*

including the fraudulent loss of Kshs. 500 million²¹⁴ and several stalled constructions despite payments to contractors with the constructions valued at more than KShs 6.5 billion.²¹⁵

3.4 LACK OF SUPPORT FROM STAKEHOLDERS

The justice chain, just like a supply and demand chain, is comprised of several actors, who contribute to the final product of justice. These external stakeholders affect the performance of the Judiciary, and they include the Directorate of Public Prosecution, the police, the AG's office, advocates, prisons, the children's department, expert witnesses, doctors, and probation and aftercare.²¹⁶ Whereas the judiciary has made deliberate reform efforts to improve service delivery to court users, these efforts may not achieve the intended goals if other court users that affect judiciary work like the police, prosecutors, and advocates are not reformed to align with the judiciary's mandate. As it were, whereas courts are bent on clearing cases and reducing backlog, stakeholders like advocates and public prosecutors hold them back through the request of frequent adjournments.²¹⁷ These results in longer time frames taken to finalize cases other than those projected in the PMMUs thus delaying justice and giving a perceived poor performance of the judiciary.

Adjournments are often sought by ill-prepared or tactical lawyers and prosecutors, when witnesses fail to appear in court on set dates or where parties or their advocates are absent from court.²¹⁸ A study on court case delays indicated that the judiciary is also to blame in delay of concluding cases with 22.43% of criminal cases being delayed because the court was

²¹⁴ Paul Ogemba, 'DPP Goes for Judiciary Staff Implicated in Sh500 Million Fraud' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001291217/dpp-goes-for-judiciary-staff-implicated-in-sh500-million-fraud>> accessed 31 October 2018.

²¹⁵ 'Judiciary on the Spot over Sh6bn Projects' (*Daily Nation*) <<https://www.nation.co.ke/news/Judiciary-on-the-spot-over-Sh6-6bn-projects/1056-4689358-156yx9qz/index.html>> accessed 31 October 2018.

²¹⁶ Performance Management and Measurement Steering Committee (n 59) 24.

²¹⁷ Edward Laws, 'Addressing Case Delays Caused by Multiple Adjournments' 12, 1–2.

²¹⁸ Machakos Antony Ikunda, 'Factors Influencing Dismissal Of Criminal Cases In Kenyan Courts: A Case Study Of Mavoko Law Courts' (MA Sociology, University of Nairobi 2016); Edward Laws, 'Addressing Case Delays Caused by Multiple Adjournments' 12.

not in session, in civil matters, 44.78% were delayed due to litigants' unpreparedness. This study took an average of cases for two years between the time they were filed and their determination.²¹⁹

Further, delay in concluding civil and succession matters was flagged in the second cycle of performance management, as being caused by other agencies in the justice chain.²²⁰ There is thus a need for the judiciary to liaise with the various stakeholders including the Directorate of Public Prosecution, the police, the AG's office, advocates, prisons, the children's department, expert witnesses, doctors, and probation and aftercare, in order to chart the way forward on synergetic engagements towards timely justice.

3.5 SETTING OF REALISTIC TARGETS

This was highlighted as a problem in the first performance management cycle in the 2015/2016 financial year.²²¹ PMMUs were signed with each implementing unit in a process involving negotiation, target setting and signing by directors in the case of directorates as the first party and the Judiciary's Chief Registrar as the second party.²²²

This largely impacted the performance results with units with low targets far surpassing them, while those that set ambitious goals finding it difficult to attain and thereby performing poorly. This problem did not affect the 2nd cycle since the assessed achievement formed the basis of setting new targets.

²¹⁹ Performance Management Directorate, 'Court Case Delays: Impact Evaluation Diagnostic Study Report' (The Judiciary of Kenya 2014) 26.

²²⁰ 'Performance Management and Measurement Understandings Evaluation Report, 2016/2017' (The Judiciary of Kenya 2018) 71 <<https://www.judiciary.go.ke/download/performance-management-and-measurement-understandings-evaluation-report-2016-2017/>> accessed 3 August 2018.

²²¹ 'Institutionalising Performance Management and Measurement in the Judiciary' (n 167) 55 paragraph 3.

²²² 'Performance Management and Measurement Understandings Evaluation Report, 2015/2016' (The Judiciary of Kenya 2017).

3.6. OTHER CHALLENGES

3.6.1. MULTIPLE INSTITUTIONAL OVERSIGHT

While performance management is overseen and measured by PMMSC, it falls to the Directorate of Human Resources and Administration, as well as the JSC to implement and enforce a system of incentives and penalties for individual performance. JSC has the constitutional mandate to appoint, investigate and remove from office or otherwise discipline judicial staff as prescribed in the Judiciary Service Act.²²³ In addition, there is the Performance Management Directorate (PMD) which collects data through DCRTs and publishes reports regularly. Lastly, there the Directorate on Human Resource and Administration (DHRA), which has oversight of the performance appraisal system.

A clear incentive and penalties framework is likely to motivate judges, judicial officers and staff to support performance management through diligence in sending data through DCRT and weekly and monthly reports, as well as in increased productivity. This is yet to be implemented by JSC.

The current institutional framework has multiple reporting channels which leads to bottlenecks in information flow and lack of clarity in decision making.

3.6.2. RESTRICTIVE INSTITUTIONAL CULTURE

Institutional culture has been defined as the collective mindset that distinguishes members of one organization from another.²²⁴ The above discussion has shown that the judiciary as an institution has had a culture of preserving its independence albeit by remaining detached from public scrutiny, shunning attempts at judicial accountability and remaining opaque to the

²²³ The Constitution of Kenya (n 141).

²²⁴ Judicaster Nthuku, Mokaya Samuel Obino & Juma Wagoki, 'Challenges to Successful Implementation of Performance Contracting in the Judiciary, Kenya: A Case of Nakuru Law Courts' (2014) 4 International Journal of Human Resource Management and Research 31, 34.

public. In addition, there appears to be lack of motivation within judiciary staff as found in a study conducted among the paralegal staff.²²⁵ Lawyers have also voiced their complaints over absence of judges in courts.²²⁶ The lax culture of judges and staff reporting late needs to be rooted out of the judiciary, as it not only impacts on the perception of the judiciary, but it also hampers access to justice by causing delays. There is the need to keep courts and their staff accountable to their mandate, through performance management efforts.

Nthuku, Obino & Wagoki discuss the challenges facing the successful implementation of performance in the Kenyan judiciary.²²⁷ They opine that incorporation of a performance culture in the Kenyan public service by the application of an objective appraisal system will ultimately improve service delivery.²²⁸ They also address how performance measurement tools like the Daily Court Return Template (DCRT) enhance the implementation of performance contracting in the judiciary. In their conclusions, they state that the government has not institutionalized a performance oriented culture in the judiciary with no distinct performance benchmarks established.²²⁹

Furthermore, even with the presence of performance evaluation for the judges and judicial officers, a culture that does not entrench a clear sanction and reward system in the legal framework and judicial code of conduct is still a hindrance to performance management.²³⁰

²²⁵ Murungi Annerita Gatakaa, 'Perceived Relationship between Organisational Culture and Motivation of Paralegal Staff at the Kenya Judiciary' (MBA, University of Nairobi 2013).

²²⁶ Kenya CitizenTV, *Citizen Extra: Eldoret Lawyers Protest the Absence of Judges in Courts* <<https://www.youtube.com/watch?v=3WN14jnSEq0>> accessed 31 October 2018.

²²⁷ Judicaster Nthuku, Mokaya Samuel Obino & Juma Wagoki (n 245) 1.

²²⁸ *ibid* 35.

²²⁹ *ibid* 43.

²³⁰ Yorokamu Bamwine, 'Performance Management and Judicial Productivity in the High Court' (14th Annual Judge's Conference, Commonwealth Resort, Munyonyo, 8 January 2012) 12

<<http://www.judiciary.go.ug/files/downloads/PERFORMANCE%20MANAGEMENT%20%20JUDICIAL%20PRODUCTIVITY%20IN%20THE%20HIGH%20COURT.pdf>> accessed 9 August 2018.

3.6.3. PERCEIVED CONFLICT OF INTEREST IN THE PMMSC

As outlined under chapter 2 above, the PMMSC is comprised of representatives from all levels of the court including the Office of the Chief Justice and the Office of the Chief Registrar. Out rightly, the officials involved in the conduct of performance evaluation are members of the offices that undergo performance evaluation. The objectivity of the entire process therefore comes under scrutiny as there is the risk of bias which would lead to rewarding self - dealing.²³¹

3.6.4. INABILITY OF EVALUATION TOOLS TO EXHAUSTIVELY CAPTURE THE WORK OF JUDICIAL OFFICERS

Judicial work by its very nature is both imbalanced and complex. There are different administrative roles played by different judges and judicial officers. The cases filed in courts are also of varied magnitudes in complexity, length, public sensitivity among other factors. However, taking a cue from the discussion in chapter two, performance data is majorly focused on clearance of case backlog and concluding cases within suggested strict timelines without considering the other extraneous factors. PMMU has therefore received mixed reactions as to whether it really accurately portrays realistic performance indicators from different courts given its obsession with numbers as opposed to being alive to the different situations.²³²

A good performance management system should evaluate judges and magistrates on the basis of chief aspects of judging like clear communication knowledge and impartial application of

²³¹ Judicaster Nthuku, Mokaya Samuel Obino & Juma Wagoki (n 245) 36.

²³² *ibid.*

the law, temperament, court management and not just number of rulings and judgments delivered.²³³

Another issue relating to the inability of the system adopted to account for other extraneous factors relates to the Daily Court Returns Template (DCRT) and judicial officers involved in administrative work. Whereas the template allows the PMD to track case processing times and in the end form a basis of performance evaluation,²³⁴ it does not reflect the administrative work done by different judicial officers.

3.6.5 QUALITY VERSUS QUANTITY OF JUDICIAL DECISIONS

Vineta Skujeniece posits that in a democratic society, courts have the duty of administering justice by way of providing answers to disputants; effectively communicating their reasoning to public administrators who have to comply with the court's interpretation of the law during decision making; and effectively communicate their decisions to the entire public.²³⁵ This can only be achieved by quality judgments that are not difficult to understand, that contain complete information, and that contain conclusions drawn from legible arguments.²³⁶ In a situation where these factors of quality are sacrificed at the altar of the need to churn out a large number of judgments per judge or judicial officer in order to comply with PMMUs, then justice itself is threatened.

While the PMMSC considered the various performance values set out by the IFCE such as transparency, fairness, equality before the law and integrity, it chose to adopt a majority of measures of a quantitative nature including expeditious disposal of cases, case clearance rate

²³³ Rebecca White Berch and Erin Norris Bass, 'Judicial Performance Review in Arizona: A Critical Assessment' 56 ARIZONA LAW REVIEW 29, 6.

²³⁴ Maya Gainer, 'How Kenya Cleaned Up Its Courts' (*Foreign Policy*) <<https://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts/>> accessed 9 August 2018.

²³⁵ Vineta Skujeniece, *The Quality of Court Judgements* (Centre for Public Policy Providus 2003) 5.

²³⁶ *ibid* 5–6.

and productivity. This thereby characterizes the system of performance management as dwelling on quantitative aspects of justice rather than qualitative. There is thus need to re-evaluate the values guiding the PMS and incorporate those that will measure the quality of decisions and justice that is meted to citizens.

The emphasis on case clearance as encapsulated in the above discussion without much provision for quality does not depict a system that is required in a democratic society. Besides the induction courses for newly appointed judicial staff and the Continuing Judicial Education magistrates provided by the Judiciary Training Institute,²³⁷ there is no clear mentorship process for newly employed judges and magistrates aimed at linking their activities with the Judiciary goals.

There have also been concerns that with the adoption of a management system by results, the quality of decisions would reduce as a judge becomes overly pre-occupied with the number of cases and their processing times.²³⁸ The system of measuring results by numbers has indeed been criticized for failing to consider the uniqueness and weightings of diverse types of cases.²³⁹

3.7 CONCLUSION

The implementation of performance management in the judiciary has been wracked with several challenges. While that of setting low or high targets was temporary, and was soon resolved as the system took root, others such as lack of sufficient judicial officers are likely to persist for a longer period of time.

²³⁷ 'Judiciary Training Institute – The Judiciary of Kenya' <<https://www.judiciary.go.ke/about-us/affiliate-institutions/judiciary-training-institute/>> accessed 9 August 2018.

²³⁸ Contini and Mohr (n 88) 34.

²³⁹ *ibid* 36.

The Chapter highlighted challenges recognized by the PMMSC through its evaluation reports and went further to lay out other challenges that need to be brought to the attention of the Steering Committee and addressed as soon as possible. The next chapter considers the performance management models adopted by Australia with a consideration of the State of Victoria and the United States of America, with a special consideration of the state of New Jersey and evaluate how their experience could be beneficial to the Kenyan model in alleviating the above challenges.

CHAPTER FOUR

LESSONS AND BEST PRACTICES FROM PERFORMANCE MANAGEMENT SYSTEMS IN THE JUDICIARIES OF AUSTRALIA AND THE UNITED STATES OF AMERICA

4.0 INTRODUCTION

Performance management in the judiciary has been adopted and implemented in many jurisdictions with the goal of enhancing judicial accountability and overall effectiveness in the administration of justice to the masses. There are however varying models and different levels of success. This study chose to focus on the judiciaries of the United States of America and Australia, as both these countries have developed successful judiciary performance management models which have impacted positively on the court's performance, that of the individual judges and increased public trust in the judiciary. They have adopted various methods to this end, which though applied in a legal environment that is different from that of Kenya, would be of value to the Kenyan experience. This chapter will focus on the models adopted across both countries and shall thereafter consider the model adopted by the State of New Jersey in the US and the Australian State of Victoria with the hope of identifying alternative solutions to the shortcomings in the Kenyan approach.

4.1 AUSTRALIA'S JUDICIAL PERFORMANCE MANAGEMENT SYSTEM

The Commonwealth of Australia is a federal republic consisting of several semi-autonomous States and Territories. It constitutes of a Federal Government along with the various States and territories.²⁴⁰ The laws governing and applicable to the territories emanate from the

²⁴⁰ Constitution of Australia, 1901 [2010]: Explanatory Notes, at vi-vii; 'The World Factbook — Central Intelligence Agency' <<https://www.cia.gov/library/publications/the-world-factbook/geos/as.html>> accessed 14 August 2018.

Commonwealth Parliament save for instances where such power have been ceded to a particular territory.²⁴¹

Under Section 51 of the Constitution, state governments separately retain legislative power over matters not under Commonwealth control.²⁴² They also have their own constitutions, and a structure of legislature, executive and judiciary. Pursuant to Section 109 of the Constitution of Australia, however, in the instance of inconsistency with Commonwealth law, then such State law is invalid to the extent of the inconsistency.

In light of the above, there are several legislations and policies from both the Commonwealth and the States that deal with the subject issue of performance management of the judiciary across Australia. For instance, the State of Tasmania has its own State Service Act, 2000 which touches on subtle aspects of performance management within the State.

The Australian court system is a complicated structure, divided into the two levels of federal courts and State and Territory courts.

4.1.1. LEGAL FRAMEWORK OF PERFORMANCE MANAGEMENT IN AUSTRALIA

Being a constitutional monarchy, Australia's legal framework must stem from the Constitution. Australia's performance management system has strong linkages in its Acts of Parliament, which we consider below.

a. The Australian Constitution, 1901

This Constitution established a federation, with powers distributed between the central government and regional governments. It then separated these federal powers by vesting executive, legislative and judicial powers in particular institutions.²⁴³ Chapter 3 of the

²⁴¹ Constitution of Australia, 1901 [2010]: Explanatory Notes, at viii.

²⁴² Constitution of Australia, 1901[2010]: Explanatory Notes, at vi-vii.

²⁴³ Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive' 47.

Constitution guards the judiciary's independence from the other arms of government, through protecting the appointment, tenure and remuneration of federal judges.²⁴⁴

b.Acts of Parliament

Several Australian laws are applicable and relevant to matters performance management. The Public Service Act 1999, applies to judicial officers by virtue of Subdivision 18N (4) of the Federal Court of Australia Act 1976.²⁴⁵ The Australian Public Service (APS) as set out in the Act is career-based and requires effect performance from each of its employees.²⁴⁶ While the Act makes no exclusive provision for establishing a performance management, it sets out several measures to ensure optimum performance from its employees. Subdivision 10 of the Act states the values that the APS should be guided by including ethics, where the Public Service should show leadership, be trustworthy, and acts with integrity, in all that it does. Within the framework of Ministerial responsibility, it is to exercise accountability to the Australian community under the law.

Subdivision 13 of the Public Service Act provides for the APS' code of conduct which prescribes use of resources properly and for a good purpose, and that the APS must have honesty and act ethically in connection with APS employment. It should be noted that non-performance or unsatisfactory performance of duties is a ground for termination under Subdivision 29(3) of the Public Service Act.

²⁴⁴ *ibid.*

²⁴⁵ AG, 'Federal Court of Australia Act 1976' <<https://www.legislation.gov.au/Details/C2018C00005/Html/Text>, <http://www.legislation.gov.au/Details/C2018C00005>> accessed 23 September 2018.

²⁴⁶ PMC, 'Public Service Act 1999' <<https://www.legislation.gov.au/Details/C2017C00270/Html/Text>, <http://www.legislation.gov.au/Details/C2017C00270>> accessed 23 September 2018.

From 1 July 2016, the Courts Administration Legislation Amendment Act established the Federal Court of Australia,²⁴⁷ which is an amalgamation of the Family Court of Australia²⁴⁸ and the Federal Circuit Court of Australia.²⁴⁹ This was in order to improve both courts' financial sustainability.²⁵⁰ The Act mandates the Chief Executive Officer of the Federal Court of Australia to report on the annual performance of the Federal Court of Australia to the Chief Justice and the Attorney General.²⁵¹

The Public Governance, Performance and Accountability Act, 2013, establishes a logical system of governance and accountability across Commonwealth entities, this however does not include the courts or judges. With respect to courts, it only applies to Commonwealth entities related to courts or tribunals and to reports, information, documents, activities, or notifications about matters of an administrative nature, whereby such entities must keep the Ministers for Justice and for Finance apprised of the undertakings of the entity and to submit reports, documents and information in relation to those activities.²⁵² In accordance of this requirement, the Federal Court of Australia published a four year corporate plan, where each

²⁴⁷ 'Federal Court of Australia Corporate Plan 2016–2020' 3–4 <http://www.fedcourt.gov.au/__data/assets/pdf_file/0019/29026/Corporate_Plan_2016-2020.pdf> accessed 14 August 2018.

²⁴⁸ Established under the Australian Family Law Act, 1975.

²⁴⁹ Established under the Australian Federal Circuit Court of Australia Act, 1999.

²⁵⁰ Section 18S of the Federal Court of Australia Act, 1976 [as amended by Section 38 of the Courts Administration Legislation Amendment Act, 2016].

²⁵¹ Paragraphs 35-39 of the Public Governance, Performance and Accountability Act, 2013 read with the Courts Administration Legislation Amendment Act, 2016.

²⁵² Finance, 'Public Governance, Performance and Accountability Act 2013' <<https://www.legislation.gov.au/Details/C2017C00269/Html/Text>, <http://www.legislation.gov.au/Details/C2017C00269>> accessed 23 September 2018.

of its four constituent courts set out key outcome measures focused on timely resolution of disputes.²⁵³

It should be noted that none of the above laws specifically address the tests, tools, standards, and model of performance management of the judiciary in Australia.

The Productivity Commission Act of 1998 established the Australian Government Productivity Commission (AGPC), which is one of the bodies that reports on performance management of the judiciary in Australia against identified specific performance indicators.²⁵⁴ This is a permanent commission consisting of an appointed Chair and commissioners appointed by the Governor General.²⁵⁵ One of the primary functions of the Commission is performance monitoring and benchmarking service to government bodies.

Colbran identified three models of performance management: judicial attributes such as legal ability, impartiality, independence, integrity, temperament and management skills based on the opinions of those directly involved with the legal system; traditional forms of judicial accountability including the principle of ‘open justice’, parliamentary accountability and appellate review and court and administrative performance measurement.²⁵⁶

In relation to courts, the AGPC’s Report to the Government tends to focus on case management by the various courts. The Australian judicial performance management approach thus appears to lay more weight on court administration tests which focus on the

²⁵³ ‘Federal Court of Australia Corporate Plan 2016–2020’ (n 268).

²⁵⁴ corporateName:Productivity Commission, ‘Productivity Commission - Operating Principles and Policy Guidelines’ (--) <<http://www.pc.gov.au/about/operate>> accessed 14 August 2018.

²⁵⁵ Treasury, ‘Productivity Commission Act 1998’
<<https://www.legislation.gov.au/Details/C2016C00867/Html/Text>,
<http://www.legislation.gov.au/Details/C2016C00867>> accessed 23 September 2018.

²⁵⁶ Stephen Colbran*, ‘A Comparative Analysis of Judicial Performance Evaluation Programmes’ (2006) 4 Journal of Commonwealth Law and Legal Education 35.

aggregate work of the court rather than a specific individual judge or judicial officer.²⁵⁷ In this sense, not enough indicators are employed by the AGPC in the assessment and determination of the performance of individual judicial officers. According to Colbran, this gap could be bridged by asking practitioners to rate a judges' written clarity, logic or precision, efficiency in giving judgements, among others.²⁵⁸

However, Australia's Family Court has taken a more in-depth stance towards judicial performance management by adopting measures proposed by the Framework for Court Excellence (IFCE) as made by the International Consortium of Court Excellence (ICCE).²⁵⁹ The IFCE proposes an all-encompassing approach on evaluating judicial performance instead of a narrow view on the aspects of court administration, operations or governance. This approach takes into account the views and needs of all court users. The use of IFCE by the Family Court has been used comprehensively since 2012 to determine the individual productivity of specific judges and can then be employed to assist underperforming officers or stations by adopting appropriate corrective mechanisms such as training, budgetary adjustments, deployment or additional officers, among other measures.²⁶⁰

Performance management initiatives in Australia are not uniform since the courts including federal courts are self-managed.²⁶¹ However, in a bid to promote efficiency, productivity and

²⁵⁷ *ibid* 6.

²⁵⁸ *ibid*.

²⁵⁹ 'The International Framework for Court Excellence' 1
<<http://www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%20E%202014%20V3.ashx>> accessed 14 August 2018.

²⁶⁰ Performance Management and Measurement Steering Committee (n 59) 19.

²⁶¹ Tonny Lansdell and Stephen O'Ryan, 'Benchmarking and Productivity for the Judiciary', *Judicial Accountability* (Family Court of Australia 2000) 4
<http://www.familycourt.gov.au/wps/wcm/connect/c4a0f79d-be85-47bb-aac9-5929a6707f03/oryan.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-c4a0f79d-be85-47bb-aac9-5929a6707f03-lyjPe.f> accessed 14 August 2018.

public confidence, the Family Court has proactively been involved in the development and implementation of a Resource Planning Model and the establishment of quantitative benchmarks for judicial activity.²⁶² Some of these sophisticated internal court performance benchmarks and analysis capabilities now form a significant part of performance management in Australian judiciary.²⁶³

In agreement with Colbran, McIntyre argues that in Australia, programs of judicial performance evaluation have been more limited, with the focus mostly on administrative and court performance measurement as part of a strategic approach to judicial institutional management as opposed to individual performance.²⁶⁴ Whereas he concedes the systematised tools of performance evaluation have been utilised for judicial professional development, it has been indicated elsewhere that there is no formal performance appraisal for promotion purposes in Australia.²⁶⁵ In contrast, the performance management tools used in Kenya are relied upon when assessments are done for promotion of judges and magistrates.

4.1.2. POLICY FRAMEWORK ON PERFORMANCE MANAGEMENT IN AUSTRALIA

As in several other countries including the US, the 1980s ushered in Australia a golden age for accountability. Performance indicators, codes of conduct, new reporting requirements

²⁶² *ibid* 3.

²⁶³ Colbran (n 5).

²⁶⁴ Joe McIntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2533854 <<https://papers.ssrn.com/abstract=2533854>> accessed 14 August 2018.

²⁶⁵ Vishvajeet Singh Rathore, 'Performance Assessment System of Magistrates' (National University of Juridical Sciences, Kolkata) 5 <<http://www.nja.nic.in/3.%20pafn%20Vishvajeet%20Singh%20Rathore.pdf>> 13 August 2018.

and the like were introduced to supplement the traditional lines of accountability leading up through the public service to the Minister, Parliament and its committees.²⁶⁶

In 1997, eight CJs of Australian States and Territories lent their signatures to the Declaration of Principles on Judicial Independence which sought to adopt certain principles relating to appointment of state and territory judges. This Declaration is enshrined in the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights which jointly guarantee the exercise of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, and the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region which prescribes the minimum standards for judicial independence.

A significant policy document adopted in Australia is the IFCE, which was published in 2008 by the ICCE, which is comprised of the Australasian Institute of Judicial Administration (AIJA), the National Centre for State Courts (NCSC), USA, the Federal Judicial Centre, USA and the State Courts of Singapore (then Subordinate Courts of Singapore).²⁶⁷

The objective of the Consortium's effort was to develop values, concepts, and tools by which courts worldwide can voluntarily submit to assess and improve the quality of justice and court administration they deliver.²⁶⁸ The Framework identifies seven areas of excellence which a court should focus on including court management and leadership; court policies;

²⁶⁶ Gareth Griffith, New South Wales and Parliamentary Library Research Service, *Judicial Accountability* (NSW Parliamentary Library 1998).

²⁶⁷ Dr Liz Richardson, 'The Use, Modification and Impact of the International Framework for Court Excellence: A Research Paper' 41.

²⁶⁸ 'International Framework for Court Excellence' (n 16).

human, material and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services and public trust and confidence.²⁶⁹

The Framework additionally sets out eleven global measures which are clear and actionable and aligned with the above excellence areas, which provide individual courts, justice systems, and countries with a guide for good practices for successful performance measurement and management. They are court user satisfaction, case clearance rate access fees, employee engagement, on-time case processing, and cost per case, duration of pre-trial custody, case backlog, trial date certainty and compliance with court orders.²⁷⁰

In Australia, Victoria's Supreme Court was the first in Australia to become a member of the International Consortium for Court Excellence.²⁷¹ In 2015, this court integrated three of the global measures into its output performance measures.²⁷²

4.1.3. INSTITUTIONAL FRAMEWORK OF PERFORMANCE MANAGEMENT IN AUSTRALIA

There is no single designated authority or agency in Australia charged with performance management over the court system and the judicial officers. Rather, performance management in the Australian judiciary is overseen by way of several independent institutions and offices such as the Attorney General, the Legislature, the Australian Government Productivity Commission (AGPC), and civil society including the media.²⁷³ The Australian International Commission of Jurists (ICJ) Guide further expands this list of

²⁶⁹ *ibid.*

²⁷⁰ 'Global Measures of Court Performance'
<<http://www.courtexcellence.com/~media/Microsites/Files/ICCE/Global%20Measures%20Pre-Publication%20-%20Sep%202018.ashx>> accessed 17 September 2018.

²⁷¹ State Government of Victoria Supreme Court of Victoria, 'Court Performance' </court-performance> accessed 17 September 2018.

²⁷² 'Court Services Victoria Annual Report 2015-16' Court Services Victoria 148.

²⁷³ Performance Management and Measurement Steering Committee (n 59) 19–20.

institutions to include judicial councils and commissions for the many States,²⁷⁴ professional associations, national human rights institutions, ad hoc tribunals, anti-corruption bodies among others.²⁷⁵

The AGPC is an independent authority whose mandate covers all Commonwealth entities including the judiciary. Section 5(2) of the Productivity Commission Act, 1998 defines the mandate of the Commission to extend to matters relating to industry, industry development and productivity, including:

“...legislative or administrative action taken, or to be taken, by the Commonwealth, a State or a Territory that affects or might affect the productivity performance of industry, industry development, or the productivity performance of the economy as a whole.”

This section gives the Commission wide authority to monitor all activities, legislative and administrative, that could affect an industry’s performance or that of the entire economy.

The Commission adopts three-interrelated performance indicators in performance evaluation and management, *viz*,²⁷⁶ equity which includes access to interpreter services among other indicators; efficiency which includes rate and cost of finalisation of matters, among others, and effectiveness which includes tools such as, backlog, perception of court integrity, among others.

The Commission’s annual report is then given to the relevant Minister. The report must as far as practicable, report on assistance and regulations affecting industry and such effect of the assistance and regulations on industry and on the economy as a whole and according to section 10(3) of the enabling Act, ‘assistance’ may include conferring a pecuniary benefit on a person in respect of carrying on a business or activity.

²⁷⁴ See Constitution of Australia, 1901 [2010]: Explanatory Notes *above*.

²⁷⁵ International Commission of Jurists (n 132) 33–34.

²⁷⁶ Productivity Commission Report, 2018, at <http://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice/courts/rogs-2018-partc-chapter7.pdf> <accessed 5/8/2018>.

A key institute is the Australasian Institute of Judicial Administration (AIJA), a research and educational institute,²⁷⁷ which mainly collects and disseminates information on judicial administration, conducts professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, and carries out research into various aspects of judicial administration. Its membership of 700 consists of academic lawyers, judges, court administrators, magistrates, court librarians, tribunal members, legal practitioners, and others with an interest in judicial administration.²⁷⁸

AIJA has published several bench books and guidelines with the purpose of equipping judges and judicial officers with resources on various areas of law, enabling them to balance the interests of different participants in a matter. Among the guidelines is a Guide to Judicial Conduct, which was drafted in for the benefit of all levels of Australian Judiciary's members.²⁷⁹

4.1.4. PERFORMANCE MANAGEMENT MEASURES AND TOOLS EMPLOYED IN THE AUSTRALIAN JUDICIARY

These include annual reports prepared by courts as well as the annual report prepared by the Australian Government Productivity Commission (AGPC), which reports on the performance of the judiciary at all levels of government, among other institutions.

a. Annual Report on Government Services

AGPC's Annual Report gives data on government services and their efficiency, equity and effectiveness. This includes Australia's judicature, whereby its inclusion contributes to the

²⁷⁷ 'About the AIJA' (*Australasian Institute of Judicial Administration*) <<https://aija.org.au/about/>> accessed 14 September 2018.

²⁷⁸ *ibid.*

²⁷⁹ Australasian Institute of Judicial Administration and Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2017).

welfare of all Australians as it promotes improvement of services.²⁸⁰ This Report is critical as it assists in assessment of policies, informs planning, aids in the budgeting process and it also works to implement government accountability.²⁸¹

A performance indicator framework is developed for each sector, stating the outputs and the impact of the services on society, which is the outcome. Generally, these output indicators are grouped into three; equity, efficiency and effectiveness.

With respect to the Justice sector, these are the output indicators: access to interpreter services in court; how many judicial officers are there to deal with cases in vis a vis the size of the population; the measure of backlog; the rate of disposal of cases; how many appearances in court must a party or their lawyer make before a judicial officer/mediator/arbitrator, in which instance binding orders can be made; clearance of cases filed in the reporting period; the fees paid by applicants; court file integrity i.e. the proportion of files that are accessible, accurate and complete; number of judicial officers per finalisation; the number of full time staff for each finalisation, and what is the cost of each finalisation, which figure is arrived at by dividing each court's recurrent expenditure within by the total number of finalised cases.²⁸²

b. Annual Reports by Courts

Another performance measurement tool used in Australia is the publication of annual reports by all the various courts. Depending on a jurisdiction, these are submitted and published to the Minister or Attorney General per legislative requirement. This seen in the states of Victoria and Queensland, and the Supreme Court of South Australia. In New South Wales

²⁸⁰ Productivity Commission, 'Report on Government Services 2018 - Report on Government Services 2018' (24 January 2018) <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/approach/performance-measurement>> accessed 13 September 2018.

²⁸¹ *ibid.*

²⁸² *ibid* 7.

and Western Australia , there is no legislative necessity to publish annual reviews but they do so of their own volition.²⁸³

These annual reports state the achievements and progress of the court in that reporting period. This creates transparency and keeps the public informed on the courts activities, increasing public trust.

For example, in the 2016/2017 Annual Report of Australia's Federal Court, it reported that it had launched a National Court Framework in order to re-energise the Court's take on case management by further modernising its running so that the Court is at a better position to meet litigants' needs and can operate at a national and international plane.²⁸⁴ One of the key reforms to safeguard nationally synonymous and simplified practice, was the review of the Court's practice documents²⁸⁵

4.1.5. VICTORIA'S PERFORMANCE MANAGEMENT MODEL

Victoria' Supreme Court was the first Australian court to become a member of the ICCE.²⁸⁶ The Judiciary in Victoria is composed of several courts including the Supreme Court, Court of Appeal Civil and Criminal and Probate courts.²⁸⁷

Victoria's judiciary adopted the outcome measures of clearance rates whereby against the international standard of 100%, in the 2017/2018 financial year, it performed at 101%; case

²⁸³ Jan-Marie Doogue, Colin Doherty and Jeff Simpson, 'Accountability for the Administration and Organisation of the Judiciary' 9 <<https://myold.lawsociety.org.nz/in-practice/practising-law/litigation/accountability-for-the-administration-and-organisation-of-the-judiciary/Judicial-Accountability-Asia-Pacific-Conference-March-2013-FINAL.pdf>> accessed 13 September 2018.

²⁸⁴ 'Federal Court of Australia Annual Report 2016-17' 240.

²⁸⁵ *ibid.*

²⁸⁶ Supreme Court of Victoria (n 292).

²⁸⁷ *ibid.*

backlog; on time case processing and court file integrity.²⁸⁸ In addition, it adopted the output measures of cases initiated, which informs the court on the workload; cases cleared, which monitors the efficiency of the courts administrative operations, and cases pending, which measures the timeliness in processing cases.²⁸⁹

The Court Services Victoria (CSV) is an institution worth noting key institution in Victoria. Established in 2014 through the Court Services Victoria Act, this is a statutory body corporate with the mandate of giving services and facilities to the courts, the Victorian Civil and Administrative Tribunal and the Judicial College of Victoria.²⁹⁰ Its establishment has been considered to be one of the most important establishments in the notable events of courts in the Victoria judiciary, as upon its establishment, the courts became independent of the executive and put the court's administration into an entity directly under the judiciary, enabling it to self-govern and allocate resources to achieve the best outcomes for the community.²⁹¹ CSV is governed by the Courts Council which is chaired by Victoria's Chief Justice, and composed of each head of jurisdiction and two non-judicial members.

Since 2005, the courts in Victoria have unsuccessfully attempted to establish an Integrated Case Management System (ICMS) with the objectives of enabling judicial fora to effectively cope with the large volume and complex measure of cases, improving case management efficiency in the judiciary and improving the interactions of the public and lawyers with the justice system.²⁹² As it recognises the value that such a system can afford to court

²⁸⁸ State Government of Victoria Supreme Court of Victoria, 'Whole of Court Performance' </about-the-court/court-performance/whole-of-court-performance> accessed 23 September 2018.

²⁸⁹ *ibid.*

²⁹⁰ leesa, 'About CSV' (*Court Services Victoria*, 10 July 2014) <<https://www.courts.vic.gov.au/about-csv>> accessed 23 September 2018.

²⁹¹ *ibid.*

²⁹² Victoria (ed), *Connecting Courts: The Integrated Courts Management System* (Victorian Government Printer 2009).

performance, a new CMS is currently in under development in Victoria's Magistrates and Children's Courts.²⁹³

This new system is intended to be the only entry for all matters into these two courts. Its objective is to make court processes efficient, by reducing manual practices and digitising some court processes where appropriate, and streamlining the manner in which courts record data, reducing the use of paper, and linking people to cases, providing a view of a court case from all angles.²⁹⁴

4.1.6 LESSONS FOR THE KENYAN JUDICIARY

The performance indicator framework as conducted by the Australian Government Productivity Commission is beneficial to the Kenyan context. There are similarities with the Kenyan performance measures particularly those relating to timely and expeditious justice such as clearance rates of cases, case backlog and the number matters disposed of in a station in relation to the number of judges or judicial officers in that station.

While the Kenyan framework also recognises access to justice as a key performance measure, the PMMU tool makes no provision for its measurement. The Australian model synthesised this indicator into a measurable factor that is the ability to access interpreter services to ensure fair and equitable court services. The AGPC also takes into consideration the aspect of fees paid by the applicants. This is critical with respect to measuring access to justice in Kenya, where the poor are vulnerable and likely to be denied justice as it is outside their means.

²⁹³ leesa, 'Case Management System Project' (*Court Services Victoria*, 5 April 2018)

<<https://www.courts.vic.gov.au/projects-resources/case-management-system-project>> accessed 23 September 2018.

²⁹⁴ *ibid.*

The AGPC also measures the costs expended to finalise cases within a court station in the reporting period, as a measure of the efficiency of the court. This should be taken up by the Kenyan courts to guard against resource waste.

The Victorian Courts recognise the key support a functioning Integrated Case Management System could offer in enhancing the performance and the measurement of this performance in the jurisdiction. Kenya is in the process of rolling out its ICMS system and should thus be encouraged in implementing this vital program.

4.2. UNITED STATES OF AMERICA

The American court system has made extensive use of performance management methodologies and tools for more than 20 years, with its systems focusing on both the accountability of the court as an institution as well as on the individual judge. Significant strides have been made towards measuring performance qualitatively, which most jurisdictions shy away from, as well as the more traditional quantitative measures such as case clearance rates. Having considered the Australian model, it behoves us to consider the American model and how it can inform the development of the Kenyan judiciary's performance management system. We shall consider the Judiciary Performance Evaluation (JPE) program as adopted by about 20 states and court performance measures employed since the 1970s.

The American court system consists of federal courts as well as state courts. Both levels of courts are generally divided into trial courts and intermediate and final appellate courts.²⁹⁵ The Supreme Court is the highest court in the federal judiciary, and is mandated to determine

²⁹⁵ Dana Rubin, 'LibGuides: Case Law Research: U.S. Court System' <<http://nyulaw.libguides.com/c.php?g=773843&p=5551842>> accessed 16 September 2018.

at its discretion, important questions of federal law, and its decisions bind all federal courts while its decisions on the Constitution and federal law are binding on all state courts.²⁹⁶

4.2.1. LEGAL FRAMEWORK OF PERFORMANCE MANAGEMENT IN THE AMERICAN JUDICIARY

Article III of the US Constitution is the foundation of judicial independence. It protects judges' tenure by providing that judges of the Supreme Court and Interior Courts shall enjoy tenure of their offices good behaviour and have the benefit of a salary which will not be diminished while they are in office.²⁹⁷

The Constitution's Sixth Amendment defines the right of an accused person in criminal proceedings to a timeous justice and public trial by an impartial jury of the State and district where the crime shall have been committed. Such district ought to have been previously ascertained by law, and this accused person has a right to know of the nature and cause of the accusation; to confront the witnesses and evidence against him; to obtain witnesses in his favour, and to have a defence lawyer.²⁹⁸

The need to balance independence and accountability of the judiciary has been highlighted earlier in this study, for the purposes of ensuring that the judiciary carries out its mandate as it ought to, fulfilling its obligations to its users and upholding the rule of law. The Sixth amendment places an obligation on the court to remit speedy justice that is fair and impartial.

²⁹⁶ *ibid.*

²⁹⁷ 'The 3rd Article of the U.S. Constitution' (*National Constitution Center – The 3rd Article of the U.S. Constitution*) <<http://constitutioncenter.org/interactive-constitution/articles/article-iii>> accessed 17 September 2018.

²⁹⁸ 'The 6th Amendment of the U.S. Constitution' (National Constitution Center – The 6th Amendment of the U.S. Constitution) <<https://constitutioncenter.org/interactive-constitution/amendments/amendment-vi>> accessed 17 September 2018. The Civil Justice Reform Act of 1990 is Title I of the Judicial Improvements Act of 1990. Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82).

Performance measurement mechanisms have been used to ensure the court works accordingly, both at the federal and state level.

Two Acts of Parliament stand out with respect to performance management in the USA: the Civil Justice Reform Act, 1990 and the Judicial Conduct and Disability Act, 1980.

Under the Civil Justice Reform Act (CJRA) the Director of the Administrative Office of the Courts must prepare a biannual report which states for each judge or magistrates, how many motions are more than six months old , how many submitted bench trials have been pending for more than six months, and the number of cases pending more than three years. This data must be availed to the public. The provisions of this act thereby enforce a measure of transparency and accountability with respect to the performance of federal judges.²⁹⁹

The CJRA additionally mandates the creation of advisory groups in each of the federal district courts, which groups are to assess the condition of its court's dockets, note current case filing practices, pinpoint the major sources of cost and delay in civil litigation, and assess the measure to which such cost and delay could be reduced by a better assessment of the impact of new legislation on the courts, and thereafter report to the district court, making recommendations concerning measures to reduce cost and litigation.³⁰⁰

On its part, the Judicial Conduct and Disability Act of 1980 sets out the formal procedure for reviewing complaints: “alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that

²⁹⁹ Rebecca Love Kourlis and Jordan M Singer, ‘A Performance Evaluation Program for the Federal Judiciary’ 86 DENVER UNIVERSITY LAW review 45.

³⁰⁰ R Lawrence Dessem, ‘Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!’ 54 UNIVERSITY OF PITTSBURGH LAW REVIEW 31.

such judge is unable to discharge all the duties of office by reason of mental or physical disability.”³⁰¹

4.2.2. POLICY FRAMEWORK OF PERFORMANCE MANAGEMENT IN THE AMERICAN JUDICIARY

a. Code of Conduct for United States Judges

This Code of conduct was enacted in 1973 by the nationwide policy-making body of the federal courts, Judicial Conference of the United States.³⁰² The code has five ethical canons providing guidance to judges in their official capacity as well as in other external activities. They are that a Judge should refrain from inappropriate political activity, uphold the integrity and Judicial independence; avoid the risk of conflict with official duties; stay away from impropriety or the appearance of such in all activities; pay mind to appropriate standards in performing the duties of the office fairly, diligently and impartially, and may engage in extrajudicial activities at par with obligations of judicial office.³⁰³

b. Code of Conduct for Judiciary Employees, 1995

This Code applies to all judicial employees, including interns, externs, and other volunteer court employees.

The canons set out in this Code are similar to those of judges, but are customised to the context of judicial employees. They provide that a judicial employee should refrain from inappropriate political activity, uphold the integrity and Judicial independence as well as that of the Judicial Employee's office; avoid the risk of conflict with official duties; stay away

³⁰¹ Kourlis and Singer (n 320).

³⁰² ‘Code of Conduct for United States Judges’ (*United States Courts*) <<http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>> accessed 17 September 2018.

³⁰³ *ibid.*

from impropriety or the appearance of such in all activities; pay mind to appropriate standards in performing the duties of the office, and comply with disclosure requirements.³⁰⁴

c. American Bar Association Guidelines for Judicial Performance Evaluations

These guidelines were developed by a Special Committee on the Evaluation of Judicial Performance and adopted in 1985. They are described as "suggestions for criteria, uses, and methodology useful for judging the quality and performance of our judges," and are not "substitutes for nor... accretions upon the existing Code of Judicial Conduct" nor "principles to be invoked to discipline a particular judge".³⁰⁵

These guidelines restrict dissemination of data and results from JPE programmes, stating that they should be confidential except for the authorized uses which ought to be consistent with the law, the data and results. That is, where judicial evaluations are for judicial self-improvement, results should be provided only to the judge evaluated and their supervisor.³⁰⁶

It also recommended that development and implementation of JPE programmes is ultimately the mandate of the mantle court or other constitutionally mandated body having responsibility for judicial administration.³⁰⁷ This would make the evaluation process internal, thereby guarding against interference with judicial independence from third parties.

The guidelines also recommend that the daily activities of the JPE should be through a diverse, independent and broadly based committee. The committee's composition would depend on whether the evaluations are to be for self-improvement alone and quality

³⁰⁴ 'Code of Conduct of Judiciary Employees', *Guide to Judicial Policy*, vol 2A (2013).

³⁰⁵ Penny J White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' 27.

³⁰⁶ 'Guidelines for the Evaluation of Judicial Performance with Commentary' [2005] American Bar Association 19.

³⁰⁷ *ibid.*

enhancement of the entire judiciary, where the oversight committee would be comprised of lawyers and judges or whether the evaluations would suffuse resolution regarding re-election of judges in office, where the committee would constitute citizens who are familiar with the judicial system.³⁰⁸

The criteria for judicial performance is set out as being ethics, integrity and impartiality, legal ability, good communication skills, professionalism administrative capacity and temperament.

With respect to methodology, the guidelines recommend the use of behaviour-based instruments, in the form of questionnaires to be taken by persons who have experienced professional contact with the judge. They should therefore ask questions on actual behaviour of the judge instead of general qualities, thereby avoiding bias and collecting accurate data.

4.2.3. INSTITUTIONAL FRAMEWORK OF PERFORMANCE MANAGEMENT IN THE AMERICAN JUDICIARY

Similar to the Australian context, there is a multiplicity of agencies and bodies overseeing judiciary performance management in America. This can be attributed to the federal court system and the decentralised state court system.

Performance management efforts are overseen mainly by the highest court in any given state, as recommended by the ABA Guidelines. There are however those that are initiated by bodies from the Executive arm of the government. With respect to Judiciary Performance Evaluation (JPE) programmes, they are often conducted by a court branch itself but in a few states, they are conducted by executive-branch agencies. Trial Court Performance Standards (TCPS) were designed to be used by the trial court.

³⁰⁸ *ibid.*

There are several institutions that support the performance management through publishing of guidelines such as the American Bar Association, the Bureau of Judicial Accountability, and the National Centre for State Courts, which published the Judges and Judicial Officers respective Codes of Conduct.

4.2.4. PERFORMANCE MANAGEMENT MEASURES AND TOOLS

The US Judiciary employs several performance management tools at the federal courts and the state courts. These include the Trial Court Performance Standards and Measurement System (TCPS) and the Judiciary Performance Evaluation Programmes (JPE).

a. Trial Court Performance Standards and Measurement System

Launched in August 1987 through the concerted efforts of the Bureau of Justice Assistance (BJA) of the U.S. Department of Justice and the National Centre for State Courts (NCSC), these standards and system are to measure the performance of general jurisdiction State trial courts.³⁰⁹ This system was not designed to measure the performance of individual judges; rather it was for the general jurisdiction trial court.

TCPS sets out twenty two standards which set aims for court performance in five areas: public trust and confidence; equality, fairness and integrity; expedition and timeliness; independence and accountability, and access to justice further comprises of 68 measures in order to measure how well courts meet these performance standards.³¹⁰ For instance, in access to justice, there are the standards of affordable costs; effective participation, responsiveness, courtesy, and request; public proceedings; safety, and accessibility and convenience. Under public proceedings are the measures of tracking court proceedings,

³⁰⁹ 'Trial Court Performance Standards with Commentary' (Bureau of Justice Assistance 1997)

<<https://www.ncjrs.gov/pdffiles1/161570.pdf>> accessed 17 September 2018.

³¹⁰ Tiffany Clements, 'Trial Court Performance Standards: An Assessment of the Second Judicial District Court, Washoe County, Reno, Nevada' 149.

access to open hearings, and during open court proceedings, whether the participants are audible.³¹¹

Various data collection methods are used in the application of the 68 measures including public opinion polls, case record searches, interviews, and surveys of reference groups, simulations, group techniques, and observation.³¹²

Similar to the ABA guidelines set out above, these standards are guiding principles and not stringent rules.

b. Judiciary Performance Evaluation Programmes

JPE programmes trace back to the 1970s and 1980s and were initially a tool of giving data on a judge's accomplishment to the electorate in judicial retention elections, in states which judges were appointed for an election cycle. There are all federal judges and a few state judges given a lifetime appointment by the American President with the Senate's vote.³¹³

JPE programmes are currently being implemented in 20 American States. The programmes vary from one state to another but they are all crafted to attain three objectives: (1) to provide the public education on the work of judges and foster realistic expectations of the role of the judge (2) where applicable to provide information to decision-makers concerning judges' retention or reappointment; and (3) to provide useful assessment to sitting judges to inform their professional development.³¹⁴

In states like Alaska, Arizona, Colorado, Tennessee, and Utah which use JPE programmes in retention elections, evaluation committees are constituted and are composed of attorneys, laypersons, and judges, who assess a variety of judicial performance indicators including

³¹¹ *ibid.*

³¹² 'Trial Court Performance Standards with Commentary' (n 330).

³¹³ Richard C Kearney, 'Judicial Performance Evaluation in the States' [1999] PAQ Winter 23.

³¹⁴ Kourlis and Singer (n 320).

knowledge of and application of the law, communications skills, interpersonal skills, administrative abilities, time management skills, and integrity.³¹⁵

JPE has benefitted from the technical support and encouragement from the American Bar Association who published recommendations for evaluating the judiciary's performance as well as a Model Code of Judicial Conduct and the National Centre for State Courts, which distributes information and other assistance on JPE methods and implementation.³¹⁶

4.2.5. NEW JERSEY'S JUDICIARY PERFORMANCE EVALUATION PROGRAMME

New Jersey was one of the first states to adopt a JPE programmes in 1986, after Alaska. A distinct feature of this program is that it is an internally administered program whose primary goal is the improvement of judges' performance rather than the facilitation of selection or retention processes.³¹⁷ The goals of the programme are the enrichment of judicial educational programs; the efficient assignment and use of judges within the Judiciary; the improvement of judicial performance on an individual and institutional basis and the enhancement of the reappointment process.³¹⁸

This programme is administered by New Jersey's Supreme Court Committee on Judicial Performance assisted by the Judicial Performance Commission, which is comprised of six retired judges.³¹⁹ The data is collected through questionnaires anonymously filled by advocates on several performance standards in the fields of legal ability and comportment,

³¹⁵ Kearney (n 334).

³¹⁶ *ibid.*

³¹⁷ Francis Bremson, Alan Handler and Janet Franz, 'Judicial Performance Evaluation' (1986) 4 *Law and Inequality: A Journal of Theory and Practice* 15.

³¹⁸ 'Judicial Performance and Education' <<https://www.njcourts.gov/courts/education/education.html>> accessed 20 September 2018.

³¹⁹ Kearney (n 334) 479.

and in the instance of appeals, questionnaires by the appellate court through which they assess the trial court.³²⁰ Video recordings of court proceedings are also reviewed by the Commission.³²¹ The results are thereafter shared with a judge, the assignment judge, the Judicial Evaluation Commission, the Supreme Court, the Governor and the Senate Judiciary Committee.³²²

On comportment, this JPE programme measures temperament, which focuses on a judge's attentiveness, courtesy, open-mindedness, absence of arrogance, listening skills, decisiveness, fostering a sense of fairness and the absence of bias.³²³ These are qualitative measures that capture the human angle of justice, and assist courts to ensure that this does not hinder the fair administration of justice

Another key feature of New Jersey's JPE programme is its combination of judicial evaluation and judicial discipline, where evaluation information is constructively used in a disciplinary setting. ABA Guidelines do not however advocate for this combination as judicial discipline involves formal procedures, triggered through the filing of a complaint, while judicial evaluation is designed to lead to self-improvement.³²⁴

New Jersey's JPE programme is considered one of the leaders in the country due to its efforts in judicial education. It uses several activities to achieve its objectives including an Orientation Program for new judges, which assists the transition of new judges from bar to bench; the Divisional Comprehensive Judicial Orientation Programs, for newly employed or transferred judges facilitated by experienced judges; Divisional conferences, which increase

³²⁰ 'Judicial Performance and Education' (n 339).

³²¹ Kearney (n 334).

³²² 'Judicial Performance and Education' (n 339).

³²³ Stephen Colbran, 'Temperament as a Criterion of Judicial Performance Evaluation' (2002) 21 University of Tasmania Law Review 62.

³²⁴ Bremson, Handler and Franz (n 338) 85.

expertise of judges and staff in special areas of the law, and an Audio-Visual Library which contains virtually all academic programs.³²⁵

4.2.6. LESSONS FOR THE KENYAN JUDICIARY

The JPE programmes have benefited from the support of the American lawyers i.e. the ABA and the National Centre for State Courts (NCSC). This is similar to the support the Australian judiciary receives from Australasian Institute of Judicial Administration (AIJA). This shows strong stakeholder engagement and support to these performance management systems. The Kenyan judiciary should consider reaching out to the Law Society of Kenya, performance management and court administration experts and academics, and other persons interested in promoting judicial accountability through performance management, for the purpose of supporting Kenya's performance management system. This includes members of the justice chain including the Offices of the Directorate of Public Prosecutions and the Attorney General. This could be done through research and publication on performance management, preparation of bench books as well as participating in surveys.

One of the major uses of JPE programmes in the US is for retention of judges in elective offices, and for this reason, they collect information from various members of society and thereafter publish this data, in order to enable the electorate to vote from a place of knowledge. As judges and judicial officers in Kenya enjoy security of tenure and do not go through an election process, a performance management system that publishes data on their individual performance would be beneficial to justify retention in service. The Judiciary currently publishes performance data on stations in the evaluation reports prepared by the PMMSC.

³²⁵ 'Judicial Performance and Education' (n 339).

The emphasis on qualitative measurement of performance is a highly celebrated aspect of the American Judiciary's Performance Management System. This is especially the case with New Jersey's JPE programmes which comprehensively measures the temperament of the judge, including judicial knowledge and decision-making. The Kenyan Judiciary should enthusiastically take up this best practice and adopt standards to measure the fairness and equity of an individual judge. Due to the sensitivity of this information, this data should not be disclosed to the public and should only be available to the evaluated judge and their supervisor, for the purpose of self-improvement.

4.3. CONCLUSION

This study has shown that there are several features of the American and Australian models from which Kenya can glean lessons. These jurisdictions' performance management models are characterised by the involvement of stakeholders including the bench and academia in the development of their systems. In addition, it comes out clearly that especially in the US system, they have customised their performance measures into practical and actionable measures that will guard against bias and ensure accurate results. There is thus the need for the institutions involved in the Kenyan Judiciary's Performance management system to identify practical and measurable features of Kenya's court administration to enable the collection of accurate and actionable data.

Another key feature from the US process is the use of a variety of data collection tools including surveys and opinion polls. This enables the collection of different types of data, including that which will aid in assessing individual judges' performance. This will assist the Kenyan system to measure and manage the qualitative aspects of performance, thus ensuring that quality is not sacrificed at the cost of quantitative performance.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

This Chapter presents the conclusion and the recommendations to the incorporation of performance management towards enhancing accountability within the judiciary. The study sought to evaluate the legal, policy and institutional framework governing the judiciary's performance measurement and management system.

5.1 STUDY FINDINGS

This study found that while Kenya's legal, policy and institutional framework has made great strides in institutionalizing performance management in the Judiciary, there are several gaps in the law, policy and organizational structure that need to be addressed in order to streamline implementation of an effective and beneficial performance management system.

On the legal aspect of performance management, the study found that there are various international frameworks which can guide the judiciary in implementing an effective performance management system. They include the International Framework for Court Excellence (IFCE); the UN Human Rights Council resolution on Independence and Impartiality of the Judiciary; the Latimer House Guidelines, 2003; and the Bangalore Principles of Judicial Conduct. Kenya should adopt these instruments in its domestic statutory framework.

The study also found that there is a consistent constitutional requirement for accountability within public institutions. This requirement should be entrenched through statutory provisions. In the judiciary, it is only the Organization and Administration Acts of the High Court and the Court of Appeal, both of 2015, which have express provisions for performance

management. There is need for the Kenyan statutory system on performance management to cover all courts in the judicial structure.

This research found that there is a strong and rich policy framework on performance management, which has the advantage of flexibility and adaptability. There is thus the need to ensure that this policy framework recommends international best practices at any one time, ensuring the Kenyan system is at par with the most developed performance management systems globally.

The research found that the institutional framework on performance management within the judiciary falls within the purview of several bodies. They include the Office of the Chief Justice, the Judicial Service Commission (JSC), the Performance Management and Measurement Steering Committee (PMMSC), the Performance Management Directorate (PMD), and the Directorate of Human Resource and Administration (DHRA). While each entity has its separate mandate, there is need to structure the same to allow for synergy and an efficient performance management process.

Further, the study found that there is a perceived conflict of interest within PMMSC's discharge of its duties, as it is composed of representatives of courts and units that undergo performance evaluation, thus creating a risk of bias in the process. PMMSC also has a limited composition that does not fully represent all courts and divisions in the Judiciary. The Judiciary should ensure that the public perceives its processes and institutions as fair and should take steps to eliminate any real or perceived bias.

The study found that there are several challenges in the implementing of performance management, as captured in the Performance Management and Measurement Understanding (PMMU) Evaluation Reports of 2015/2016 and 2016/2017 performance cycles. They include lack of sufficient judicial officers and staff, budgetary constraints, lack of support from

stakeholders and the inability of the performance management evaluation tools to capture the unique nature of judicial and administrative work of judicial officers.

The study considered performance management in the judiciaries of Australia and the United State of America and particularly in the states of Victoria and New Jersey respectively. On the American performance management system, the study found that there is much to be gained from the support of stakeholders such as academia, the probation office, prisons, the children's department and the Directorate of Public Prosecution. This support is an essential element of performance management in these two systems.

In addition, the tools used by the courts in these systems are characterized by actionable and practical measures. These courts use a wide selection of tools to collect data, which guards against bias and enables both qualitative as well as quantitative measurement of court performance.

Further, the study found that in New Jersey's Judicial Performance Evaluation (JPE) Program, performance management incorporates qualitative measures that weigh the temperament of a judge and considers whether they exhibit any bias based on race, gender or religion, whether all parties are given a fair chance to present their arguments and whether the judge is open-minded. This guards against injustices through bias, which cannot be measured by considering how many matters a judge has concluded.

5.2 RECOMMENDATIONS

This study makes the following recommendations, drawing on the above findings:

5.2.1 LEGISLATIVE REFORMS

5.2.1.1. The Kenyan Judiciary ought to adopt the values and principles espoused in international instruments on performance management in its local legislation.

The international instruments that lay a basis for performance management within the judiciary are declarations and guidelines. Therefore, in order to enforce them in Kenya, their principles and values ought to be captured in local legislation to ensure their implementation. Incorporation of performance management values in Australia's Productivity Commission Act and America's Civil Justice Reform Act have provided a stable foundation for performance management to grow and flourish in these jurisdictions.

5.2.1.2 Amendment of the statutes constituting the Magistrate's Court, the Environment & Land Court, the Employment and Labour Relations Court and Supreme Court, to specifically provide for performance management.

Under the current legislative environment, only the Acts incorporating the Court of Appeal and the High Court have provisions for performance management. There is thus need to amend the Supreme Court Act, ELC Act, ELRC Act and the Magistrate's Court Act, to specifically provide for performance management. Such amendment will enhance uniformity in its implementation and entrench performance management in the entire court structure.

The successful uniform application of IFCE measures by courts in the Australian State of Victoria paints a picture of coherence and Kenya should adopt a similar approach to enjoy effective implementation of performance management.

5.2.1.3 Gazettement of regulations to operationalise the Judiciary Fund and increase of budgetary allocation to the judiciary

The Judiciary Fund will grant the judiciary financial independence and or autonomy to be able to facilitate development of its infrastructural projects and innovative initiatives to

promote performance management. The regulations to operationalise the fund are currently pending for review by the Attorney General, before they are gazetted. There has been delay in conclusion of this exercise. The judiciary should continue to push for gazettelement of these regulations as they will enable it to take up innovative initiatives and to expand the courts' infrastructure, thereby promoting access to justice.

5.2.1.4 Enactment of legislation to consolidate all laws establishing tribunals

making provision for performance management mechanisms

The constitution requires that certain tribunals transit to the judiciary. Over 20 tribunals have since moved their operations to the judiciary. They perform quasi-judicial functions. The various tribunals are however established under different Acts of parliament. There is therefore need to harmonize their operations through a single law and put them on performance management as the rest of the units in judiciary. This should also apply to courts Martial as they are part of the subordinate courts.

5.2.1.5 Amendment of the Judicial Service Act to clearly provide for performance management and the regulations thereof.

The JSC under section 47 (g), Judicial Service Act, has power to make regulations for a performance appraisal system of the judiciary. The Act should therefore be modified to specifically state that a performance measurement and management system should be established in the judiciary.

5.3.1 POLICY REFORMS

5.3.1.2 Recruitment of additional judges, judicial officers and staff, to ensure that all court stations and registries are running optimally;

The number of judges, magistrates, Kadhis and judicial staff currently serving in the judiciary is low compared to the growing population and the increasing rate of cases being filed in the

country. The JSC should develop a recruitment policy to ensure a periodic review of the staff establishment. There is for instance urgent need to recruit statisticians whose main role is to collect and analyze data at every court station. This is the data that PMD uses to prepare performance management reports. Case statistical data at court stations should at all time tally with that in possession of PMD. This is necessary for informed decision making processes, including resource allocation and operational efficiency.

5.3.1.3 Stakeholder engagement in the justice chain system;

In order to buttress the implementation of an effective PMS within the judiciary, there is need to engage all players in the justice chain system, to ensure, not only buy in, but that they also initiate similar reforms in their respective fields. All stakeholders should move in the same direction and on the same pace. Judiciary reform measures may be derailed if for example the police, Directorate of public prosecution and the practicing advocates do not embrace performance measurement mechanisms.

Similar to the American Bar Association, the Law Society of Kenya could play a major role in keeping the judiciary accountable through conducting surveys, while the academic fraternity could assist in the development of an effective PMS, as seen in the Australasian Institute of Judicial Accountability (AIJA). The Kenyan judiciary should take this a step further and engage with other stakeholders such as prisons and after care departments as well as the Attorney General's office.

There is thereafter the need to develop regulations and guidelines in consultation with these stakeholders to guide their interactions with the judiciary, towards the goal of increasing the court system's performance and efficiency.

5.3.1.4 The PMMSC should customize data collection templates to capture the different administrative roles played by judges and judicial officers;

The PMMUs, DCRT and performance appraisals need to be crafted in such a way as to capture the unique nature of work performed by judicial officers, which includes both judicial and administrative duties. This will ensure a fair appraisal and evaluation process. In the past the JSC has relied on data from PMD to consider judicial officers for promotion. The category serving as Deputy Registrars (DR's), and who mainly performed administrative duties, suffered as their administrative duties had not been captured in the DCRT.

The different court stations and divisions should ensure that their respective PMMUs capture the breadth of their tasks, both of judicial and administrative nature. The DCRT, which is fashioned to primarily collect quantitative data, should also be customized to include administrative tasks.

5.3.1.5 The Judiciary should allow implementing units to exercise creativity and ingenuity in developing unique performance management initiatives;

The Australian and American models of performance management, showcases the advantages of a decentralized approach to performance management initiatives. Courts are more likely to own the performance management system when they have control and agency to customize it. The Kenyan model should thus consider giving the implementing units leeway to exercise ingenuity in developing performance management initiatives that uniquely work for each station, allowing for adaptation with respect to the implementing unit's environment.

5.3.1.6 Development of a reward and sanction framework

Currently the judiciary does not have in place a reward and sanction framework. This framework would guide the process of identifying best and poorly performing courts for purposes of either rewarding or sanctioning them. In the 2015/2016 and 2017/2018 PMMU

evaluation cycles, some court stations have been rewarded for best performance. In the absence of a reward and sanction framework, this process may fail to gain the confidence of all courts and officers subject of evaluation. Incentives are meant to motivate staff to perform better.

In Australia, the reward and sanctions framework is set out in the Public Service Act, 1999, and the actions available to deal with underperformance include action for possible breach of the Australian Public Service Code of Conduct, reassignment of duties, reduction in classification and termination of employment.

5.3.1.7 Development of a quality management system

The current performance evaluation system concentrates more on the quantity of concluded cases. There is no clear mechanism of assessing the complexity of cases as well as the quality of judicial decisions. The result is obsession with numbers and this alone could occasion a detrimental effect on the administration of justice. This is exemplified where the lower court may dismiss many matters and record high performance, a near similar number of cases may be filed on appeal and thus creating case backlog up the judicial ladder. An indicator would be to evaluate not only the number of cases concluded by an officer but also the number of cases either upheld or dismissed on appeal. A blanket application of performance evaluation measures to all categories of cases may lack objectivity. The judiciary should thus develop a quality management system to inspire confidence in the PMS implementation strategies.

In the state of New Jersey, USA, the Judiciary performance evaluation program (JPE) lays emphasis on qualitative performance measurement, which includes measuring temperament, judicial knowledge and decision making ability of a judge.

In order to measure the quality of judges and their decisions, judiciary should take up the best practice established by American courts of using a variety of data collection tools including surveys and opinion polls. This enables the collection of different types of data, including that

which will aid in assessing individual judges' performance. These surveys take the form of questionnaires, which are to be filled by lawyers, litigants which have audience before the courts and in the instance of appeals, by the appellate court, reviewing the performance of the trial court.

5.3.1.8 Case Management system and ICT strategy

Performance management can be more enhanced in the judiciary through a clear case management system and use of ICT to manage the flow of cases from inception to conclusion. All courts across board should be able to electronically manage cases and give prompt information about the same to court users.

5.3.1.9 Capacity building and an effective training policy

Sensitization of judges, judicial officers, staff and stakeholders on the importance of performance management is crucial to the effective implementation of PMS. The restrictive culture that is responsible for perceived resistance to judicial reforms is partly caused by lack of training opportunities. A training policy must therefore be developed to help entrench performance management in the judiciary.

5.4.1 INSTITUTIONAL AND ADMINISTRATIVE REFORMS

5.4.1.1 The Judiciary should rationalize the structure of the various offices involved in the implementation of performance management to ensure synergy and efficiency;

The Performance Management System is overseen by several institutional offices, including that of the Chief Justice, JSC, PMMSC, PMD and DHRC. While it is clear that all the other offices report to the Chief Justice, there is need for clear roles of the various offices towards the judiciary's incorporation of performance management. Institutional uniformity is seen in the American model, where performance management is often overseen by the highest court in each jurisdiction.

Towards building harmony in the actions of JSC, it would be prudent to bring the PMD under the umbrella of JSC to enable the latter to give direction on the kind of data they need in fulfilling their mandate. Further there is need to harmonise the actions of DHRA and JSC, as the bulk of obligations that would normally fall under a human resources office is being carried out by JSC in the judiciary.

The Judiciary thus ought to administratively arrange these different offices to establish channels of communication and authority, to ensure an optimal PMS.

5.4.1.2 Judiciary should take measures to guard against perceived conflict of interest within PMMSC;

PMMSC is a standing committee composed of representatives from different units within the judiciary, including superior courts, magistrates, Kadhis and staff drawn from PMD. Some members of PMMSC are heads of court stations or divisions of the High court. These stations or divisions are also evaluated like any other in the judiciary by the same members of PMMSC. This scenario presents perception of conflict of interest. To guard against this risk, the judiciary should make membership of PMMSC rotational. This is a practice adopted in the Australian Government Productivity Commission, where commissioners are appointed for a fixed term.

The judiciary should also expand PMMSC's membership to cover all courts including the ELC and the ELRC to ensure fair representation. This is seen in the Court Council of the Court Services of Victoria, where the council is constituted by all heads of jurisdiction, ensuring all courts and divisions are represented in the body. The judiciary may also consider mechanisms of engaging retired judges as members of the evaluation committee. This will enhance objectivity and remove perceptions of conflict of interest within PMMSC.

5.4.1.3 Infrastructure development to create a conducive working environment for judges, judicial officers and staff

The Judiciary's performance can only be at its optimal when judges, magistrates, Kadhis and judicial staff work in a conducive environment. Court rooms, registries and chambers must be habitable for improved service delivery. There is need to rehabilitate old court buildings and build new ones across the country for better service delivery.

In closing, the study notes that the Kenyan Judiciary has made great strides in the journey to achieving judicial accountability through performance management. This study has found that the system however has a lot of room for streamlining and improvement of the performance measures and the tools for collecting data. The American judiciary, as noted in this study has an elaborate performance management system that is diverse in its application, from which the Kenyan judiciary should draw lessons. This includes adoption of a variety of tools that measure both quantitative and qualitative performance of Judges and judicial officers. The fulfilment of the reform recommendations made in this paper should assist in streamlining the performance management system in the Kenyan judiciary and ultimately enhance judicial accountability. This in turn will ensure effective and efficient delivery of justice to the Kenyan people.

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