THE ROLE OF PERFORMANCE MANAGEMENT AND MEASUREMENT UNDERSTANDINGS IN ENHANCING ACCOUNTABILITY AND ACCESS TO JUSTICE KENYA: AN ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING JUDICIAL PERFORMANCE

ANN ASUGAH

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DECLARATION

I, ANN ASUGAH, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Signature……  ……Date 23rd November, 2021

ANN ASUGAH

This Research Project has been submitted for examination with my approval as the University Supervisor

Signature:  Date: 24th November, 2021.

DR. NANCY BARAZA

DEDICATION

This Research Project is dedicated to my family who have been the wind beneath my wings. I appreciate them all.

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The Court of Appeal (Organization and Administration) Act, 2015 Laws of Kenya.

The High Court (Organization and Administration) Act, 2015 Laws of Kenya.

The Judicial Service Act, 2011 Laws of Kenya

The Speedy Trial Act of 1974 18 U.S.C. § 3161(a)(1)-(a)(2)

The Trial Court Delay Reduction Act of 1986 passed by the State of California.

ABBREVIATIONS

IAALS- The Institute for the Advancement of the American Legal System

IFCE- International Framework of Court Excellence

JFT- Judiciary Transformation Framework

NCSC- the National Center for State Courts

PAS- Performance Appraisals Systems

PMMSC- Performance Management and Measurement Steering Committee

PMMUs- Performance Management and Measurement Understandings

SDC- Service Delivery Charters

SJT- Sustaining Judiciary Transformation

TCPS- Trial Court Performance Standards

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ABSTRACT

The Kenyan Judiciary's regime of Performance Management and Measurement Understandings (PMMUs) require courts to strive to achieve expeditious disposal of cases, improve case clearance rates and reduce case backlog. They measure court performance through four indicators; its ability to dispose cases expeditiously, its ability to meet trial and delivery dates with certainty, its case clearance rate and its case backlog. Although it was believed that they would be effective tools of attaining efficacy and judicial accountability, the Judiciary still continues to grapple with performance challenges like case backlog and inordinate delays in determination of cases. The study seeks to investigate why the PMMUs have failed to meet their expectations as tools of enhancing judicial efficacy and accountability. It utilizes qualitative methodology. It also analysis judicial performance evaluation in the USA with a view to identifying lessons and best practices.

The study establishes the efficacy of PMMUs in attaining access to justice has been decelerated by legal challenges surrounding their foundation and backing in law. PMMUs do not place direct responsibility on individual judges, do not provide the mechanism for assessing individual judges, and hence cannot be used to achieve individual accountability. In addition, framework on judicial performance does not provide enough sanctions for judicial officers who do not meet their targets under the PMMUs. The JSC lacks legal basis of initiating disciplinary proceedings against a judicial officer who fails to meet the performance indicators and there is no clear demarcation of roles and responsibilities of key stakeholders in their implementation. The study reveals that Kenya has a lot to learn from the US's experience on judicial evaluation. The USA regime redresses the challenge of case delays by enacting statutes specifically designed to enhance efficacy and clear case backlog. The US regime is designed to promote the quality of the court as a whole and enhance judicial self-improvement for individual judges.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Background of the Study

Measuring judicial performance has always raised serious questions all over the world regarding the intrusion of private management practices into the arena of public services such as judicial decision making.[1] The argument against performance measurement has always been that it may interfere with independence of judicial officers and quality of justice. For the purposes of the study, the term 'judicial officer' includes judges and magistrates. Performance measurement of the judiciary recognizes that, though independence of the judiciary is a fundamental principle of constitutionalism, the doctrine also requires accountability on the part of the judiciary to those it serves.[2] To achieve accountability, the Kenyan Judiciary in 2014 introduced the Performance Management and Measurement Understandings (PMMUs), to monitor and evaluate the output of judicial officers.[3]

The main objectives of the PMMUs were to measure court performance, improve judicial efficiency and accountability. A PMMU is a freely negotiated performance agreement between the Judiciary and its internal units[4] clearly specifying the obligations of both, with a view to establishing consensus among the parties to enhance service delivery.[5] It sets mutual commitments and expectations for each party towards realization of agreed targets and performance goals. This way, it has been viewed as being most suitable for measuring

[1] Kate Malleson, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) 60 (5) The Modern Law Review 655-667.
[2] Ziyad Motala, 'Judicial Accountability and Court Performance Standards: Managing Court Delay' (2001) 34 (2) The Comparative and International Law Journal of Southern Africa 172.
[3] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, The Judiciary, April 2015) 27.
[4] Internal Units comprises of Courts, Directorates, Tribunals and semi-autonomous institutions.
[5] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 9. Other measurement tools include Performance Appraisals, Quality Management Standards, Citizens Service Delivery Charters and Standards, Annual Work Plans and Strategic Plans.

performance and enhancing accountability in the judiciary.[6] It also fits in well with the recommendations of the Ouko report[7] which are still remain relevant and form part of the strategic goals of the Judiciary with respect to performance management.

The PMMUs apportion specific duties and responsibilities to various courts and the Judiciary as an institution. Although there are eight different models of PMMUs for the various court stations,[8] the responsibilities apportioned to judicial officers are similar in a material way. The courts are required to hear certain matters within specified timelines and their performance is measured using four indicators; its ability to dispose cases expeditiously, its ability to meet trial and delivery dates with certainty, its case clearance rate and its case backlog.[9]

The PMMUs place overall responsibility on court heads or representatives rather than on individual judicial officers. The representative is required to ensure that the court they represent achieves the agreed court targets on timelines for hearing and determining certain matters. The Supreme Court is represented by the Deputy Chief Justice, the Court of Appeal is represented by the President, Court of Appeal, the High Court is represented by the Principal Judge, the Employment and Labour Relations Court is represented by the Principal Judge; the Environment and Land Court is represented by the Presiding Judge, the Magistrates Courts are represented by the Head of magistrates' court station and the Kadhis' Courts are represented by the Chief Kadhi.[10]

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[6] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 9.

[7] Government Printers (2010), *Final Report of the Task Force on Judicial Reforms*. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf> accessed 13 November 2021.

[8] There is a model for the Supreme Court, Court of Appeal, High Court, Employment and Labour Relations Court, Environment and Land Court, the Chief Registrar of the Judiciary, Magistrates Courts and Kadhi's Court.

[9] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 60-61.

[10] Ibid.

In addition, they are required to ensure that the courts they represent strive to achieve expeditious disposal of cases, meeting trial and delivery dates with certainty, improving case clearance rates and ensuring reduction of case backlog.[11] Consequently, it can be deducted that the various PMMUs models require judicial officers to ensure expeditious disposal of cases, reduce backlog of cases and observe trial and delivery dates with certainty.[12] It was believed that these models will be effective tools of attaining efficacy, performance and accountability of the Judiciary and Judicial officers in Kenya.

1.1 Statement of the Problem

The Kenyan Judiciary has employed various performance-based management and measurement tools, and key among them is the PMMUs. PMMUs apportion specific duties and responsibilities to individual courts and the Judiciary as an institution. Court representatives are required to ensure that the courts they represent achieve the agreed court targets on timelines for hearing and determining cases. Whereas the PMMUs were supposed to result in expeditious disposal of cases, reduce case backlog and ensure observance of trial and delivery dates with certainty, nevertheless, the Judiciary continues to grapple with case backlog, inordinate delays in delivery of judgments, and delays in disposal of cases, six years into PMMU implementation. Therefore, there exists a gap in the expected outcomes of the implemnetation of PMMUs and the prevailing situation. The gaps may be attributed to lack of a robust implementation framework or lacuna in the existing legal regime governing PMMUs.

This study seeks to interrogate the gaps in the legal framework governing PMMUs which hinder their optimization in attaining judicial accountability and access to justice in Kenya. In addition, the study will examine the extent to which Kenya can learn from the US experience on their tools of attaining and accountability and enhancement of access to justice and lastly,

[11] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 59.
[12] Ibid.

it will identify and make recommendations on how to improve the PMMUs in the Kenyan Judiciary.

1.2 Justification of the study

The study is of great significance in a number of ways. The study seeks to examine the usefulness of PMMU's in enhancing accountability of the Judiciary with regard to implementation of its strategic goals and transformation agenda. The findings will therefore inform the Judiciary's leadership on the pertinent issues relating to PMMUs which need improvement and which should be enhanced. Further, examining the efficiency of PMMUs is at the center of advancing the findings of the Ouko report, which recommends the introduction of a performance management framework and comprehensive case monitoring and mechanisms.[13]

In addition, the objectives of the study are in line with the Judiciary's strategic goals and its ambitious transformation agenda under the Social Transformation through Access to Justice (STAJ).[14] Based on the programme, the Judiciary believes that optimal performance and integrity in the administration of justice can be achieved through performance evaluation.[15]

Furthermore, the findings of the study will be very useful to various users including policy makers and the Judiciary. It will be very helpful to the Judiciary in implementing the STAJ program, and any other internal mechanisms designed to enhance efficacy, performance and accountability of the Judiciary and judicial officers in Kenya.

Lastly, the study seeks to fill a gap in literature on the utility of PMMUs as tools of attaining efficiency and accountability of the Judiciary and Judicial officers in Kenya. This way, the study seeks to enrich the body of available literature on PMMUs and other tools employed by

[13] Government Printers (2010) (n 7) xxix.
[14] Judiciary, Republic of Kenya (2021), *Social Transformation through Access to Justice* (STAJ), 2022-2032.
[15] 44.

the judiciary with a view to attaining efficacy, performance and accountability of the Judiciary and Judicial officers in Kenya.

1.3 Research Objectives

1. To establish the conceptual and theoretical foundations of PMMUs.
2. To interrogate gaps in the legal framework governing PMMUs in attaining judicial accountability and access to justice.
3. To identify international best practices from other jurisdictions on PMMUs.
4. To make recommendations for reform on PMMUs in Kenya.

1.4 Research Hypothesis

The study proceeds on the following hypotheses.

1. The PMMUs have been ineffective in attaining accountability of the Judiciary and in enhancement of access to justice.
2. There are inherent legal challenges that hinder the utility of PMMUs as tools of attaining accountability and access to justice in the Kenyan Judiciary.

1.5 Research Questions

1. What are the conceptual and theoretical foundations of PMMUs?
2. What are the gaps in the Kenya's legal framework on PMMUs in attaining judicial accountability and access to justice?
3. What are the international best practices from other jurisdictions on PMMUs?
4. What recommendations for reform should be introduced on PMMUs in Kenya?

1.6 Theoretical Framework

The study employs three theories, namely, Legal Realism, Positivism Theory and Goal Setting Theory. The study discusses the Legal Realism and the Positivism Theory under this section. Although the study also does a summary of the Goal Setting Theory under this section, a more substantive discussion on the theory appears in chapter two of the study. The

comprehensive theoretical analysis in chapter two does not include the Legal Realism and the Positivism Theory. The study puts more emphases on the Goal Setting Theory in chapter two because the theory offers more comprehensive underpinnings on how performance measurement ought to be conducted and assessed.

Legal Realism Theory

The study utilizes the legal realism theory which is within the broader sociological jurisprudence. Legal Realism is an approach to thinking about and studying the results of the application of law and the subsequent social engineering through systematic and purposeful change of the law.[16] It is not only concerned with the origins and basis of law, but also with its practical application and results. It followed the sociological study of law and as such, it has been said to be the most radical wing of the sociological approach.[17] Its proponents reject the concept of natural law and instead, propounded that legal concepts and terminology should be based on experience and observation.

Legal realism also posits that empirically, you can measure what the system of law output is. It answers the question of what law is by stating that Law is that which is the prediction of what the courts will do. In this regard, court performance measures provide some form of certainty which is measurable and can be empirically studied scientifically. In this respect, it seeks to anchor performance measurement of courts and its officers within the realm of empirical data collection of court outputs. This variant of empirical legal realism also focuses on efficacy. One is able to explain the legal process in a quantifiable manner and get results. If we can see the effects of the law on society that can be established empirically, then that system of law is valid.

For Sociological jurists, the law exists to validate certain societal leanings and the judge can move society in a certain direction. For legal realism you can demonstrate it by gathering

[16] Hayman, Levit, Delgado, editors, *Jurisprudence Classical and Contemporary* (West Publishing, St. Paul, Minn., 2002) 156.
[17] Roy A Mersky, 'Definition and Meaning of Law,' Central India Law Quarterly [1997 Vol. X:I] 1.

data, doing an analysis and coming up with a result. The predictions are not guess work, they are from data collection. This is where performance measurement plays a big role in establishing the direction of courts in certain matters through empirical collection, collation analysis and interpretation of data.

The Positivism Theory

The study will also utilize the positivist theory as was propounded by Joseph Raz, H.L.A. Hart, Hans Kelsen, Leslie Green, John Austin and Jeremy Bentham. The central tenet of legal positivism is that laws are enacted, or posited by human beings; so that law derives its authority as law from political and social practices rather than existing 'naturally.'[18] The theory captures well some features of legal systems, especially the ways that constitutions, statutes, and other laws are products of human agency.[19]

John Austin gave the theory its very basic nature. Through the command theory, John Austin states that law is a command of a sovereign backed by the threat of a sanction.[20] H.L.A Hart advanced Austin's command theory by bringing in the concept of primary rules and secondary rules and the idea that both are key for any legal system.[21] The theory would later be advanced by Hans Kelsens' Pure Theory of Law, in which he introduced the concept of grund norm and how the grund norm is used as the yardstick of validating or invalidating all the rules within a specific legal system.[22]

Thus, the proponents argue that rights, duties and responsibilities gain legal status only if they are written down and communicated to the subjects. Secondly, it reduces the power of the judge to the application of laws and it does not allow them to make laws. In a nutshell, the theory magnifies the role of Parliament in enacting, and improving laws with a view to

[18] Wayne Moore, 'Legal Positivism' (2017) The Wiley-Blackwell Encyclopedia of Social Theory 1.
[19] Ibid.
[20] Thomas Christiano and Stefan Sciaraffa, 'Legal Positivism and the Nature of Legal Obligation' (2003) Law and Philosophy 487, 490.
[21] Alan Cullison, 'Morality and the Foundations of Legal Positivism' (1985) 20 (1) Valparaiso University Law Review 61, 70.
[22] Julius Cohen, 'The Political Element in Legal Theory: A Look at Kelsen's Pure Theory' (1978) 88 (1) 12.

capturing the will of the people.[23] The study will utilize the theory to examine the legal validity of the PMMUs in the Kenya's legal system and their usefulness in apportioning duties and rights to different actors in the legal system. It will also be employed to argue that the identified legal challenges can be remedied through legislative interventions.

Goal Setting Theory

The most compelling theoretical underpinning for performance management and measurement is the Theory of Goal Setting,[24] whose chief proponents are Edwin Locke and Gary Latham. Although the theory achieved its finest form and articulation in their co-authored 1990 book,[25] its main arguments can be traced to earlier publications either co-authored by the duo or written separately. The earliest inception of the theory can be traced to Edwin Locke's 1968 work[26] in which he argued that workers are inspired by specific, measurable goals and their employer's feedback on their performance.[27] The publication drew the attention of Gary Latham who in response published a paper vindicating Locke's argument to the extent that there is a crucial and tangible connection between task performance and goal setting.[28]

It's against this background that the duo co-published the 1990 book, which settled and gave the theory a tangible form. The duo's 1990 work establishes several principles of goal formulation, which have since gained popularity and universal acceptance in management literature. The principles illuminate the relevance of clarity of goals, the degree of goal

[23] Brian Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 Australian Journal of Legal Philosophy 32.
[24] The theory is also known as the 4CF Goal Setting Method or Locke and Latham's five principles. See Toolshero, 'Locke's Goal-Setting Theory' (*Toolshero*, November 2020) <https://www.toolshero.com/personal-development/edwin-locke-goal-setting-theory/>accessed 4 March 2021.
[25] Edwin Locke and Gary Latham, *A Theory of Goal Setting & Task Performance* (Prentice Hall, 1990).
[26] Edwin Locke, 'Toward a theory of task motivation and incentives' (1968) 3 Organizational Behavior and Human Performance 157-189.
[27] M. T. Wroblewski, 'A Theory of Goal Setting By Locke & Latham' (*Small Business*, January 2019) <https://smallbusiness.chron.com/theory-goal-setting-locke-latham-1879.html>accessed 3 March 2021.
[28] Gary Latham and James Baldes, 'The "practical significance" of Locke's theory of goal setting' (1975) 60 Journal of Applied Psychology 122, 124.

difficulty, the commitment of subjects, feedback from the employer on goal progress, and the complexity of task in performance measurement.[29]

1.7 Literature Review

Internationally, there is extensive literature on performance measurement and evaluation of judicial officers and the Judiciary. Extensive works have been published discussing various aspects of performance management, especially its nature, its rationale and its theoretical underpinnings. However, there is scarcity of this literature in the East African region and Kenya. Nonetheless, the available literature does not cover some important issues. Essentially, the available literature does not evaluate or analyze the efficacy of the PMMUs as tools of enhancing judicial performance in Kenya. Although PMMUs were introduced in 2014, none of the available literature has sought to investigate their efficacy in achieving timely administration of justice.

The Nature of Performance Measurement and Evaluation

Joe writes on the theoretical underpinnings of judicial performance measurement and evaluation. He argues that measuring the efficacy of the judiciary and the judicial officers is a key component of modern judicial administration.[30] He posits that the purpose and role of performance evaluation is to promote responsiveness, excellence and integrity of the Judiciary because it ensures that judicial officers undertake their job in the manner they are required to.[31] He observes that the utility of the measurement mechanisms ought to be assessed by making reference to their ultimate impact on judicial accountability and efficacy.[32] Spekl'e however argues that unless the goals of the organization are unambiguous, incentivized performance measures lead to targeted achievements which distort the

[29] The five have in literature come to be known as 'Locke and Latham's Five Principles of goal setting.'
[30] Joe Mclntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4 (5) Onati Socio-Legal Series 898-926.
[31] Ibid 905.
[32] Ibid. Roland F Speklé and Frank HM Verbeeten, 'The Use of Performance Measurement Systems in the Public Sector: Effects on Performance' (2014) 25 Management Accounting Research 131 <https://linkinghub.elsevier.com/retrieve/pii/S1044500513000693> accessed 6 February 2021.

organization goals. Although the use of performance measurement system tends to enhance performance according to Spekl'e, the effectiveness of the introduction of performance measurement systems in public sector organizations thus depends both on how the system is being used by managers.[33]

Swee writes on the effectiveness of performance management in attaining efficacy and better performance of public institutions. He argues that there are several problems, challenges and barriers which impede the implementation of performance management and measurement in the public sector.[34] He argues that three key factors ought to be considered if efficacious implementation of a performance measurement system were to be achieved: stakeholder involvement, an evaluative organizational culture and managerial discretion. He observes that a successful implementation of performance measurement systems requires participation and involvement of stakeholders in the development of the system and the performance measurement.[35]

He writes that also instrumental is a supportive learning culture and a strong evaluative culture. He describes this culture as one that encourages an institution to consciously seek data on its performance with a view to using that data to educate itself on how to better deliver and manage its services and programs.[36] His contribution to the current study is twofold. One, it underscores the role of culture as an underlying factor in the implementation process. Two, it highlights the essence of public participation and involvement of all stakeholders in the development of the measurement model and its implementation.

Challenges

[33] Ibid.
[34] Swee Goh, 'Making performance measurement systems more effective in public sector organizations' (2012) 16 (1) 31, 31.
[35] Ibid 34.
[36] Ibid 36.

Lenkamai analyses the Kenya's legal framework on performance management with a view to examining the extent to which it enhances judicial accountability. He argues that Kenya's legal, institutional and policy framework has made significant achievements in institutionalizing performance management in the Judiciary. While acknowledging that the Constitution outlines a general framework for accountability, he points out that there are gaps in the enabling statutes. The only legal challenge he points out is the lack of a specific statutory provision enabling implementation of performance management in lower courts. He, however, identifies other non-legal challenges facing the implementation of performance management as lack of adequate number of staff and judicial officers; budgetary constraints and lack of support from stakeholders, multiple institutional oversights, restrictive institutional culture and the inability of evaluation tools to exhaustively capture the work of judicial officers.[37]

His work does not cover some issues. One, the study does not outline the legal challenges impeding the efficacy of PMMUs as tools of enhancing accountability. Secondly, the study does not focus on the utility of PMMU's and is largely inward looking rather that focus on results and outcomes to those who come to court rather than those who run the courts. Further, the study is very general as it covers several performance management measures and tools like service delivery charters (SDC), performance appraisals systems (PAS), Daily Court Returns Template and PMMUs.[38] This researcher focuses on special challenges facing PMMUs. Lastly, the study was published in 2018, and much has happened since then, including the release of PMMUs evaluation reports in 2019 and 2020 which have different findings from those in 2018.

[37] Ibid 63-70.

[38] Kandet Kennedy Lenkamai, 'Enhancing Judicial Accountability: An analysis of Kenya's Legal, Policy and Institutional Framework on Performance Management' (Master of Laws Thesis, 2018 University of Nairobi) 55-60.

Njuguna argues that Kenya's legal framework on judicial evaluation is inadequate because it does not stipulate the mandate of the directorate of performance management (DPM), its composition and the evaluation procedures. In addition, she argues that the Court of Appeal (Organization and Administration) Act and the High Court (Organization and Administration) Act 2015 relates to Judges of the High Court and the Court of Appeal, and does not cover magistrates.[39] Her work is crucial to the current study in that it shades light on the legal challenges revolving around the establishment of DPM. However, the scope of her study is very general as compared to that of the current study. Her work discusses performance management generally and focuses on service delivery charters and performance appraisal systems.[40] In contrast, the current study is specifically concerned with the efficacy of PMMUs, as tools of performance measurement.

Performance measurement and competing interests

Langbroek et al argue that performance measurement for judicial officers and courts is a delicate role of balancing competing constitutional requirements. On one hand is the requirement for judicial impartiality and independence, and on the other hand is the requirement for accountability of the judiciary and the courts from a democratic and societal point of view.[41] They pose the question whether it is possible to conduct performance management in a judiciary without putting too much pressure on judges so that content and outcomes of judicial decision making are being influenced.[42] They argue that interactions between evaluation results and efforts to better the functioning of judicial officers and courts are usually marked by tensions between national politics, national court administration, court management and professional judge.[43]

[39] Lucy Mwihaki Njuguna, 'Performance Management in the Kenyan Judiciary: A Critical Analysis of the Adequacy of the Legal and Institutional Framework' (Mater of Laws Thesis, University of Nairobi 2018) 96.
[40] Ibid 62.
[41] Philip M. Langbroek, Rachel Dijkstra, Kyana Zadeh and Zubeyir Turk, 'Performance management of courts and judges: organizational and professional learning versus political accountabilities' 306.
[42] Ibid 298.
[43] Ibid.

Langbroek and Mirjam argue that the success of performance management in the judiciary can only be achieved if these tensions are well balanced and mediated.[44] In a bid to solve these tensions, they suggest a number of solutions with a view to achieving a balanced relationship. One, politicians should be well informed about the performance of the judiciary so that they can develop effective policies for the justice sector. Two, court management and court administration ought to leave enough room for impartial and independent judicial decision making and judicial case work, as well as room for professional autonomy of judicial officers.[45]

They conclude that the interaction between the political domain and the court administration is very necessary because even though judicial officers have professional responsibilities, they undertake these responsibilities in a court organization which ought to be managed and administered.[46] Their work is very instrumental in the current study. It brings to the attention of this study the competing interests and tension between judicial accountability, judicial independence and professional responsibilities for the judicial officers and the idea that an ideal model ought to endeavor to balance all these interests.

Productivity versus Quality aspects of Performance Management

Pim Albers also contributes to the debate on whether performance of judicial officers should be measured and evaluated. Although he opines that the debate is a delicate one, he makes a case on why judicial work should be evaluated and measured. He argues that such an evaluation does not in any way interfere with the independence of the judge because judicial independence only protects the judge's freedom of decision making and against interference from the executive.[47] He argues that this protection does not mean that judicial officers cannot be held accountable for the work they are delivering. On the second ground, he argues

[44] Langbroek, Philip and Mirjam Westenberg, Quality work in four judiciaries, Justzimananagement Series, Stämpfli Verlag Bern, chapter 7, expected March 2018).
[45] Ibid 321.
[46] Ibid.
[47] Pim Albers, 'Performance indicators and evaluation for judges and courts' 2. <https://rm.coe.int/performance-indicators-and-evaluation-for-judges-and-courts-dr-pim-alb/16807907b0>accessed 12 January 2021.

that the performance of the court and the judges ought to be evaluated because they are funded by the public.[48]

He concludes that a sound regime of measuring performance of judicial officers and courts should not only limit the evaluation to 'productivity' and 'efficiency' aspects but should also incorporate 'quality' aspects in the evaluation.[49] He argues that a performance evaluation approach which only concentrates on 'efficiency' and 'productivity' is faulty as it does not concern itself with the quality of judicial decisions delivered by the courts. As a result, he calls for a balancing act between 'quality' on one hand and 'productivity or efficiency' on the other.[50] His contribution is very instrumental for the current study in that it informs the discussion on what an ideal model ought to contain, it brings out the need to balance between the competing interests and striking a balance between 'productivity' and 'quality' aspects of evaluation.

The concerns raised by Pim Albers have also been advanced by Mark Spottswood who argues that an overemphasis on productivity might be injurious to the ends of justice in the long run. Mark writes that placing high premiums on productivity may lower the quality of lawyer's case preparation and worsen the quality of judicial decisions.[51] He also argues that an overemphasis on speedy disposal of cases might undermine the ends of justice, because increasing the pace of litigation might decrease the accuracy of litigation results.[52] He holds this position because it has not been established whether increases in speed can be attained without undermining the accuracy of litigation outcomes.[53] Although he acknowledges that shortening time-to-disposition might have psychological and economic advantages, he maintains that those driving the productivity agenda should do so with greater caution.[54]

[48] Ibid.
[49] Ibid 14.
[50] Ibid 11.
[51] Mark Spottswood, 'The Perils of Productivity' (2014) 48 New England Law Review 503, 503.
[52] Ibid 505.
[53] Ibid 503.
[54] Ibid 505.

1.8 Research Methodology

The study will utilize qualitative methodology. It will use primary and secondary sources of data like books, parliamentary and commission reports, statutes, newspaper articles and journal articles. In addition, it will utilize doctrinal methodology in analyzing the legal framework governing the introduction of PMMUs, the history behind the introduction of the PMMUs and the implications of the PMMUs in the Kenyan judiciary. The analysis will be undertaken with a view to examining whether, and the extent to which PMMUs has been efficient in attaining efficacy, performance and accountability of the Judiciary and Judicial officers in Kenya.

Lastly, the study will use the comparative approach in analyzing other developed jurisdictions with a view to identifying any lessons which Kenya can emulate from their experiences on attaining efficacy, performance and accountability of their Judiciaries and Judicial officers. The qualitative approach will be employed to analyze the already available data.

1.9 Limitations of the study

The study is limited in terms of available data for some variables like application of laws. The study will also not investigate the qualitative aspect of performance since Judiciary PMMU has not yet incorporated quality aspects of judicial decisions. This may form areas for future research.

1.10 Chapter Breakdown

Chapter One: Introduction

The chapter offers an outline of the entire study. It starts with a background of the study, which brings the issues into the Kenyan context. It contains the statement of the problem highlighting the legal problem under investigation. It also contains the research questions, the research objectives, the study hypothesis, as well as the research methodology to be

employed to undertake the study. Lastly, the chapter offers an extensive literature review and chapter breakdown.

Chapter Two: Conceptual and Theoretical Underpinnings of the Study

The chapter focuses on the legal theories and philosophical underpinnings on which the study finds its arguments. It identifies the relevant theories, discusses the proponents and the extent to which the theory contributes or supports the hypothesis of the study.

Chapter Three: The Legal Framework on PMMUs in Kenya

The chapter first outlines the legal regime governing PMMUs in Kenya. Further, it interrogates the gaps in the legal framework which impede the utility of PMMUs in attaining accountability of the Judiciary and access to justice.

Chapter Four: Judicial Performance Evaluation in the United States

The chapter interrogates judicial evaluation in the USA with a view to identifying lessons and best practices. It identifies lessons which Kenya can learn from the United States' experiences on their tools of attaining efficacy, performance and accountability of the Judiciary and Judicial officers.

Chapter Five: Conclusion

The chapter contains study findings, and recommendations.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FOUNDATIONS OF JUDICIAL PERFORMANCE EVALUATION

2.1 Introduction

The chapter offers an in-depth discussion on the theoretical underpinnings of judicial performance evaluation, and by extension PMMUs. The discussion seeks to identify the nature of performance evaluation and features of an ideal theoretical model for measuring judicial performance. The chapter employs the Goal Setting Theory and starts by establishing the key tenets of the theory, as well as discussing the contributions of its proponents. It also features criticisms raised against the theory and explanations on how the criticisms have been addressed. Importantly, the chapter discusses the significance of the theory in judicial performance evaluation under which it identifies the ideal principles within which judicial evaluation should be undertaken.

2.2 Goal Setting Theory: Its basic Tenets

The theory advances several principles of goal formulation which illuminate the relevance of clarity of goals, goal difficulty, the commitment of subjects, feedback from the employer and the complexity of task in performance measurement.[55] The first principle is *the goal clarity* principle which states that efficacy of goals is to be achieved by setting specific and measurable goals, rather than keeping outcomes general.[56]The theory holds that performance is higher where there are specific hard goals than where the goals are non-quantitative and vague.[57]

The second principle is the *goal difficulty* principle which states that there is a causal link between performance and the degree of goal difficulty in that too difficult or too easy goals

[55] The five have in literature come to be known as 'Locke and Latham's Five Principles of goal setting.'
[56] James Young, 'Heroes of Employee Engagement: No. 4 Edwin A. Locke' (*Peakon*, December 2017) <https://peakon.com/blog/employee-success/edwin-locke-goal-setting-theory/>accessed 4 March 2021.
[57] Edwin Locke and Gary Latham, *A Theory of Goal Setting & Task Performance* (Prentice Hall, 1990) 30. The goals are vague where one is required to 'do your best' or 'work at a moderate pace.'

decrease performance because they negatively affect motivation.[58]The duo argues that hard goals induce more persistence and greater efforts when compared to easy goals.[59] The third principle is *the commitment* principle which states that goals ought to be supported by a commitment statement by the employees. The theory prefers public commitment to private commitment because the former induces stronger goal commitment when compared to the latter.[60]

The fourth principle is *the feedback* principle which states that goals require a feedback mechanism through which subordinates can assess their achievements. The theory appreciates that workers perform better if there is adequate and express feedback on goal progress.[61] The fifth principle is *the complexity* principle which states that task complexity affects employees' motivation, productivity and morale. This is so because the subjects must first discover or develop new strategies to achieve the goal, they cannot employ previously learned skills, and their attention and effort might be having limited usefulness in themselves, especially where they are employing inappropriate strategy or plan.[62]

2.3 Major Contributions to the Theory

The theory has since undergone major metamorphosis, thanks to various theorists who have contributed immensely to the current form of the theory. One notable contribution was that of Binswanger who introduced three fundamental conditions considered essential for any strategy to qualify to be treated as a goal. The three conditions are self-generation, value-significance and goal-causation.[63] The *self-generation* condition requires that the desire and the willingness to set a goal ought to come from within the organization rather than from

[58] Yatin Pawar, 'Understanding Locke and Latham's 5 principles of goal-setting' (*Upraise*, July 2017) <https://upraise.io/blog/locke-lathams-principles-goal-setting/>accessed 4 March 2021.
[59] Edwin Locke and Gary Latham, A Theory of Goal Setting & Task Performance (Prentice Hall, 1990) 30.
[60] Ibid 32.
[61] Edwin Locke and Gary Latham (n 58) 38.
[62] Gary Latham and Edwin Locke, 'Self-Regulation through Goal Setting' (1991) 50 Organizational Behaviour and Human Decision Processes 228.
[63] Ibid pp. 212-247.

external forces.[64] The *value-significance* condition requires that the goal ought to be very essential for the organization's survival and wellbeing. Lastly, the *goal-causation* condition presumes that the set goal will actually cause the achievement of the ultimate results.[65]

Klein and Mento have advanced the theory by arguing that a specific goal translate to maximum performance, because its specificity clarifies what constitutes effective performance, and hence offers a yardstick with which to measure performance.[66] In contrast, they argue that general goals do not promote optimal performance because they are gauged by a 'do-your-best' standard, which is ambiguous and has no tangible parameters for assessing one's performance.[67]

The theory was later modified by its chief proponents, Edwin Locke and Gary Latham in 2002 where they incorporated the concept of participation in goal setting. They justify that the act of participation in goal setting makes the subjects own the goals and consequently results in a higher self-efficacy.[68] The contribution was an advancement of their earlier studies in which they had argued that managers who fail to engage their subjects in setting of the goals can nonetheless achieve optimal performance by explaining the rationale and the purpose of a goal to the subordinates.[69] They view participation during goal setting as an essential stage, as it facilitates information exchange.[70]In 1994, the duo wrote that persons

[64] Edwin Locke and Gary Latham (n 58) 2.
[65] Ibid 3.
[66] Antony Mento, Howard Klein and Edwin Locke, 'Relationship of Goal Level to valence and Instrumentality' (1992) 77 (4) Journal of Applied Psychology 395-405.
[67] Ibid 396.
[68] Edwin Locke and Gary Latham, 'Building a Practically Useful Theory of Goal Setting and Task Motivation: A 35-Year Odyssey' (2002) American Psychologist 57 (9) 705, 708.
[69] Gary Latham, Erez, M and Edwin Locke, 'Resolving scientific disputes by the joint design of crucial experiments by the antagonists: Application to the Erez–Latham dispute regarding participation in goal setting' (1988) 73 Journal of Applied Psychology 753, 764. In the article, they argue that 'tell and sell' approach is better than just 'tell' instructions approach.
[70] Edwin Locke, Alavi M and Wagner James, 'Participation in decision making: An information exchange perspective' (1997) 15 Research in personnel and human resources management 293, 331.

who have participated in goal formulation and setting perform better with respect to achieving those goals than those that were not involved.[71]

The theory was later developed by Fred Lunenburg who demonstrated the relationship between goal setting, feedback mechanisms and deadlines. He argues that feedback enhances optimal goal performance because it helps the subjects gauge their success as well as identify areas for improvement and adjustments.[72] In addition, Fred argues that deadlines enhance efficacy of goals because as the deadline draws near, the subjects will prioritize the completion of the task. He contrasts this with arrangements with no deadlines whereby the subjects are likely to drag themselves as there is lots of time remaining to attain a given goal.[73] He argues that the idea of deadlines should be approached with great caution because very tight deadlines might prejudice the quality of the results, especially where it involves a complex task.[74]

The Goal Setting Theory has been the subject of several criticisms. Fred argues that the efficacy of the theory is not guaranteed where achievement of the goals attracts monetary rewards, because those charged with achieving the goals might be tempted to set easy goals.[75] Also, the theory concentrates on performance indicators which are measurable, while disregarding important components of the work which are difficult to measure. Lastly, setting of goals works best in already well-defined jobs, and it is not effective for a new job.[76]

2.4 The Rationale for Evaluating Judicial Performance

The theory has great significance in modern times, and commands great influence on evaluation of judicial performance. The quantitative parameters of evaluating judicial

[71] Gary Latham, Dawn Winters and Edwin Locke, 'Cognitive and Motivational Effects of Participation: A Mediator Study' (1994) 15 (1) Journal of Organizational Behaviour 51.
[72] Fred Lunenburg, 'Goal-Setting Theory of Motivation' (2011) 15 (1) International Journal of Management, Business, and Administration 1, 3.
[73] Ibid 4.
[74] Ibid.
[75] Fred Lunenburg (n 72) 5.
[76] Ibid.

performance include the number of pending cases, clearance rate,[77] production,[78] length of proceedings and the number of decided cases.[79] They also include court user, employee satisfaction and corruption perception index.[80] On the other hand, qualitative parameters of evaluating judicial performance focus on the quality of court pronouncements,[81] the quality of the judiciary process[82] and the quality of the functioning of justice system.[83]

The key rationale for evaluation of judicial performance rests on the broad ideas of accountability, transparency and effectiveness. Advocates of performance management of judicial officers justify it on the grounds that it improves performance of the judiciary and individual judges.[84] From a court leaders' perspective, evaluation helps them identify management priorities as well as establish on data system through which they can determine what needs to be measured and the manner to do the measurement.[85] Performance evaluation places the court at a better position in terms of setting priorities, channeling its energy where most deserved and proper utilization of its limited resources.[86] Judicial performance evaluation has also been seen as an essential tool of achieving public confidence and trust in the justice system, as well as enhancing accountability of the courts.[87] Yet others see it as an effective tool of safeguarding the interests of the wide range of court stakeholders.[88]

[77] The ratio of the number of resolved cases over the number of incoming cases.
[78] The increase in the number of cases decided according to court formation and the decrease of pending cases.
[79] Elizabeth Lambert, 'Measuring The Judicial Performance of the European Court of Human Rights' (2017) 8 (2) International Journal for Court Administration 24.
[80] Sofie Arjon Schütte et al, 'A Transparent and Accountable Judiciary to Deliver Justice for All' (*U4 Anti-Corruption Resource Centre,* 2016) <https://anti-corruption.org/wp-content/uploads/2017/05/RBAP-DG-2016-Transparent-n-Accountable-Judiciary.pdf>accessed 13 November 2021.
[81] Its focus is whether the judgments are clear and well-reasoned.
[82] Its focus is whether the judicial process has complied with procedural safeguards.
[83] Its focus on the impartiality and independence of the courts and the quality of the service provided to users of the justice system.
[84] Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2014) 41 (2) Monash University Law Review 446.
[85] Selen Siringil Perker (n 87) 2.
[86] Hanson R.A, Ostrom B.J and Kleiman, 'The Pursuit of High Performance' (2010) 3 (1) International Journal For Court Administration 6.
[87] Selen Siringil Perker (n 87) 9.
[88] Luigi Lepore, Concetta Metallo and Rocco Agrifoglio, 'Evaluating Court Performance: Findings From Two Italian Courts' (2012) International Journal for Court Administration 2.

In summary, some have seen the rationale for adopting judicial performance evaluation as three-fold; to address public confidence crisis, to stop wasteful use of public resources and to improve efficacy of the court systems and processes.[89] Lastly, judicial performance evaluation has been appraised as a way of bridging the tension and contestations on the extent to which the judiciary is insulated against scrutiny and interference from other arms of the government. In this perspective, the acceptance of judicial evaluation within the justice systems signals the judiciary's approval towards cooperation, coordination and comity with sister arms of government as well as other private and public interests.[90]

2.5 Criticisms against Judicial Performance Evaluation

Performance management of the judges has also been subject of major criticism owing to its inherent dangers to the rule of law and judicial independence. Judges believe that rigorous performance management and measurement raises grave concerns on its impact on judicial independence.[91] They argue that some measurement indicators occasion undue pressure on judicial officers and as a result hinder them from exercising their independence. One of the problematic measurement indicators is the one gauging productivity of courts and judges, which basically requires judges to resolve more cases more quickly.[92] Those opposed to judicial performance evaluation see it as a dressed-up attack on judicial independence, all though they agree that the concern can be addressed if evaluation is prudently architected and administered.[93]

Other critics have questioned and ruled out the possibility of evaluating judicial performance by use of empirical methods. Some critics have argued that quality in judging cannot be

[89] Ibid.
[90] Ingo Keilitz, 'Viewing Judicial Independence and Accountability through the 'Lens' of Performance Measurement and Management' (2018) 9 (3) International Journal for Court Administration 26.
[91] Made2Measure, 'Ten Reasons Not to Measure Court Performance' (*Made2Measure*, November 2008) <http://made2measure.blogspot.com/2008/11/ten-reasons-not-to-measure-court.html>accessed 4 March 2021.
[92] Ingo Keiltiz (n 84)26.
[93] Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluation' (2002) 29 (3) Fordham Urban Law Journal 1071.

subjected to empirical measurement.[94] Others argue that the activities of courts and judicial officers cannot be measured quantitatively because the regression analysis technique usually employed in such exercises fails to effectively capture the nuances of relationships and human personalities, which do color the functionality of judges.[95] Due to these concerns, critics warn that quantitative studies to this effect ought to be considered with great caution.[96] Yet other critics argue that the performance and behavior of judicial officers is susceptible to several factors over which they have little control. They argue that in a practical setting, the performance of a judicial officer is depended on the activities of others, workload patterns and time constraints.[97]

These criticisms notwithstanding, there are legitimate grounds justifying the significance of judicial performance evaluation. Proponents of performance transparency and accountability have advanced a convincing argument that performance management, if done well, can be an effective tool of illuminating the court's progress in addressing issues that concern ordinary citizens.[98] Scholars have warned that a judiciary that places high premiums on its independence at the expense of its accountability exposes itself to the risks of over-insulation from public scrutiny. This renders the judiciary irresponsive to legitimate societal demands and it will have no incentives to improve its performance because it cannot tackle criticism.[99] In addition, academics seem to agree that demands for continuous and regular performance evaluation should be conceded provided they promote administration of justice and they do not threaten judicial independence.[100]

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[94] Jim Rossi and Steven Gey, 'Empirical Measures of Judicial Performance: An Introduction to the Symposium' (2005) 32 Florida State University Law Review 1004.
[95] Harry Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 (5) University of Pennsylvania Law Review 1656.
[96] Ibid.
[97] Francesco Contini, Sharyn Roach Anleu and David Rottman, 'Evaluating Judicial Performance: Editors' Introduction' (2014) 4 (5), Oñati Socio-legal Series 842.
[98] Ingo Keilitz, (n 90) 26.
[99] F. van Dijk, F and G. Vos, 'A Method for Assessment of the Independence and Accountability of the Judiciary' (2018) International Journal for Court Administration Citation to volume, number, and pages 11-12.
[100] Ingo Keilitz (n 90) 24.

2.6 Performance Accountability and Judicial Independence

Even though judicial accountability and independence have been described as two strange-bed fellows,[101] nonetheless, some scholars have established a symbiotic relationship between the two, sometimes resembling co-joined twins. The available literature describes the two as fundamentally co-joined, so that the presence of one affects the presence of the other. It has been argued that the two go hand in hand and that performance accountability is a necessary condition of judicial independence.[102] In addition, it has been argued that evaluating performance of judicial officers is an essential element of accountability and transparency,[103] and that superior judicial performance is the product of accountability.[104] In addition, a judiciary that is not accountable to the public loses its independence in the long run because it does not enjoy public trust.[105]

Performance measurement of the judges inherently involves the necessary interaction between judicial independence and judicial accountability. Reforms to improve the efficiency of courts and judicial officers are always characterized by trade-offs between accountability and independence.[106] In addition, the court's freedom from interference and scrutiny ought to be balanced in exchange for accountability and transparency.[107]

Performance evaluation of the courts brings into focus the interplay between the principles of judicial independence and judicial accountability. Even though concepts like decisional independence[108] and institutional independence[109] are well appreciated in modern democracy, serious questions linger as to exact scope of the two in a system where judicial performance

[101] Francesco Contini and Richard Mohr, 'Reconciling independence and accountability in judicial systems' (2007) 3 (2) Utrecht Law Review 26.
[102] Ibid 26.
[103] Elizabeth Lambert (n 79) 21.
[104] Ingo Keilitz (n 90) 26.
[105] ENCJ, Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017. ENCJ Report, 2016-2017, 11.
[106] Ingo Keilitz, (n 90) 26.
[107] Ibid.
[108] Judicial independence at the level of the individual judge.
[109] Judicial independence at the organizational level of a court or a national court system.

is monitored and evaluated. The questions condense into one major concern; to what extent does performance measurement and management threaten judicial independence?[110] Judicial independence in the context of performance accountability is key because an evaluation system which disregards judicial independence renders the judiciary a mere agent of the executive branches and the executive.[111]

Performance measurement for judicial officers ought to be a careful balance of competing constitutional demands, especially the principle of judicial independence and the principle of judicial accountability. In particular, the evaluation should be a product of balancing the duty to inform policymakers and the public versus professional autonomy and judicial independence.[112] One way of achieving this balance is by ensuring that the evaluation exercise adequately informs politicians and policymakers about performances while at the same time leaving enough room for judges' independent decision making and professional autonomy.[113]

Due to the delicate relationship between judicial independence and political accountability, certain rules have been proposed to guide how judges can discharge their professional responsibilities in a publicly managed and administered court organization. Performance evaluation should be permitted to the extent that it facilitates the necessary interaction between the management and the judges with a view to enhancing better management of the court and the judges' professional performance.[114] Further, evaluation of the performance of an individual judge ought to be a matter for internal court governance or professional development, and must be strictly undertaken within the confines of judicial

[110] Ingo Keilitz (n 90) 24.
[111] ENCJ, Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017. ENCJ Report, 2016-2017, 11.
[112] Philip Langbroek, Rachel Dijkstra, Kyana Zadeh and Zubeyir, 'Performance management of courts and judges: organizational and professional learning versus political accountabilities' 307.
[113] Ibid 321.
[114] Ibid 322.

independence.[115]In addition, evaluation should be allowed to the extent it facilitates necessary interaction between the political domain and the court administration with a view to enhancing better functioning of the courts, professionally and organizationally.[116]

2.7 Evaluating Procedural versus Substantial Justice

Performance measurement regimes should strive to measure both procedural justice and substantial justice in equal measures. With regards to the procedural justice, theory posits that the evaluation regime should not emphasize on judicial outcomes at the expense of the processes.[117] This is so because people's confidence in the judiciary is more sensitive to procedural fairness and treatment than the outcomes of the proceedings.[118] It has been argued the public will assess the legitimacy of a judicial outcome by the extent to which the judicial process has met their expectations of fairness.[119]

Systems for evaluating judicial performance should place equal premiums on both quality and quantity of a judge's performance. It should not emphasize on efficiency and productivity at the expense of quality of the judicial services.[120] Thus, the evaluation approach should not exclusively rely on quantity factors like a court's efficacy in its disposal of matters; rather it should as well be equally concerned with factors like the quality of the judgments and services rendered to the public.[121] The quality of a judge's performance can be determined by a host of factors like preparedness and punctuality, managerial skills, diligence, freedom from impropriety, integrity and fairness.[122]

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[115] Anne Wallace, Sharyn Roach Anleu and Kathy Mack (n 84) 447.
[116] Philip Langbroek, Rachel Dijkstra, Kyana Zadeh and Zubeyir (n 112) 322.
[117] Selen Siringil Perker (n 87) 2.
[118] Tyler T and Sevier J, 'How do the courts create popular legitimacy? The role of establishing the truth, punishing justly, and/or acting through just procedures, 77 (3) Albany Law Review 1095, 1102.
[119] David Rottman and Tom Tyler, 'Thinking about Judges and Judicial Performance: Perspective of the Public and Court Users' (2014) 4 (5) Oñati Socio-legal Series 1046.
[120] Selen Siringil Perker (n 87) 2.
[121] Elizabeth Lambert (n 79) 21.
[122] Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluation' (2002) 29 (3) Fordham Urban Law Journal 1071.

Quantitative factors of evaluating performance should be applied with much caution lest they blur objectivity of the performance evaluation and occasion miscarriage of justice. Most of quantity factors have been criticized as posing real threat to achieving quality justice. The *number of cases decided* has been considered problematic as it does not consider the complexity of the cases and hence it can lead to misleading conclusions and observations.[123] The parameters cannot accurately gauge the extent to which courts are upholding and promoting human rights and fundamental freedoms.[124]Although case processing times, percentage of guilty pleas, number of dismissals and conviction rates are yardsticks for evaluating a criminal court, they have little to do with the quality of justice.[125] It has been argued that concentrating on speedy adjudication and disposal of cases can be counter-productive and prejudice administration of justice.[126]

A prudent performance evaluation system ought to encompass very clear goals, meaningful criterions for assessing performance and satisfactory evaluative information. A system will achieve efficacy if it defines its goals with clarity, if it employs objective standards of evaluating performance and if it is based on sufficient evaluative data.[127] Theorists have also suggested on the nature and structure of the measurement indicators. The indicators ought to be specific and responsive to the felt needs, with the ability to adapt to changing environments and goals to suit the unique needs of the various court stations.[128] In addition, performance evaluation for the judges should employ indicators which cannot intrude into the judicial domain of decision making and case management.[129]

[123] Elizabeth Lambert (n 79) 24.
[124] Ibid 25.
[125] George F. Cole, 'Performance Measures for the Trial Courts, Prosecution, and Public Defense' 88 in John Dilulio, Geoffrey Alpert, Mark Moore, George Cole, Joan Petersilia, Charles Logan and James Wioson, *Performance Measures for the Criminal Justice System*, Discussion Papers.
[126] Elizabeth Lambert (n 79) 28.
[127] Floyd Feeney, 'Evaluating Trial Court Performance' (1987) 12 Justice System Journal 167.
[128] Selen Siringil Perker (n 87) 1.
[129] Philip Langbroek, Rachel Dijkstra, Kyana Zadeh and Zubeyir (n 112) 322.

2.8 Factors Undermining Evaluation Systems

However, there are external factors that undermine the efficacy of evaluation systems. Even where there are formal procedures, laws and structures enacted to harmonize performance of courts in a certain legal system, it has been argued that there will still be differences and variations in the outputs and processes of the various courts.[130] These variations are attributed to the problem of 'local legal culture' which connote customs shared by membership of a certain court community with respect to handling of cases and the behavior of participants.[131]Court bailiffs, clerks, attorneys and judges of any particular court are likely to come up with informal practices and rules which are specifically configured for the unique circumstances of the court, and hence greatly influence court performance.[132]

In addition, court performance is also influenced by the idea of 'courtroom workshop.' Ordinarily, persons participating in a courtroom are regarded as a workgroup, implying that the reciprocal relationships of the defense lawyer, prosecutor, judge, court bailiff and clerk are essential in ensuring successful completion of the group's mandate.[133] Different courtrooms have different outputs and the variance is attributed to the group's leadership, influence from organizations sponsoring the participants and the group's level of cohesiveness.[134] In addition, it has been observed that the 'courtroom elite' will likely control and manage the court's operations, and hence have a bearing on the court performance.[135]

Furthermore, the cogency of the performance evaluation system is susceptible to factors that are beyond its control. For instance, litigants who have lost cases before a certain judge are likely to grade the judicial officer lower than the officer deserves, especially on the 'the

[130] George F Cole (n 125) 93.
[131] Thomas W. Church, Jr, 'Examining Local Legal Culture,' (1985) American Bar Foundation Research Journal 49
[132] George F Cole (n 125) 94.
[133] James Eisenstein and Herbert Jacob, *Felony Justice* (Boston: Little, Brown, 1977).
[134] George F Cole (n 125) 94.
[135] Peter F. Nardulli, *The Courtroom Elite: An Organizational Perspective on Criminal Justice* (Cambridge, Mass.: Ballinger, 1978).

knowledge of the law.'[136] Given that these are natural occurrences which are obvious in any evaluation exercise, it has been argued that those developing evaluation tools ought to design them in a manner which diminishes chances of prejudice occasioned by dishonest and unfair evaluators.[137]

2.9 Judicial Performance Management in Kenya

The Kenya judiciary is established under Article 159 of the Constitution of Kenya with the singular mandate of determining disputes in an expeditious and just manner. It consists of the Superior Courts and Subordinate Courts with the Judicial Service Commission having an oversight function. In carrying out its mandate the, Judiciary is obligated to follow the National Values and Principles of governance articulated in Article 10 of the Constitution.[138] One of the key values in Article 10 is accountability.

The accountability envisaged in this study relates to expeditious disposal of matters as required by Article 159 (2) (b) of the Constitution[139] which provides that justice shall not be delayed. Further, it has been said that the effectiveness of a judicial system depends crucially on the ability of the courts to resolve cases and to resolve them in a prompt manner.[140] In the context of this study, the Judiciary has a responsibility to Kenyans with regard to the speed with which disputes are resolved. Efficient judiciaries are a key component of economic development since they are predictable and attract investments.[141] Confidence in the Justice system is also measured by the length of time a matter takes to be determined fully.[142] It promotes the rule of law, secures stability of a nation by creating certainty in the resolution of

[136] Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluation' (2002) 29 (3) Fordham Urban Law Journal 1073.
[137] Ibid.
[138] The Constitution of Kenya, 2010.
[139] The Constitution of Kenya, 2010.
[140] Valentina Dimitrova-Grajzl and others, 'Court Output, Judicial Staffing, and the Demand for Court Services: Evidence from Slovenian Courts of First Instance' 36.
[141] Giuliana Palumbo & Others; *Judicial Performance and Its Determinants*, OCDE 2013, pg. 9
[142] Ibid.

disputes. One way of measuring the efficiency of the courts is through performance measurement standards.

In Kenya, performance management in government was conceived in the 1990's and took shape after the introduction of the Economic Recovery Strategy paper in 2003 which advocated for results-based management in the Civil Service.[143] In particular, the Strategy provided for the development, introduction and institutionalizing of performance-based management practices in the public service. Further, it sought to undertake service delivery surveys in all ministries and departments installing service charters with clear service bench marks and standards in order to enhance efficiency, transparency and accountability in service delivery.[144]

In 2010, the Ouko Report on Judicial Reforms was released and contained elaborate measures and recommendations relating to evaluation and performance management of judicial officers.[145] These reforms were implemented in earnest from 2014 when the judiciary sought to institutionalize the culture of performance management by introducing the tool famously known as the Performance Management and Measurement Understandings (PMMUs)[146] adopted from the International Framework of Court Excellence (IFCE) to measure judiciary performance.

2.10 Conclusion

The chapter concludes that the Goal Setting Theory offers an explanation on the nature and structure of PMMUs as tools of measuring and evaluating judicial performance. Importantly, the five principles of the theory serve as the ideal yardsticks in determining the criteria and the approach to be adopted in evaluating judicial performance. The theory shades the debate

[143] Government Printers (2003) *Economic Recovery Strategy for Wealth and Employment Creation*, pg. 28
[144] Ibid 28.
[145] Government Printers (2010) (n 7).
[146] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 27.

on how policy makers should strike a balance between quality and quantity measurement indicators with a view to safeguarding judicial independence on one hand while enhancing performance accountability on the other. It also offers a solution of how to conduct performance evaluation while at the same time addressing the various challenges inherent in the evaluation exercises.

CHAPTER THREE

LEGAL FRAMEWORK ON PMMUS IN KENYA

3.1 Introduction

The chapter responds to the second research question on the gaps in the Kenya's legal framework on PMMUs in attaining judicial accountability and access to justice. First, it discusses the close interrelationship between the nature and operations PMMUs and the concept of access to justice and further outlines the legal gaps which impede utility of PMMUs in attaining access to justice in Kenya.

3.2 PMMUs and Access to Justice

Although the term 'access to justice' has no universal definition, there is a general consensus as to its attributes and form. Its most basic and simplest meaning refers to access to litigation or the formal ability of litigants to appear in court.[147] However, the term has been used to advocate for more access to courts, judicial officers and lawyers, especially for poor people.[148] In a very broad context, the term has been interpreted to include introduction of mechanisms and procedures to handle a higher volume of cases more efficiently.[149] These approaches also seek to eliminate issues which hinder access to dispute resolution processes like litigation costs and fees, physical infrastructure and distance to the courts.[150]

The concept of access to justice has gained great significance and it is widely used to critique efficacy of courts in delivering timely remedies and interventions. The term has a relatively broader meaning which incorporates the functionality of court systems, the system's ability to serve justice and the systematic barriers experienced by litigants in pursuit

[147] ACLRC, 'What is Access to Justice?' (*Alberta Civil Liberties Research Centre*, May 2021) <http://www.aclrc.com/what-is-access-to-justice>accessed 5 May 2021.
[148] M Jerry, 'What Does 'Access to Justice' Mean?' <http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>accessed 5 May 2021.
[149] Ibid.
[150] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 1.

of justice.[151] The broad sense of the term also looks into the ability of litigants to seek and obtain a remedy through informal or formal judicial bodies in accordance with human rights standards.[152]

Kenya's legal framework adopts the broad conceptualization of access to justice because it looks beyond the formal ability of a litigant to appear in court. The approach has its roots to the constitutional provision which mandates the judiciary to ensure access to justice for all irrespective of status.[153] This obligation has been interpreted to mean that the government has a duty to create an accessible, transparent and open judiciary by taking positive steps to remove barriers to justice.[154] In the Kenyan context, the term access to justice is a function of many factors like cost of litigation, speed of case determination, nature of court procedures and processes, human resource capacity, distance to the courts and physical infrastructure.[155]

The concept of access to justice is an integral part of Kenya's legal system. The state is required to ensure access to justice for all persons and, if any fee is required, the state is obligated to ensure that the fees are reasonable and does not impede access to justice.[156] The constitutional principles on access to justice and expeditious disposal of cases have been advanced by a host of statutes. The most notorious legislative provision is sections 1A and 1B of the Civil Procedure Act, which introduce the overriding objective famously known as the oxygen principle.[157] The provision pushes for affordable and expeditious resolution of civil matters. It requires courts to dispose proceedings in a timely manner and to ensure adjudication costs are affordable by respective litigants.[158]

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[151] ACLRC, 'What is Access to Justice?,' (*Alberta Civil Liberties Research Centre*, June 2020) <http://www.aclrc.com/what-is-access-to-justice>accessed 4 May 2021.
[152] United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005).
[153] The Constitution of Kenya, 2010 Article 159 (2) (a).
[154] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 1.
[155] Ibid.
[156] The Constitution of Kenya, 2010 Article 48.
[157] The Civil Procedures Act, Cap 21, Laws of Kenya.
[158] The Civil Procedure Act, s 1B (d).

The broader conceptualization of access to justice pays considerable attention to the idea of expeditious disposal of cases, which is well buttressed in the Constitution. Kenyans have a right to fair hearing, which require determination of cases without unreasonable delay.[159] On the other hand, courts and tribunals are bound to ensure that justice is not delayed.[160] Parliament is required to enact a law to promote timely determination of electoral disputes.[161]

A comparison between the definition of access to justice and the indicators listed under PMMUs demonstrates a very close link between the two. One of the key objectives of PMMUs in Kenya is to provide equitable access to justice for all, and courts achieve this by ensuring expeditious disposal of cases, improving case clearance rate, reducing case backlog and ensuring certainty on trial and delivery dates.[162] In addition, Kenyan PMMUs are very comprehensive in a manner which covers and accommodates the broadest conceptualization of access to justice. The PMMUs look beyond formal appearance in court and seek to address other external factors which have a real impact on the functionality of the court. An Indicator like trial and delivery date certainty is meant to improve accountability and transparency in the judiciary and ultimately boost public confidence in the courts.[163]

Introduction and implementation of PMMU in Kenya was designed to advance access to justice. They were introduced to serve as yardsticks of measuring the performance of the judiciary with regards to expeditious delivery of justice and access to justice. PMMUs do this by assessing its performance, its ability to meet set goals, the levels of customer satisfaction and identifying deficient areas for improvement.[164]The regime sets annual targets and

[159] The Constitution of Kenya, 2010 Article 50 (2) (e).
[160] The Constitution of Kenya, 2010 Article 159 (2) (b).
[161] The Constitution of Kenya, 2010 Article 87 (1).
[162] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 60-61.
[163] Ibid.
[164] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) 27.

employs various indicators to measure achievement in the period under review.[165]With these features, it was believed that information collected from the PMMUs would populate the commitments and a quantifiable way of measuring progress.[166]

The nature and operations of PMMUs falls squarely within the purview of the Concept of Access to Justice. PMMUs were introduced as a tool of measuring the judiciary's commitment to access to justice. It was expected that they would increase productivity of judges, improve effectiveness and efficacy, and ultimately streamline systems and internal processes.[167]Through this mechanism, the judiciary aspired to assess the functioning of judges as well as identify the challenges facing particular court stations.[168]

3.3 The Legal Framework on PMMUs

Kenya has a relatively robust legal, institutional and policy framework on the adoption and implementation of PMMUs. The constitution provides for the right to access justice for all, and requires that any fees incidental to litigation must reasonable and should not impede access to justice.[169] It mandates the judiciary to ensure that justice is not delayed and provides the right to have trials concluded without unreasonable delay.[170]

The duty to hear and determine cases expeditiously is well replicated under a host of statutes. Both the Civil Procedure Act[171] and the Appellate Jurisdictions Act[172] advance the principle of overriding objectives in civil matters commonly referred to as the Oxygen Principle. The principle requires courts to facilitate expeditious resolution of disputes.[173] Thus, Kenya's constitutional dispensation provides a general framework on which to found the duty of the courts to act without delay.

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[165] The Judiciary, Republic of Kenya, (June 2020) Performance Management and Measurement Understandings Evaluation Report, 2018/2019, 4th Cycle of Performance Management Implementation V.
[166] Nicholas Menzies, 'Justice in Kenya: Measuring what counts' (*World Bank Blogs*, May 20 2015) 4.
[167] Kihara Kariuki, 'Judicial accountability as a tool for promoting efficiency in the courts' Keynote address 13.
[168] Ibid.
[169] The Constitution of Kenya, 2010 Article 48.
[170] The Constitution of Kenya, 2010 Article 50.
[171] The Civil Procedure Act, 2010 s 1A & 1B.
[172] The Appellate Jurisdiction Act Cap 9, s 3A & 3B.
[173] The Civil Procedure Act, 2010 s 1B (d).

In addition, Kenya's regime has a special framework on management and measurement of judicial performance. The Principal Judge of the High Court has powers to oversee the implementation of a performance management system and this includes evaluating the manner in which the judges are discharging their mandate.[174] The powers are carefully exercised to guard them against possible abuse in that they are exercisable upon consultation with the Judicial Service Commission.[175] Similar powers have been granted to the presiding judge of the Court of Appeal. And just like the case of the High Court, the presiding judge is empowered to oversee the implementation of a performance management system at the Court of Appeal and the powers are exercisable upon consultation with the JSC.[176]

Furthermore, the JSC has general powers and privileges with regards to measuring, monitoring and managing judicial performance. The JSC is required to prepare an annual report on issues pertaining the Judiciary and the Commission. Among the many things to be captured in the report include data on case disposal at the courts, information about the performance of the judiciary and data on issues of access to justice.[177] The list of the things to be included in the report is not exhaustive as it includes any other statistical information on the functioning of the courts which the Judiciary and the JCS considers appropriate.[178]

The Judiciary has specialized rules on case management and management of caseloads. With regards to the High Court, the Chief Justice is mandated to make special rules to stipulate the role of the Principal Judge and Deputy registrars in caseload management.[179]In addition, the Chief Justice has powers to make rules to ensure matters are disposed of within a year from the commencement of the hearing.[180] The Chief Justice has

[174] The High Court (Organization and Administration) Act, 2015 s 29.
[175] The High Court (Organization and Administration) Act, 2015 s 29.
[176] The Court of Appeal (Organization and Administration) Act, 2015 s 31.
[177] The Judicial Service Act, 2011 s 38 (3) (c), (d) and (e).
[178] The Judicial Service Act, 2011 s 38 (3) (f).
[179] The High Court (Organization and Administration) 2015, s 27 (1) and (2).
[180] The High Court (Organization and Administration) 2015, s 39 (2) (d).

similar powers with regards to the Court of Appeal. He or she is empowered to make special rules to stipulate the role of the presiding judge and Deputy Registrars in caseload management at the Court of Appeal.[181]

The special rules place Deputy Registrars and the Principal Judge at the centre of case management at the High Court. Deputy Registrars are in charge of managing caseloads and they do this by giving directions to ensure efficient and expeditious proceedings.[182] The Deputy Registrar is required to facilitate case management conferences with a view to enhancing efficient disposal of matters and avoiding unmerited applications which occasion delay in determination of cases.[183] The Principal Judge is required to come up with measures to ensure disposal of matters within twelve months from the commencement of their hearing.[184]The Principal Judge is required to ensure older cases are given priority, limiting the number of adjustments, adopt alternative dispute resolution mechanisms, monitor individual judge's caseload and allocation of sufficient time for writing rulings and judgments.[185]

In addition to the High Court, the Kenyan regime has special rules to enhance better case management at the Court of Appeal. The court employs case management conferences with a view to minimizing adjournments and unnecessary applications.[186] The court of Appeal rules, introduced in 2015, sanctions the idea of ensuring timely and efficient disposal of matters at the Court of Appeal and advances the implementation of the Court of Appeal Rules 2010.[187]

The requirement for expeditious disposal of cases is not restricted to civil cases, but rather extends to criminal cases. The judiciary has introduced several rules to facilitate effective

[181] The Court of Appeal (Organization and Administration) 2015, s 29 (1) and (2).
[182] The High Court (Organization and Administration) (General) Rules, 2016 Rule 24.
[183] The High Court (Organization and Administration) (General) Rules, 2016 Rule 26 (1).
[184] The High Court (Organization and Administration) (General) Rules, 2016 Rule 27 (1).
[185] The High Court (Organization and Administration) (General) Rules, 2016 Rule 27 (2).
[186] The Court of Appeal Practice Directions on Civil Appeals and Applications.
[187] Ibid.

case management of criminal proceedings and expeditious disposal of trials. Criminal courts are required to conduct pre-trial conferences and case managements as well as conscious management of the trial process to avoid inordinate delays.[188] Similar rules have been introduced to enhance efficacy and expediency in the management of traffic cases.[189] It has been argued that the rules have enhanced case management in that they have minimized delays in prosecuting cases and the efficacy of the traffic courts generally.[190]

3.4 The Utility of PMMUs in Attaining Judicial Accountability

The use of PMMUs as measurement tools has grown gradually over the last four years and they have become a common reference point for judges, magistrates and other judicial officers. Although only 227 units subjected themselves to the first cycle of PMMUs implementation in 2017, the number has been increasing gradually with the PMMSC recording 257, 276 and 272 units for the second, third and fourth cycle respectively.[191]

Kenya's regime approaches issues of judicial performance evaluation with caution to protect and promote judicial independence. Generally, the JSC is empowered to make special regulations on management of judicial functions and performance appraisal at the judicial officers. For the regulations to acquire legal force, however, they must be debated and approved by the National Assembly.[192] Similarly, the power of the Principal Judge to oversee the implementation of performance management at the High Court is counterchecked by the JSC.[193] The same JSC oversight applies to the Presiding Judge at the Court of Appeal when overseeing performance management at the court of Appeal.[194]

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[188] The Practice Directions for Active Case Management of Criminal Cases in Magistrate Courts and High Courts.
[189] The Judiciary, Republic of Kenya, Traffic Practice Directions, 2015.
[190] Lucy Mwihaki Njuguna (n 39) 61.
[191] The 1st cycle of PMMUs evaluation was conducted in 2015/2016 financial year, the 2nd cycle in 2016/2017, the 3rd cycle in 2017/18 and the 4th cycle 2018/19. The implementing units comprise court stations.
[192] The Judicial Service Act, 2011 s 47 (3).
[193] The High Court (Organization and Administration) Act, 2015 s 29.
[194] The Court of Appeal (Organization and Administration) Act, 2015 s 31.

The implementation of PMMUs is a collective responsibility shared amongst several key players and stakeholders. The implementation requires consultation and collaboration between judicial staff, judicial officers, judges, directorates, registries, tribunals and courts.[195] Most of the times, the implementation involves highly participative and consultative negotiations between the PMMSC and implementing units.[196] PMMUs do not operate in isolation and rely and work together with other performance management tools. The other tools include court used satisfaction surveys, performance reporting, performance appraisals, quality management standards, strategic plans and annual work plans.[197]

Kenya's judiciary has a robust institutional framework for implementing PMMUs. The framework includes the Directorate of Planning and Organizations Performance and the Performance Management and Measurement Steering Committee (PMMSC). The PMMSC spearheads the implementation of PMMUs while the directorate offers day to day coordination and technical support.[198]Moreover, the composition of PMMSC draws representation from judicial officers, magistrates and judges. The framework was informed by a comprehensive case census, which established the actual status of the judiciary in terms of resources available in each court, support staff, judges, the age and type of all cases.[199]

Kenya's legal framework on PMMUs is a special modification and configuration of international standards of measuring court performance. The Kenya's PMMU is based on the internationally recognized ten measures for court excellence. The measures include productivity, work environment and employee satisfaction, court user satisfaction, case

[195] The Judiciary, Republic of Kenya, (June 2020) Performance Management and Measurement Understandings Evaluation Report, 2018/2019, 4th Cycle of Performance Management Implementation Vii.
[196] The Judiciary, Republic of Kenya, (June 2020) Performance Management and Measurement Understandings Evaluation Report, 2018/2019, 4th Cycle of Performance Management Implementation 4.
[197] Kihara Kariuki, 'Judicial accountability as a tool for promoting efficiency in the courts' Keynote address by the Hon. Justice Kihara Kariuki, President, Court of Appeal of Kenya During the Annual Uganda Judges Conference Held at Speke Resort, Munyonyo on 19-21 January, 2015 13.
[198]The Judiciary, Republic of Kenya, (June 2020) Performance Management and Measurement Understandings Evaluation Report, 2018/2019, 4th Cycle of Performance Management Implementation 4.
[199] Nicholas Menzies, 'Justice in Kenya: Measuring what counts' (*World Bank Blogs*, May 20 2015) 4.

backlog, case clearance rate, trial and delivery date certainty, court files integrity, remand custody, expeditious disposal of cases and access to justice.[200]

The introduction of PMMUs in Kenya was well based on elaborate research and policy considerations. Prior to the institutionalization of PMMUs in Kenya, PMMSC undertook elaborate research and comparative analysis of Australia's and the US's experiences on performance measurement. It is on the basis of this research that PMMSC identified lessons and best practices that Kenya could borrow from these jurisdictions.[201] In addition, the PMMSC undertook extensive nationwide stakeholder consultation workshops, with a view to sensitizing all stakeholders like judges, registrars and magistrates among others.[202]

The efficacy of PMMUs has been attributed to the periodic arrangements and internal mechanisms through which best performers are awarded. The programme targets those with commendable and exemplary performance in expeditious hearing and ruling of matters.[203]

3.5 Legal Challenges to Attaining Efficiency and Accountability

To some extent, the efficacy of PMMUs in attaining access to justice has been decelerated by legal challenges surrounding their foundation and backing in law. Although the framework creates a sound foundation for conducting judicial performance and evaluating the performance of the judges, it does not set performance standards and indicators for judges, and it does not provide the mechanism for assessing individual judges.[204]

The design of the PMMUs does not place direct responsibility on individual judicial officers, and hence a hindrance to achieving individual accountability. The PMMUs place overall responsibility on court heads or representatives rather than on the individual judicial officers. The representative is required to ensure that the court they represent achieves the agreed

[200] The Judiciary, Republic of Kenya, (June 2020) Performance Management and Measurement Understandings Evaluation Report, 2018/2019, 4th Cycle of Performance Management Implementation 2.
[201] The Judiciary, Republic of Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary* (n 3) Viii.
[202] It targeted judges of the Supreme Court, Court of Appeal, High Court, Heads of court stations, Registrars, Directors, members of the Kenya Judiciary Staff Association, Executive officers and Court assistants.
[203] Bernard Gitau, 'Backlog of cases attributed to slash in Judiciary budget' *The People* (August 7 2020) 5.
[204] Lucy Mwihaki Njuguna (n 39) 55.

court targets on timelines for hearing and determining certain matters.[205] In addition, they are required to ensure that the courts they represent strive to achieve expeditious disposal of cases, meeting trial and delivery dates with certainty, improving case clearance rates and ensuring reduction of case backlog.[206] With this kind of framework, it becomes problematic to request accountability from individual judicial officers.

Kenya's framework on judicial performance does not provide enough sanctions for judicial officers who do not meet their targets under the PMMUs. Even though the Directorate of Performance Management has established mechanisms of rewarding hard working judicial officers, the Directorate is yet to design similar rules to punish those who continually fail to meet the measurement indicators. This predicament is amplified by the fact that PMMUs do not expressly provide specific duties to individual judicial officers.[207]

And what is more is that the JSC does not have a legal basis for initiating disciplinary proceedings against a judicial officer for failure to meet the performance indicators enlisted in a PMMU. An attempt to base these sanctions on the disciplinary powers of the JSC is problematic. This is because disciplinary proceedings in the form of interdiction, suspension, reprimand or removal can only be instituted where one has been convicted of a serious criminal offence,[208] on grounds of public interest,[209] gross misconduct or breach of judicial code of conduct prescribed by an Act of Parliament.[210]

In addition, the efficacy of PMMUs has been prejudiced by lack of clear demarcation of roles and responsibilities of key stakeholders in their implementation. It has been argued that some

[205] The Supreme Court is represented by the Deputy Chief Justice, the Court of Appeal is represented by the President, Court of Appeal, the High Court is represented by the Principal Judge, the Employment and Labour Relations Court is represented by the Principal Judge, of the other part; the Environment and Land Court is represented by the Presiding Judge, the Magistrates Courts are represented by the Head of magistrates' court station, of the other part and the Kadhis' Courts are represented by the Chief Kadhi.
[206] Ibid 59.
[207] Lucy Mwihaki Njuguna (n 39) 67.
[208] The Judicial Service Act, 2011 s 32. Third Schedule, *Provisions Relating To The Appointment, Discipline And Removal Of Judicial Officers And Staff* 17.
[209] Ibid s 16.
[210] The Constitution of Kenya, 2010 Article 168.

of the institutions at the centre of implementing judicial performance do not have backing in law.[211] For instance, the Directorate of performance management is not anchored in law with respect to its composition and mandate. It has been opined that the directorate can achieve more efficacy if it's well established in law which outlines parameters for assessing court stations and judicial officers, and bases performance management on clearer procedures and principle.[212]

The efficacy of PMMUs in the tribunals has been destabilized by legal challenges inherent in the law establishing tribunals. It has been argued that the high levels of case backlog being experienced at the tribunals can be attributed to the shortfalls of the law establishing tribunals.[213] Maraga opines that tribunals as currently constituted are having teething problems and that the Tribunal Act should be enacted to streamline their operations.[214]

In addition, the JSC is yet to draft and introduce finer and specific regulations to oversee evaluation of judicial performance. Even though the law gives general powers to the Principal Judge of the High Court and the Presiding judge of the Court of Appeal, the JSC is mandated to come up with finer regulations to guide the evaluation process. The regulations can touch on several issues including performance appraisal, and management and administration of judicial functions.[215]

3.6 Non-Legal Challenges to Attaining Judicial Accountability and Efficiency

The implementation of PMMUs is also affected by other external factors, which impede successful implementation of judiciary's strategic goals. One of these factors is the problem of underfunding of the judiciary. Notably, the Judiciary has been receiving a cut on their allocations for the last two years. In the 2020/21 financial year, Judiciary allocation was

[211] Lucy Mwihaki Njuguna (n 39) 57.
[212] Ibid 57.
[213] Bernard Gitau (n 196) 4.
[214] Ibid.
[215] The Judicial Service Act, 2011 s 47 (2).

reduced from Kshs 18.8 billion to 18.1 billion,[216] while the same was slashed further to Kshs 17.9 billion in the 2021/2022 financial year.[217]

The underfunding of the judiciary has immediate ripple effects on its ability to run its initiatives and programmes. The cash shortage has occasioned understaffing of the superior courts and decelerated the judiciary's agenda to clear case backlog.[218] Underfunding directly hinders access to justice in that the judiciary is prevented from constructing more courts and improving the requisite infrastructure to support justice delivery.[219] For instance, even though towns like Ruiru and Thika deserve a fully-fledged High Court because of the high number of cases they receive and their location within an economically active area, the Judiciary has not managed to establish adequate infrastructural development due to the budgetary constraints and cuts.[220]

3.7 Conclusion

The nature and operations of PMMUs falls squarely within the purview of the Concept of Access to Justice. A comparison between the definition of access to justice and the indicators listed under PMMUs demonstrates a very close link between the two. The introduction and implementation of PMMUs in Kenya was designed to advance access to justice and to operate as a tool of measuring Judiciary's commitment to achieving access to justice. Kenya's regime has a special framework on management and measurement of judicial performance and the Judiciary has developed special rules on case management and management of caseloads. The regime approaches issues of judicial performance evaluation with caution to protect and promote judicial independence, and it is a special modification and configuration of international standards of measuring court performance.

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[216] Bernard Gitau, 'Backlog of cases attributed to slash in Judiciary budget' *People Daily* (Nairobi, August 7 2020) 5.
[217] Winfrey Owino, 'Koome on a low start Treasury slashes Judiciary Budget again' *The Standard* (June 10 2021) 6.
[218] Bernard Gitau, 'Backlog of cases attributed to slash in Judiciary budget' *The People* (Nairobi, August 7 2020) 5.
[219] Ibid.
[220] Ibid.

However, the efficacy of PMMUs in attaining access to justice has been decelerated by legal challenges surrounding their foundation and backing in law. The design of the PMMUs does not place direct responsibility on individual judicial officers, and hence a hindrance to achieving individual accountability. The framework on judicial performance does not provide enough sanctions for judicial officers who do not meet their targets under the PMMUs. The implementation of PMMUs is also affected by other external factors, which impede successful implementation of judiciary's strategic goals. One of these factors is the problem of underfunding of the judiciary and the shortage of judicial officers, which has been amplified by the failure of the President to appoint 41 judges nominated by the JSC.

CHAPTER FOUR

JUDICIAL PERFORMANCE EVALUATION IN THE UNITED STATES

4.1 Introduction

This chapter analyses judicial performance evaluation in the United States (US) with a view to identifying lessons and best practices which Kenya can learn from her experience. It first gives a justification for choosing the US for the purposes of the study. It discusses how the US has handled management of case backlogs, the nature of judicial performance evaluation in the US, attributes of the institutional framework and sanctions exercisable against non-performing judges. Lastly, the chapter interrogates the role of public participation and consultation as well as public sensitization in the development of responsive legislative reforms.

4.2 Rationale for Choosing the United States

The choice of the US for this study is based on principle. One, the US has had operational court performance standards since 1987 and thus the country has a considerably longer experiences and more advanced jurisprudence on application of performance measurement.[221] In addition, the US regime on performance measurement has been applauded as the best around the world. It is the recognized world leader judicial administration and her regime on court administration is more stable and more mature than in Europe.[222] The regime is the most ambitious in scope because it conceptualizes performance in its widest sense.[223] Unlike other jurisdictions which concentrate on the traditional measurement tools like clearance rates, the US adopts a wider conceptualization which evaluates the quality of judgments by paying attention to qualitative factors like integrity, due process of law and equality.[224]

In addition, both Kenya's and USA's regime on performance measurement have similar objectives with respect to introducing measurement of court performance. The USA's regime

[221] Maria Dakolias, 'Court Performance Around the World: A Comparative Perspective' (1999) 2 (1) Yale Human Rights and Development Law Journal 91.
[222] Ingo Keilitz (n 90) 24.
[223] Maria Dakolias (n 213) 91.
[224] Maria Dakolias (n 213) 91.

was introduced to reduce court delay, increase confidence and public trust in the courts as well as reducing case backlog which was overwhelming the courts.[225] The US regime takes court performance measurement as the most efficient self-measurement tools for judicial officers[226]and the concept is well embraced by the US courts with some developing sophisticated capabilities for court performance data and analysis.[227]

4.3 Management of Case Backlogs and Disposition Timelines

US's legislature redresses the challenge of case delays by enacting statutes specifically designed to enhance efficacy and clear case backlog. The USA regime has specific statutes outlining statutory timelines within which cases should be heard and determined.[228] Some of the statutes include California's Trial Court Delay Reduction Act,[229] Speedy Trial Act[230] and Civil Justice Reform Act.[231] For instance, the Speedy Trial Act establishes specific time limits for completing the various stages of a federal criminal prosecution.[232] The Civil Justice Reform Act seeks to address concerns of cases taking too long.[233]

The US regime has legal sanctions for the violation of the requirement on speedy adjudication of cases. If a criminal trial does not confine to the statutory timelines, the trial is dismissed with or without prejudice to reprosecution.[234] In addition, Judicial Council of California is required to collect and make public statistics on courts' compliance with the

[225] Richard Y. Schauffler, 'Judicial accountability in the US state courts Measuring court performance' (2007) 3 (1) Utrecht Law Review 118.
[226] Stephen Colbran, 'A comparative analysis of judicial performance evaluation programmes' (2006) 4 (1) Journal of Commonwealth Law and Legal Education 7.
[227] Ibid 32.
[228] Ziyad Motala, 'Judicial accountability and court performance standards: managing court delay' (2001) 34 (2) The Comparative and International Law Journal of Southern Africa 185.
[229] The Trial Court Delay Reduction Act of 1986 passed by the State of California.
[230] Speedy Trial Act of 1974 18 USC ss 3161-3174 (West 1985 & Supp 19).
[231] The Civil Justice Reform Act (CJRA) of 1990 28 USC ss 471-473 (Supp IV 1992).
[232] Speedy Trial Act of 1974, <https://www.justice.gov/archives/jm/criminal-resource-manual-628-speedy-trial-act-1974>accessed 30 July 2021.
[233] Terence Dunworth and James Kakalik, 'Evaluating the Civil Justice Reform Act of 1990' (*Rand Corporation*, Research Brief, 1995) <https://www.rand.org/pubs/research_briefs/RB9022.html>accessed 30 July 2021.
[234] The Speedy Trial Act of 1974.

timeline standards.[235] Given that dismissal with prejudice does not permit reprosecution, the court is required be cautious and put into consider the circumstances leading to dismissal, the impact that reprosecution would have on the administration of justice and the seriousness of the offence, before ordering dismissal with prejudice.[236] Courts are mandated to examine each statutory factor before they arrive at a decision to dismiss a charge with prejudice and a minor violation of the timelines that does not disadvantage the accused person's trial preparation does not justify a dismissal with prejudice where the accused is facing a serious offence.[237]

The US regime on enhancing performance of the judiciary and speedy resolution of matters pays attention to the rights of the accused person, and protects defendants' right to fair trial. The law provides a minimum time period during which trial may not commence so that accused persons are not rushed to trial without an adequate opportunity to prepare.[238] A criminal trial cannot commence less than 30 days from the date the accused person was arraigned in court unless with their written consent.[239]In addition, the regime provides that accused persons have discretion on whether to waive their rights to speedy trial.[240]

US courts and the judiciary set case disposition timelines only where such powers have been expressly delegated to them by the legislature. Federal courts have been granted the authority to develop a case management system to minimize delay.[241]California courts have been empowered to adopt case processing timelines for the processing and disposition of criminal and civil cases.[242]

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[235] Judicial Council of California, Administrative Office of the Courts *Prompt and fair justice in tbe trial courts: draft report to tbe legislature on delay reduction in the trial courts* (1991) 3. (Judicial Council of California).
[236] The Speedy Trial Act of 1974 18 U.S.C. § 3161(a)(1)-(a)(2)
[237] *United States v. Taylor*, 487 U.S. 326 (1988),
[238] The Speedy Trial Act of 1974.
[239] Ibid.
[240] *United States v. Saltzman*, 984 F.2d 1087, 1090-1092 (10th Cir. 1993).
[241] Ziyad Motala (220) 185.
[242] Ibid.

4.4 The Nature of Judicial Performance Evaluation

The US regime of judicial performance evaluation has two separate systems. The first system evaluates individual judges by analyzing their judicial attributes and employing the traditional forms of accountability like appellate review and the principle of 'open justice.'[243] The second system is termed as court and administrative performance measurement and it generally evaluates administration and management of a court in an aggregate sense.[244] The current study does not concern itself with the first system of evaluation but rather pays much attention to the second system. Even though court performance measurement targets the court as an institution, it has aspects and attributes which it employs to evaluate performance of individual judges. Thus, the purpose of the court performance measurement is two-fold; to promote the quality of the court as a whole and to enhance judicial self-improvement for individual judges.[245]

The striking feature of the US regime for trial courts is that it places high premiums on case management and productivity and pays less attention to procedural justice aspects of the functioning of the court. For instance, nine out of the ten CourTools measures relate to productivity and that only one measure addresses procedural justice. The ten CourTools measures include Cost per Case, Court Employee Satisfaction, effective use of Jurors, collection of monetary penalties, reliability and integrity of case files, trial date certainty, age of active pending caseload, time to disposition, clearance rates and access and fairness.[246] The last element evaluates the accessibility of the court as well as how the court treats customers in terms of respect, equality and fairness.[247]

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[243] Stephen Colbran, 'A Comparative analysis of Judicial Performance Evaluation Programmes' (2006) 4 (1) Journal of Commonwealth Law and Legal Education
[244] Ibid.
[245] American Bar Association, Guidelines for the Evaluation of Judicial Performance with Commentary (February 2005) 1.
[246] Selen Siringil Perker (n 87) 2.
[247] Ibid 3.

The US regime does not generally target performance of individual judicial officers but rather the performance of the court as an institution. Conceptually, the performance standards are not designed to evaluate the performance of individual judges per se but instead seek to focus on the court.[248] This approach, which targets the court as an institution, is significantly broader because it incorporates and brings into focus both judicial officers and other persons who perform administrative court functions. As a result, the standards do not only address judicial officers but also other persons like social service providers, lawyers, probation officers, managers and clerks.[249]The comprehensiveness of the approach is also manifested by the diversity of its parameters which include factors like integrity and fairness, equality, timeliness and expedition, confidence and public trust, independence and accountability and access to justice.[250]

However, the regime allows evaluation of individual judges though under very strict rules of confidentiality and promotion of judicial independence. Assessment of individual judges is achieved through comprehensive surveys based on key informants. The informants are specifically chosen court participants reserved for those who gave direct experience with and knowledge of the judicial officers. Informants in a survey for appellate judges are litigants and attorneys while surveys on trial judges are respondent by witnesses and jurors.[251] The process also involves observation of the judge in the courtroom by an expert, who is usually a retired judge. The evaluation process ends with a meeting between the rated judge and JPE commissioners with a view to discussing the evaluation results.[252] In addition to survey

[248] Richard Y. Schauffler (n 225) 119.
[249] Pamela Casey, 'Defining Optimal Court Performance: The Trial Court Performance Standards' (1998) Court Review- Winter 28.
[250] Commission on Trial Court Performance Standards, *Trial Court performance Standards with Commentary*, 1997.
[251] Sharon Paynter and Richard Kearney, 'Who Watches the Watchmen? Evaluating Judicial Performance in the American States' (2010) 41 (8) Administration & Society 928.
[252] Ibid.

responses, the commission employs written opinions, judicial-self evaluations and caseload statistics to make a comprehensive evaluation.[253]

In cases where the evaluation targets an individual judge, the US regime has special rules outlining the purpose of the evaluation as well as dissemination of the report to individual judge. The individual evaluation can only be used to enhance self-improvement, self-assessment and internal evaluation of the particular judge.[254] In addition, the evaluations are not used to attain judicial discipline and they are not disseminated to judicial disciplinary bodies except where the dissemination is authorized by law.[255] The evaluation results are supplied to individual judicial officers on a confidential basis together with the presiding judge of the court on which the judge serves[256] with a view to assisting them in self-improvement.[257]

And just like the case for the evaluation of appellate judges, the program for evaluation of trial judges is judge-centered. For instance, the evaluator is required to meet the trial judge for a discussion of the results as well as offer advice on performance.[258] During the discussion, the trial judge must be advised on whether they met the evaluation standards and the evaluator is required to prescribe mandatory steps which the trial judge must undertake with a view to improving their performance. After the meeting, the judge is required to sign the evaluation summary acknowledging they have been informed of the evaluation results.[259] And what is more is that the regime gives the evaluated judge a room to express their opinion

[253] Ibid.
[254] Pamela Casey (n 249) 28.
[255] American Bar Association, Guidelines for the Evaluation of Judicial Performance with Commentary (February 2005) 2.
[256] Ibid.
[257] Jennifer Elek and David Rottman, 'Methodologies for Measuring Judicial Performance: The Problem of Bias' (2014) 4 (5) Oñati Socio-legal Series 866.
[258] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (C) (2).
[259] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (C) (3).

with regards to the evaluation results by giving them an opportunity to submit a written response.[260]

The US regime for evaluating individual judicial officers pays more attention to qualitative aspects of judicial work. It takes into consideration aspects like appellate review of judicial decisions, challenge rates and recusal rates.[261] These parameters are useful in identifying an underlying problem. For instance, further investigation on a judge might be initiated by the JPE commission in cases where majority of a judge's decisions are overturned on appeal.[262]

4.5 Attributes of the Institutional Framework

The US regime has a robust institutional framework overseeing the implementation of court performance measurement. The chief institution is the Judicial Performance Evaluation (JPE) Commission which reviews performance of appellate judges as mandated by law with each state having its own commission.[263] Generally, they collect as well as disseminate data on a judge's individual performance.[264] Also important institution is the Commission on Trial Court Performance Standards which comprises of individuals who established the standards for evaluating trial court performance.[265] In addition, the role of court administration in enhancing good governance in the US courts is promoted by a host of professional organizations like the National Association for Court Management, the National Center for the State Courts, the Conference of Court Administrators and the Conference of Chief Judges.[266]

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[260] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (C) (4).
[261] Sharon Paynter and Richard Kearney (n 251) 936.
[262] Ibid.
[263] TnCourts, 'Judicial Performance Evaluation Commission' (*Tn Courts*, June 2018) <https://www.tncourts.gov/boards-commissions/boards-commissions/judicial-performance-evaluation-commission> accessed 2 August 2021.
[264] Ballotpedia, 'Utah Judicial Performance Evaluation Commission' (*Ballotpedia*, September 2017) <https://ballotpedia.org/Utah_Judicial_Performance_Evaluation_Commission>accessed 2 August 2021.
[265] Commission on Trial Court Performance Standards, Trial Court Performance Standards with Commentary (1990) 2.
[266] Ingo Keilitz (n 90) 24.

Furthermore, the US institutions administering the judicial evaluation program are robust in terms of independence and diversity. The composition of steering committees is comprised of representatives from the bar and the bench, the committees are responsive to a jurisdiction's population diversity and are independent from external influence.[267]

Specific states have very robust framework for evaluation of judges. In the state of New Hampshire, for instance, a judicial performance evaluation program is administered by the Supreme Court through an advisory committee which advises the court on the design as well as implementation of the program.[268]The advisory committee comprises of diverse stakeholders namely a judges from the supreme court and superior courts, representative of the bar association, a representative of the judicial council, the Public Defender, persons from parliamentary house committees and a supreme court employee privy to administration of the program.

The committee meets periodically and offers advice and recommendations on key issues in the program like establishing the evaluation standards, how judges should undertake self-evaluation and determining a judge's overall evaluation results.[269] Furthermore, implementation of the program at circuit courts and superior courts is the mandate of the administrative judge and the chief judge of the court respectively.[270]The administrative judge of the circuit court together with the chief judge of the superior court is evaluated by a panel comprising of the three justices of the Supreme Court.[271]

Despite these major attributes, the US regime faces institutional challenges which decelerate its utility as a tool of enhancing optimal court performance. Most court administrators do not

[267] American Bar Association, Guidelines for the Evaluation of Judicial Performance with Commentary (February 2005) 5.
[268] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Administrative Rules 35 to 59. <https://www.courts.state.nh.us/rules/scr/scr-56.htm>accessed 2 August 2021.
[269] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Rule 56. Performance Evaluation of Judges s (B) and (C) (1).
[270] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Rule 56 (C). It comprises of the chief justice of the Supreme Court and two associate justices of the supreme court.
[271] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Rule 56 (C) (2) Part II (A).

have sufficient professional management training to lead complex public institutions like courts.[272] The court management team has the same challenge because most judicial officers are, by training and inclination not strong managers.[273] Another similar challenge is occasioned by the rotating nature of the position of the presiding judge because it causes discontinuity within the judiciary.[274] But what is more is that the US judicial leadership plans to redress these challenges and install skilled management by creating a professional and educational infrastructure.[275]

4.6 Performance Evaluation and Sanctions

The New Hampshire's regime incorporates mechanisms to assist judges who have not met the performance standards improve their performance. The chief justice and relevant presiding judges are mandated to develop and identify suitable programs with a view to assisting judicial officers who have not met the performance standards.[276] They are also required to take administrative actions to remedy issues affecting a judge's performance as well as determine mandatory actions to be undertaken by those with unsatisfactory performance.[277]In cases where a trial judge has not met the performance standards, the judge presiding over the station is required to assist the 'troubled' judge comply with the remedial steps proposed by the evaluator.[278] The state has a similar prudent regime for evaluating trial court judges. The evaluator writes a summary of the evaluation results, gives a description of the performance in terms of the performance standards, highlights areas where the trial judge

[272] Richard Y. Schauffler (n 225) 127.
[273] Ibid.
[274] National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge*, 2005. <http://www.ncsconline.org/D_Research/Documents/Res_JudInd_ElementsofaRule_final2.pdf> accessed 31 July 2021.
[275] Richard Y. Schauffler (225) 127.
[276] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Rule 56 (C) (2).
[277] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Rule 56 (C) (3 and 5).
[278] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (D) (1).

is performing dismally and proposes steps which the judicial officer must take to improve performance.[279]

Generally, the US regime is not meant to punish non-performing judicial officers and it does not impose strict personal duties enforceable against non-performers. However, the regime has various in-built mechanisms which by implication act as enough sanction. Even though evaluation of trial judges is done every three years, a judge whose performance has been found unsatisfactory is reevaluated within 18 months.[280] In addition, most of the recommendations proposed by the evaluator to the judge are usually mandatory in nature and ought to be undertaken within the proposed timelines.[281]Furthermore, individual evaluation results are also required where a judge is being nominated or considered for different judicial position.[282]

But what is more is that the presiding judge has a variety of remedies exercisable against a judge who fails to take the specified steps. The presiding judge can utilize administrative discipline, take necessary steps to safeguard compliance, take initiatives to rectify the non-compliance and can also report the issue to the committee on judicial conduct.[283] Further, a judge who does not attain the satisfactory levels on two consecutive evaluations loses their right to confidentiality and their evaluation results are made public.[284]The right to confidentiality is also lost by a judge who intentionally fails to complete the remedial initiatives proposed in the evaluation summary.[285]

4.7 Responsive Legislative Reforms and Public Sensitization Policy

The US regime has been consistently reworked and revised to address the felt necessities of the times as well as remedy prevailing implementation challenges. The 1990 TCPS were

[279] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (C) (1).
[280] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (D) (1).
[281] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (D) (2).
[282] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (D) (4).
[283] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part II (D) (3).
[284] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part III (D) (3).
[285] The State of New Hampshire, Rules of the Supreme Court of the State of New Hampshire, Part III (D) (3).

renovated in 2005 to expand their limited application since they could only be used for self-improvement and internal evaluation and were not usable for cross-court comparison.[286] These limitations were done away with in 2005 by the CourTools, which now enabled the use of the measures for the purposes of cross-court comparison.[287] With time, it was realized that the mode of self-assessment of the courts under the 1990 TCPS was difficult to realize because courts could not implement all the 68 measures under it. This complexity challenge occasioned by the high number of measures was resolved in 2005 when the CourTools reduced the number from 68 to 10 practical measures.[288] In addition, the CourTools are more cost effective and practical than the TCPS of 1990[289] and they have been viewed as a more realistic and balanced set of performance measures.[290]

The US has invested considerably in enhancing awareness and acceptance of the standards by conducting civic education and public sensitization on the use of the Performance measurement standards. The Bureau of Justice Assistance has availed several publications with a view to enhancing a better understanding of the standards, their use and the objectives. One of such publications is a guide which offers directions on the use of the standards and also tries to answer and address issues likely to arise in their implementation.[291] Another one is a program brief, which provides court officials and policymakers with an overview of the

[286] Eric Scorsone and Emaunuele Padovani, 'A Conceptual Framework for Performance Measurement Development in an Intergovernmental Setting: The Case of Intergovernmental Systems in the USA and Italy' (The Status of Intergovernmental Relations and Multi Level Governance in Europe and the US, Milan, Italy June 12-14 2008) 22.

[287] Ibid.

[288] Pim Albers, 'The assessment of court quality: a breach of the independence of the judiciary or a promising development?' (*Council of Europe*, June 2018) <https://rm.coe.int/the-assessment-of-court-quality-a-breach-of-the-independence-of-the-ju/168078c569>accessed 31 July 2021.

[289] Tiffany Clements, Trial *Court Performance Standards: An Assessment of the Second Judicial District Court, Washoe County, Reno, Nevada* (Institute for Court Management 2006) 43.

[290] CourTools, 'Trial Court Performance Measurement' (CourTools, July 2021) <https://www.courtools.org/trial-court-performance-measures>accessed 31 July 2021.

[291] Commission on Trial Court Performance Standards. 1997a. *Planning guide for using the Trial Court Performance Standards and measurement system*. NCJ 161568. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance.

standards, their development and their application.[292] In addition, the Bureau has published a commentary on the standards which offers an excellent starting point by summarizing the requirements for each of the 22 performance standards.[293]Also published was a manual which was intended to guide professionals, court staff, policy makers, lawyers, court managers and judges in the implementation process.[294]

The success of the US regime can also be attributed to the elaborate, comprehensive and lengthy trials which were conducted before the official launch of the measurement standards. Even though the standards were developed in 1990, they were not launched immediately because they were subsequently subjected to a 4-year demonstration phase.[295] The demonstration phase was very helpful in enhancing the quality of the standards, because it was on the basis of the experiences observed during the phase that the standards were revised and reviewed to achieve more efficacy.[296] Indeed, although the original draft contained 75 performance measures, the demonstration projects saw their reduction to 68.[297]

The US regime is informed by several fundamental principles which describe how an ideal judicial performance ought to look like. For starters, the regime ought to be established through a statute rather than through a directive or rule.[298] Secondly, evaluation of appellate judges ought to pay regard to clarity of their written opinions, their fairness and their legal analysis and reasoning.[299] The Institute for the Advancement of the American Legal System (IAALS) posits that a sound regime should take into consideration factors like clarity of

[292] Commission on Trial Court Performance Standards. 1997c. *Trial Court Performance Standards and measurement system—Program brief.* NCJ 161569. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance.
[293] Commission on Trial Court Performance Standards. 1997d. *Trial Court Performance Standards with commentary*. NCJ 161570. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance.
[294] Commission on Trial Court Performance Standards. 1997b. *Trial Court Performance Standards and measurement system implementation manual.* NCJ 161567. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance.
[295] Nancy Gist, 'Trial Court Performance Standards and Measurement System' Bureau of Justice Assistance Fact Sheet 2. <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/tcps.pdf>accessed 31 July 2021.
[296] Ibid.
[297] Nancy Gist (295) 2.
[298] IAALS, 'Judicial Performance Evaluation: How it Works' (*IAALS*, July 2021) <https://iaals.du.edu/judicial-performance-evaluation-how-it-works>accessed 2 August 2021.
[299] Ibid.

written and oral communications, administrative skills, freedom from bias, judicial temperament and the judge's command of relevant procedural rules and substantive law.[300]

4.8 Public Participation and Wide Stakeholder Consultation

The US regime pays significant attention to public involvement and broad stakeholder consultation in matters of judicial performance evaluation. The USA's Trial Court Performance Standards (TCPS) were generated and adopted through an exceedingly consultative procedure putting together the diverse interests of the relevant stakeholders. The process of enactment involved the court community and it received endorsement from key national court organizations like the American Judges Association, the National Association for Court Management, Conference of State Court Administrators and the Conference of Chief Justices.[301]

The court performance standards were midwifed by the Commission on Trial Performance Standards, whose composition comprised of scholars in judicial administration, an elected court clerk, local and state court administrators and local and state judges.[302]Similar wide consultations were also manifested in 2005 when a newer set of performance management tools was being created. The new tools, which have come to be known as CourTools were a product of consensus and wide consultations between judicial officers and court administrators from across the US, thereby conferring the CourtTool system a high degree of external legitimacy.[303]

4.9 Conclusion

The chapter concludes that the US regime has a host of positive attributes from which Kenya can borrow best practices and lessons. It reveals that the US has developed a very

[300] IAALS is a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.
[301] Pamela Casey (n 249) 25.
[302] Ibid 24.
[303] Eric Scorsone and Emaunuele Padovani, 'A Conceptual Framework for Performance Measurement Development in an Intergovernmental Setting: The Case of Intergovernmental Systems in the USA and Italy' (The Status of Intergovernmental Relations and Multi Level Governance in Europe and the US, Milan, Italy June 12-14 2008) 27.

comprehensive framework for evaluating judicial officers, which promotes judicial efficacy while at the same time being cautious of the cardinal rule on judicial independence. In addition, the success of the US regime can be attributed to her robust legal and institutional framework. Lastly, her law making approach is commendable because the approach capitalizes on public participation, wide stakeholder consultation and well executed public sensitization policy, all of whom account for her responsive legislative reforms.

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The study sought to examine the utility of PMMUs in enhancing efficiency and judicial accountability in Kenya. PMMUs require courts to strive to achieve expeditious disposal of cases, improve case clearance rates and reduce case backlog. They measure court performance through four indicators; its ability to dispose cases expeditiously, its ability to meet trial and delivery dates with certainty, its case clearance rate and its case backlog. It was believed that they would be effective tools of attaining efficacy and judicial accountability in Kenya. However, although Kenya has institutionalized PMMUs for the last 6 years, the judiciary still continues to grapple with performance challenges like case backlog and inordinate delays in determination of cases.

The study sought to investigate why the PMMUs have failed to meet their expectations as tools of enhancing judicial efficacy and accountability. Essentially, it sought to unearth why the judiciary still struggles with efficacy challenges, six years into the implementation of the performance measurement tools, PMMUs. The study sought to investigate the theoretical foundations of PMMUs as well as the legal framework governing them in Kenya. It also sought to identify lessons and best practices that Kenya can borrow and emulate from the USA. Lastly, it sought to make recommendations for reform on PMMUs in Kenya.

The study proceeded on two hypotheses. It hypothesized that PMMUs have been ineffective in attaining efficacy and judicial accountability in Kenya, and that there are inherent legal challenges that impede the utility of PMMUs as tools of attaining efficacy in the judiciary. The study utilized a mixed approach methodologies comprising of qualitative, comparative and doctrinal methodologies. It employed the doctrinal methodology to analyze the legal framework on PMMUs as well as their implications on the Kenyan judiciary. The comparative approach was employed to analyze the United States' experiences on PMMUs

with a view to identifying lessons and best practices which Kenya can emulate from her experience. It also utilized primary and secondary sources of data like books and journal articles among others.

5.2 Study Findings

Generally, the study confirmed the hypotheses. It established that PMMUs have been ineffective in attaining efficacy and judicial accountability in Kenya. It also verified that there are inherent legal challenges that impede the utility of PMMUs as tools of attaining efficacy and judicial accountability in Kenya.

With respect to theoretical underpinnings, the study reveals that the foundations, nature and structure of judicial evaluation are best explained by the Theory of Goal Setting, whose chief proponents are Edwin Locke and Gary Latham. The theory underscores that judicial evaluation serves three purposes; to address public confidence crisis, to stop wasteful use of public resources and to improve efficacy of the court systems and processes. Although performance evaluation of the judges has been subject of major criticism owing to its inherent dangers to the rule of law and judicial independence, judicial evaluation has been conceded provided it promotes administration of justice and it does not threaten judicial independence. The theoretical underpinnings reveal that evaluation regimes should strive to measure both procedural justice and substantial justice in equal measures as well as place equal premiums on both quality and quantity of a judge's performance.

In addition, the theory holds that quantitative factors of evaluating performance should be applied with much caution lest they blur objectivity of the performance evaluation and occasion miscarriage of justice. Another tenet of the theory is that a prudent evaluation system ought to encompass very clear goals, meaningful criterions for assessing performance and satisfactory evaluative information. Importantly, the theory takes cognizance of other

factors that undermine evaluation systems. One of them is the 'local legal culture' and the other one entail factors that are beyond the system's control.

Kenya has a relatively robust legal, institutional and policy framework on PMMUs. The JSC has general powers and privileges with regards to measuring, monitoring and managing judicial performance and the judiciary has specialized rules on case management and management of caseloads. The special rules place Deputy Registrars and the Principal Judge at the centre of case management at the High Court and the regime has special rules to enhance better case management at the Court of Appeal. The framework is a special modification and configuration of international standards of measuring court performance and the introduction of PMMUs in Kenya was well based on elaborate research and policy considerations.

The use of PMMUs as measurement tools has grown gradually over the last six years and they have become a common reference point for judges, magistrates and other judicial officers. The regime approaches judicial evaluation with caution to protect and promote judicial independence, and the implementation of PMMUs is a collective responsibility shared amongst several key players and stakeholders. They are designed to advance access to justice and are comprehensive in a manner which accommodates the broadest conceptualization of access to justice.

To some extent, the efficacy of PMMUs in attaining access to justice has been decelerated by legal challenges surrounding their foundation and backing in law. Although the framework creates a sound foundation for conducting judicial performance and evaluating the performance of the judges, it does not set performance standards and indicators for judges, and it does not provide the mechanism for assessing individual judges. The design of the PMMUs does not place direct responsibility on individual judicial officers, and hence it is a hindrance to achieving individual accountability. The PMMUs place overall responsibility on court heads or representatives rather than on the individual judicial officers.

Kenya's framework on judicial performance does not provide enough sanctions for judicial officers who do not meet their targets under the PMMUs. In addition, the JSC does not have clear cut legal basis for initiating disciplinary proceedings against a judicial officer for failure to meet the performance indicators under a PMMU. An attempt to base these sanctions on the disciplinary powers of the JSC is problematic. This is because disciplinary proceedings in the form of interdiction, suspension, reprimand or removal can only be instituted where one has been convicted of a serious criminal offence, on grounds of public interest, gross misconduct or breach of judicial code of conduct prescribed by an Act of Parliament.

Moreover, the efficacy of PMMUs has been prejudiced by lack of clear demarcation of roles and responsibilities of key stakeholders in their implementation. Some of the institutions at the centre of implementing judicial evaluation do not have backing in law. One of such institutions is the directorate of performance management; it is not anchored in law with respect to its composition and mandate. The efficacy of PMMUs in the tribunals has been destabilized by legal challenges inherent in the law establishing tribunals.

In addition to these legal challenges, the efficacy of PMMUs is also affected by other external factors, which impede successful implementation of judiciary's strategic goals. One of these factors is the problem of underfunding of the judiciary, which has immediate ripple effects on its ability to run its initiatives and programmes. The cash shortage has occasioned understaffing of the superior courts and decelerated the judiciary's agenda to clear case backlog. Underfunding directly hinders access to justice in that the judiciary is prevented from constructing more courts and improving the requisite infrastructure to support justice delivery.

The study reveals that Kenya has a lot to learn from the US's experience on judicial evaluation. For starters, the USA regime redresses the challenge of case delays by enacting statutes specifically designed to enhance efficacy and clear case backlog. The specific statutes outline statutory timelines within which cases should be heard and determined. In

addition, the regime has legal sanctions for the violation of the requirement on speedy adjudication of cases. Moreover, the regime pays attention to the rights of the accused person, and protects defendants' right to fair trial. US courts and the judiciary set case disposition timelines only where such powers have been expressly delegated to them by the legislature.

The US regime is designed to promote the quality of the court as a whole and enhance judicial self-improvement for individual judges. The striking feature of the regime for trial courts is that it places high premiums on case management and productivity and pays less attention to procedural justice aspects of the functioning of the court. Generally, the US regime does not target performance of individual judicial officers but rather the performance of the court as an institution. However, the regime allows evaluation of individual judges though under very strict rules of confidentiality and promotion of judicial independence.

In cases where the evaluation targets an individual judge, the regime has special rules outlining the purpose of the evaluation as well as dissemination of the report to individual judge. The individual evaluation can only be used to enhance self-improvement, self-assessment and internal evaluation of the particular judge, and the program for evaluation is judge-centered. The regime gives the evaluated judge a room to express their opinion with regards to the evaluation results by giving them an opportunity to submit a written response. Importantly, the regime for evaluating individual judicial officers pays more attention to qualitative aspects of judicial work.

Furthermore, the regime has a robust institutional framework overseeing the evaluation program and the institutions administering the program are rich in terms of independence and diversity. Some states have mechanisms to assist judges who have not met performance standards improve their performance. Ideally, the regime is not meant to punish non-performing judicial officers and it does not impose strict personal duties enforceable against non-performers. However, the regime has various in-built mechanisms which by implication

act as enough sanction. The presiding judge has a variety of remedies exercisable against a judge who fails to take the specified steps.

The US regime has been consistently reworked and revised to address the felt necessities of the times as well as remedy prevailing implementation challenges. The US has invested considerably in enhancing awareness and acceptance of the standards by conducting civic education and public sensitization on the use of the performance measurement standards. The success of the regime can also attributable to the elaborate, comprehensive and lengthy trials which were conducted before the official launch of the measurement standards. The regime pays significant attention to public involvement and broad stakeholder consultation. Lastly, the regime is founded on two principles: a regime for judicial performance ought to be established through a statute rather than through a directive or rule, and that evaluation of appellate judges ought to pay regard to clarity of their written opinions, their fairness and their legal analysis and reasoning.

5.3 Recommendations

Based on the study findings and the conclusions, the study makes the following recommendations;

1. **Enactment of an enabling statute/amend existing statutes**

The study recommends that parliament should enact a new legislation/amend existing statutes with a view to giving PMMUs sufficient backing in law. The new statute/amendments should bring clear demarcation of roles and responsibilities of key stakeholders in the implementation of the PMMUs as well as establish competent institutions to oversee the implementation of the framework. The institutions charged with the mandate of overseeing the programme ought to be rich in terms of independence and diversity.

2. **Performance evaluation for judicial officers**

The study recommends that the Kenya regime should be reformed to introduce performance evaluation for individual judicial officers and place direct responsibility on individual judicial officers. However, the individual evaluation should be for self-improvement and self-assessment purposes and ought to be done under very strict rules of confidentiality and promotion of judicial independence.

3. **Sanctions for non-performance**

The study recommends that the Kenyan framework should be revised to provide enough sanctions for judicial officers who do not meet their targets under the PMMUs. One of the suitable sanctions would be empowering JSC to initiate disciplinary proceedings against a judicial officer who repeatedly fails to meet the performance standards.

4. **Statutory timelines for adjudication of cases**

The research recommends that parliament should enact a statute which enhances speedy adjudication of cases by outlining statutory timelines within which cases should be heard and determined. The statute should place high premiums on the rights of the accused person, promote the right to fair trial and sanctions for violation of the statutory timelines.

5. **Quality aspects of evaluation program**

The Kenyan approach to evaluation criteria should be redesigned to ensure that the evaluation system pays more attention to qualitative aspects of judicial work. The approach should be reworked to ensure that evaluation of appellate judges pays regard to clarity of their written opinions, their fairness and their legal analysis and reasoning. The judiciary can measure quality without infringing on decisional independence by ensuring that the measurement exercise does not impact the judicial officer's freedom of decision making.

6. Public involvement and stakeholder consultation

Similarly, the judiciary should conduct elaborate and comprehensive trials before the official launch of the judicial evaluation program. Although Kenya's regime does not currently experience non-acceptance judicial officers, best practice from the US indicate that public involvement and broad stakeholder consultation improves the efficacy of the legal and institutional framework.

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