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RESEARCH PROJECT:

**VETTING OF JUDGES AND MAGISTRATES IN INSTITUTIONAL
TRANSFORMATION: LESSONS FROM KENYA**

**THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENT OF MASTER OF
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15th November 2012

DECLARATIONS

I declare that this thesis is my original work and has not been presented before for a degree in this or any other university.

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Date

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

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DEDICATION

This thesis is dedicated to Theon. You are a source of great inspiration. May the institutional reforms being implemented or contemplated in Kenya today herald better and more fruitful days for your generation.

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3. *Latimer Guidelines for the Commonwealth* (adopted on 19th June 1998).
4. *Bangalore Draft Code of Judicial Conduct 2001.*
5. *European Convention for the Protection of Human Rights and Fundamental Freedoms.*
6. *The Inter-American Convention on Human Rights.*
7. *UN Basic Principles on the Independence of the Judiciary.*
8. United Nations Development Programme, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines, 2006.*
9. Universal Declaration of Human Rights.

STATUTES REFERRED TO

1. Constitution of Kenya 2010.
2. Advocates Act (Cap 16 of the Laws of Kenya), Advocates (Disciplinary Committee) Rules.
3. Civil Procedure Act, Cap 21 of the Laws of Kenya, Civil Procedure Rules, 2010 published under Legal Notice No. 151 of 2010.
4. Constitution of Kenya (repealed).
5. English Bill of Rights 1689.
6. Kenyan Anti-Corruption and Economic Crimes Act, 2003.
7. Vetting of Judges and Magistrates Act, 2011, Vetting of Judges and Magistrates (Procedure) Regulations, 2011.

LIST OF CITED CASES

1. *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233).
2. *R VS Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 2).
3. *R v Communications Commission of Kenya ex parte TRL and Nairobi HC MISC Civil Application no. 141 of 2008.*
4. *R v Dr. Achieng Agonga and 3 others* ACC No. 1347 of 2008.
5. *R v The Judicial Commission of Inquiry into the Goldenberg Affair and 2 others ex parte Prof. George Saitoti* [2006] eKLR.
6. *Deepak Kamani and another v Kenya Anti Corruption Commission and 3 others* Nairobi High Court Petition No. 199 and 200 of 2007 eKLR.
7. *Jayne Mati and Another v The Attorney General and 2 others*, Nairobi H.C.C. Petition No. 108 of 2011 (Unreported).
8. *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Civil Application No. Nai 307 of 2003 (154/03 UR).*
9. *Hon. Lady Justice Jeanne Gacheche v The Judges and Magistrates Vetting Board and 2 others* JR Applc. No. 295 of 2012, consolidated with *Centre for Human Rights and Democracy and 2 others v The Judges and Magistrates Vetting Board and 2 others*, Eldoret Petition No. 11 of 2012, *Hon. Justice R.S.C. Omolo v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 433 of 2012, *Hon. Justice S.E.O. Bosire v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 434 of 2012, *Hon. Justice J.G. Nyamu v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 438 of 2012 eKLR.

10. *Express Kenya v Manju Patel* Nairobi Civil Appeal No. 158 of 2001.
11. *Mecol Limited vs Attorney General & 7 Others* [2006] eKLR.
12. *Kenya Airways Limited vs Kenya Airline Pilots Association* Miscellaneous Application No. 254 of 2001 (Unreported).
13. *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others* (2010) Eklr.
14. *Trusted Society of Human Rights Alliance v The Attorney General and 3 others and Mumo Matemu*, Nairobi High Court Petition No. 229 of 2012 eKLR
15. *Dennis Mogambi Mangare v Attorney General & 3 Others*, (2011) Eklr.
16. [2010] eKLR. In his judgement, Justice Ochieng
17. *Justice Amraphael Mbogoli Msagha vs Chief Justice of the Republic of Kenya & 7 others*, [2006] eKLR.
18. *Joseph Vitalis Odero v The Chief Justice of Kenya & 6 Others* [2010] eKLR.
19. *Moiwo Ole Keiwa v Chief Justice of Kenya & 6 Others* [2006] eKLR.
20. *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & 5 Others* [2009] eKLR.
21. *Republic v Hon. Chief Justice of Kenya & Others ex parte Roseline Naliaka Nambuye*, HC Misc. 764 of 2004.
22. *Honourable Lady Justice Nancy Makokha Bara v The Judicial Service Commission & 9 Others*, Petition No. 23 of 2012.
23. *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256.
24. *Ezekiel Ngare Wanjohi v LebaInyangala and others* Civil Appeal No. 44 of 2002 (Unreported).

CHAPTER 1

INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE

1.1 The place of the Judiciary in democratization

The judiciary is an important institution. The place of the judiciary in the “third wave” of democratization in transition countries is even more critical in securing the transition process.¹ Democratization entails the gradual, evolutionary, and delicate process during which “democratic procedures of government” are established and maintained.² In this context, the rule of law is essential. The institutionalization of the rule of law leads to the development of a constitutional culture clearly demarcating the bounds that the state cannot transgress for the achievement of partisan gains. The citizenry is also made aware and assured of redress in the event of such transgression by either the state, state actors or fellow citizens. The society in this context moves from the rule of men to the rule of law.

This significant role of the rule of law in the democratization process axiomatically creates a uniquely important role for the judiciary. Being the institution mandated to mediate in disputes between the citizenry as citizens on the one hand and between citizens and government on the other, the judiciary has a crucial role to play in the democratization process. In this regard, the judiciary’s capacity to discharge its obligations to the satisfaction of all is important. The capacity to deliver the intended objectives of the judiciary is not automatic. The judiciary’s ability to deliver on the intended objectives ultimately depends on the confidence that the public has in it. This is so as the delivery on the objectives is for the most part determined by public

¹See Samuel Huntington, *The Third Wave of Democratization in the Late Twentieth Century* (University of Oklahoma Press: Oklahoma, 1991) at 10.

² Christopher Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’, (1996) 44 *The American Journal of Comparative Law* 605 at 607.

perception. This is indeed reflected in the oft-quoted aphorism "not only must justice be done; it must also be seen to be done."³

The public confidence in the judiciary is built upon various blocks. Amongst these building blocks is judicial independence, the competences of the officers who preside over it, reasonable, reliable procedures and processes, expeditious, proportionate and fair administration of justice.⁴ To the extent that these building blocks are human attributes, their attainment in full can only be an aspiration. It has been argued that human beings with a natural aptitude to virtuous action are rare. All other people have to practice a 'certain discipline' in pursuit of such perfection⁵. It is doubtful that any system of justice presided over by human beings can possess all of these attributes in maximum measure. Even the most competent judge or magistrate could and will make an error of law or personal judgment. As such, it is a matrix that looks more to the attainment of the highest possible standards than to being a perfect system. Indeed, since the gauge of whether a just decision has been reached in a case is more dependent on public perception thereof rather than the legality of the decision, the person making the decision ought not to be a perfect person. They must be subject to the usual human failings and emotions to be able to appreciate and proximate the justice of the case that will resonate with the public.⁶ Of course, it cannot be overlooked that not all decisions by the judiciary need to win public support.

³See *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233). See also *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.2). In the latter case, there was an unprecedented setting aside of a House of Lords judgment on account of a possibility of bias based on public perception. In the case, Lord Hoffmann had failed to disclose his wife's links to Amnesty International in an appeal regarding the immunity of former Chilean dictator General Augusto Pinochet.

⁴ Johann Kriegler, 'Can Judicial Independence Survive Transformation?', A public lecture delivered at the Wits School of Law on 2nd September 2009, available at <http://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/>, (accessed on 10th October 2012).

⁵Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence*, 8th Edition, (Sweet and Maxwell: London, 2008) at 142.

⁶ Rt. Hon. Lord MacMilan G.C.V.O., *Law and Other Things* (Cambridge University Press: Cambridge, 1938) at page 217 cited in Stribopoulos, J. and Yahya, M.A., 'Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario', (2007) 45 *Osgoode Hall Law Journal* 2 at 12.

As the duty of the judiciary is to interpret and apply the law to the facts, decisions may be arrived at that may not please the masses. This of itself does not mean that the judiciary will have failed in its duties.⁷

The consequences of a lack of these building blocks can be tragic. This is so as the citizens would cease to have any trust in the judicial system as the avenue through which to seek redress for transgressions on their rights. The domino effect of this is that the citizens would resort to self-help methods to redress perceived wrongs. This lack of confidence in the judiciary to resolve the disputed election results after the 2007 General Elections in Kenya is one of the reasons attributed to the post-election violence that occurred thereafter.⁸ This would lead to the breakdown of law and order; a regression towards the “state of nature”.⁹ From an economic perspective, the presence of an unreliable, partial and incompetent judiciary will scare away foreign investments. Foreigners mainly invest in countries where they are assured that the judicial system is independent, efficient and predictable. Only in these countries are they assured of a return to investment and that in the event of any breaches of their rights, there will be speedy and impartial justice meted out.¹⁰

From the foregoing, it is apparent that there is a focus of most countries in transition from undemocratic and authoritarian regimes, or rising from war or genocide focus on the judiciary as one of the priority institutions to be transformed.¹¹ This is in order that they may install and

⁷ *Ibid.*

⁸ See Independent Review Commission, *Report on the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (‘Kriegler Commission Report’).

⁹ *Supra* n 5.

¹⁰ *Supra* n 4.

¹¹ *Supra* note 2. See also the case of Kenya under the *Vetting of Judges and Magistrates Act, 2011*.

safeguard the rule of law.¹² Only on this basis can other milestones in the transition process be guaranteed.

1.2 The Kenyan Judiciary

The Kenyan constitutional structure embodies the principle of separation of powers.¹³

Discussing the principle of separation of powers in the Kenyan constitutional framework, Justice

David Majanja stated:

[E]ach organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within this framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so.¹⁴

Under the previous and current constitutional framework, the judiciary is required to be independent.¹⁵ Institutional systems and processes are put in place to guarantee the discharge of its duties and obligations in an impartial manner. Despite the foregoing, the judiciary in Kenya has since independence suffered from an acute lack of public confidence.¹⁶ This lack of confidence is largely due to, amongst others, the following factors; lack of judicial independence, an erstwhile opaque appointment process for judges and magistrates, corruption, incompetence

¹² A.V. Dicey described a State in which the rule of law is in force as “*where no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint,*” See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed, (Oxford: London, 1914) at 34.

¹³ See chapters 8, 9 and 10 of the Constitution of Kenya.

¹⁴ Judgment delivered on 23rd December 2011 in *Jayne Mati and Another v The Attorney General and 2 others*, Nairobi H.C.C. Petition No. 108 of 2011 (Unreported) at page 16.

¹⁵ Section 61 of the repealed Constitution of Kenya and Article 160 of the Constitution of Kenya 2010.

¹⁶ See for instance, The Waruhiu Committee Report 1979/1980, The Mbithi Committee Report 1990/1991, The Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary Committee, 1991-1992 (The Kotut Report), The Report of the Committee on the Administration of Justice, 1998 (The Kwach Report), The Report of the Integrity and Anti-Corruption Committee of the Judiciary, 2003 (The Ringera Report), Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS), Report of the Sub-Committee on the Ethics and Governance of the Judiciary, January 2006 (The Otieno Report), Report of the Committee on Ethics and Governance of the Judiciary in October 2008 (The Kariuki Report) and The Task Force on Judicial Reforms of 2010 (The Ouko Report).

and delays in conclusion of cases.¹⁷ The lack of independence of the judiciary has historically been one of the greatest threats to the rule of law in Kenya.¹⁸ An overview of some of the challenges facing the Kenyan judiciary will be addressed in the following section of the thesis.

i. The Appointment Processes, Incompetence and Partiality

These three issues are discussed together as they have a nexus. If the appointment process is not open and above board, the possibilities of appointing unsuitable persons to be judges or magistrates is high. The unsuitability may manifest itself in incompetence and perceptions of impartiality. The perception of a lack of judicial independence in the Kenyan judiciary is largely attributed to the procedures that were in place for the appointment of the judges and magistrates. The process for the appointment of judges has under the repealed Constitution been an executive prerogative.¹⁹ The appointment of the judges has until the year 2010 been done by the President on the recommendation of the Judicial Service Commission.²⁰ This may give the false impression that this process was transparent and apt. On the contrary; the Judicial Service Commission was composed of other Presidential appointees.²¹ As such, the Judicial Service Commission was more or less a rubber stamp for the appointment of persons already proposed by the Executive. As argued by Kameri Mbote and Migai Akech, “judicial officers appointed

¹⁷*Ibid.*

¹⁸ Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa: Johannesburg, 2011) at 19.

¹⁹Ochich, G. ‘The Changing Paradigm of Human Rights Litigation in East Africa’ cited in *Reinforcing Judicial and Legal Institutions: Legal Institutions* (International Commission of Jurists Publication: Nairobi, 2007) 5 at 29 arguing: “The Executive-Judiciary partnership during the colonial era sowed the seeds for what has manifested itself in form of a refined apparent friendship that has persisted between the judiciary and executive arms of government. This has been unfortunate, considering that the most serious incidences of human rights abuse are often orchestrated by or with the complicity of the executive.”

²⁰ See Article 166 of the Constitution of Kenya 2010, on the procedure for the appointment of judges. See also Section 61 of the repealed Constitution of Kenya.

²¹Under Section 68 of the repealed Constitution of Kenya, the Judicial Service Commission was composed of the Chief Justice, as chairman, the Attorney General, two persons who are for the time being designated by the President from among the puisne judges of the High Court and the judges of the Court of Appeal and the chairman of the Public Service Commission. Under Article 174 of the Constitution of Kenya, the current membership of the Judicial Service Commission is not determined by the Executive hence entrenching independence.

through this process are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority.”²².

The farcical nature of this process reached an absurd peak when on 6th December 2006 a scheduled swearing in at State House Nairobi of three new judges of the High Court²³ was cancelled at the last minute. The new judges were already robed and accompanied by the Chief Justice headed towards State House for the swearing in. It was alleged that cancellation was on account of complaints of a lack of consultations:²⁴ that the proposed names had not yet been sanctioned for appointment. It is of course noted that the formal process for the appointment of judges did not require such consultations.²⁵ It is instructive that the secretive nature of this process played out in Parliament when a question was raised about the cancellation as no substantive reason was given by the Minister in charge of Justice and National Cohesion.²⁶

As will be discussed later in this thesis (Chapter 4, part 4.3), this less than transparent process for the appointment of judges and magistrates, the competence and impartiality of the appointees was always brought to question.²⁷ Cronyism resulted in the appointment of unqualified persons to the judiciary. This has resulted in judicial decisions that are not well reasoned or according to the law due to the judge or magistrate not being well grounded on the law and its application.²⁸ Further, the partiality of some of the judges and magistrates has resulted in questionable decisions biased in favour of sectarian interests.

²² *Supra* n 18.

²³ Hon. Aggrey Muchelule, Hon. Florence Muchemi and Mrs. Abida Ali-Aroni (as they then were).

²⁴ See National Assembly Official Record (Hansard) 24 July 2007, Question No. 232, ‘Cancellation of Judges’ Swearing in Ceremony’.

²⁵ See Section 61 of the repealed Constitution of Kenya.

²⁶ *Supra* n 24.

²⁷ See chapters 3 and 4.

²⁸ See for instance the judgment delivered on 24th June 2011 in *R v Communications Commission of Kenya ex parte TRL and Nairobi HC MISC Civil Application no. 141 of 2008* where the learned Judge in a judicial review

ii. Corruption

One of the major complaints about the judiciary in general and judges and magistrates in particular has been on allegations of corruption.²⁹ The judiciary has always been rated as one of the most corrupt institutions in Kenya.³⁰ While assessing the magnitude and level of corruption in the judiciary, the 2003 Ringera Report stated that:

[O]n a percentage basis, the level of implication was fifty six (56%) percent in the Court of Appeal, fifty (50%) percent in the High Court and thirty two (32%) percent of the Magistrates.³¹

The depth of the corruption allegations have sometimes been apparent in judgments delivered by the Courts. In one instance in May 2001, Kwach, JA publicly accused other judges,³² in a 3 judge bench appeal, of corruption. In an apparent reference to the two judges, he prefaced his judgment thus:

There was a time when this Court enjoyed the integrity of Caesars wife. It was above suspicion. But that is now water under the bridge. Something has to be done to redeem the reputation and independence of this Court.³³

In order to deal with this public spat, the then Chief Justice Bernard Chunga called a press conference in the presence of the three judges where they confirmed having buried the hatchet and resolving to work together in harmony. Nothing more was done about the underlying

application issued orders not only quashing a decision by the Commission to cancel an award of a frequency tender to the Applicant, but also went ahead to award frequencies over and above those contemplated in the tender. An order was also issued prescribing the manner in which the payment for the licence fee for the frequencies was to be paid: in installments.

²⁹ *Supra* n 16.

³⁰ According to Transparency International's *Global Corruption Barometer 2010*, the judicial system is perceived by households to be one of the most corrupt institutions in Kenya, ranked joint second behind the police in the survey. See J. Riaño, F. Heinrich and R. Hodess, *Global Corruption Barometer 2010*, Transparency International, 2010. Available at <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/kenya/corruption-levels/judicial-system/> (accessed on 15th January 2012).

³¹ Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (Vol. 1) (The Ringera Report), September 2003 submitted to the Hon. Mr. Justice Johnson Evans Gicheru, at 31, available at http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf (accessed on 10th March 2012).

³² Justice Philip Tunoi and Justice Amritlal Shah, J.J.A, as they then were.

³³ *Express Kenya v Manju Patel* Nairobi Civil Appeal No. 158 of 2001 eKLR.

allegations despite their public display. Instances where two judgments reaching diametrically opposed conclusions in the same file have also been reported.³⁴

1.3 Towards reforming the Kenyan Judiciary

To try and rid itself of the bad apples, the judiciary has come up with various committees to investigate and make recommendations on the challenges afflicting it.³⁵ These committees have made a myriad of recommendations aimed at institutional transformation. However, the perception of lack of probity and independence has not waned.³⁶

Indeed, the quest towards transforming the judiciary to achieve judicial independence has driven part of the constitutional reforms in Kenya since independence. Kenyans desired (and still desire) to see a judiciary incapable of manipulation by the executive³⁷ and the legislature,³⁸ to have judges appointed purely on the basis of their competence and rectitude;³⁹ a corruption free

³⁴*Supra* n 31.

³⁵*Supra* n 16.

³⁶ International Legal Assistance Consortium (ILAC), 'Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010 at 52 records that: "Six months after the contested presidential elections led to widespread post-election violence, a Gallup Poll conducted across provinces in Kenya suggested that confidence in the judicial system had declined from 55% in 2007 to only 36 in 2008. When the poll was conducted in April 2009, just 27% of Kenyans expressed confidence in the judicial system, half the percentage that had expressed confidence in the judicial system in 2007." See also Steve, C. and Bob, T., "Lacking Faith in Judiciary, Kenyans Lean Towards the Hague" (Gallup, August 5, 2009), available at <http://www.gallup.com/poll/122051/lcking-faith-judiciary-kenyans-lean-towards-hague.aspx>.

³⁷*Supra* n 31.

³⁸P. Kichana, 'The Administration of Justice in Kenya.' A Paper presented at the Symposium on the Administration of Justice in the Southern African Development Community, Crowne Plaza Hotel, Harare, 9– 10 September 2004, 8, (on file with the author) where he argues 'in the Old Constitution, judicial power is not *explicitly* vested in the Judiciary and this creates a room for usurpation of judicial power by the Legislature.'

³⁹Lucy Kambuni, 'Judicial reforms at crossroads.' in *The Dawn of a New Political Era: Consolidating Kenya's democratic gains* (Law Society of Kenya Publication: Nairobi, 2004,) 63. According to the author, the process for appointing judges has a direct bearing on the dwindling public confidence in the Judiciary. The Executive continually entrenches itself into the judiciary in order to sustain the political agenda and orientation of the day. See also Transparency International. 'Radical Surgery in Kenya's Judiciary.' in *Global Corruption Report: Corruption in Judicial Systems* (Cambridge University Press: Cambridge, 2007) 221-225.

and accountable judiciary;⁴⁰ to have gender equity and sectoral representation in judicial appointments;⁴¹ and to create a clear cut hierarchy of courts in which various courts do not outsmart one another for supremacy.⁴²

The lack of confidence in the judiciary was highlighted after the 2007 general elections. The Orange Democratic Movement (ODM), which was protesting the result of the presidential election that declared incumbent president Mwai Kibaki re-elected, refused to take its dispute for judicial determination because it did not believe in the impartiality of the judiciary.⁴³ It will be recalled that the executive made several appointments of judges in the period immediately preceding the 2007 General Elections. This was perceived as an advance ‘rigging’ of the judiciary to staff the courts with pliant judges who would prospectively hear and favourably determine any election petitions that would flow from the elections.⁴⁴

After the disputed presidential results and the ensuing violence, President Mwai Kibaki and Mr. Raila Odinga signed a power-sharing agreement.⁴⁵ In its Statement of Principles on Long-term issues and solutions, the protagonists reaffirmed their ‘commitment to complete the comprehensive constitutional review process within twelve months.’⁴⁶ The agreed institutional reforms to be addressed in the constitutional review process included judicial reforms.

⁴⁰ See Judy Thongori, ‘The Gender Aspects of Corruption.’ in *Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform*, (Law Africa Publishers: Nairobi, 2007) at 90.

⁴¹ Mugambi Laibuta, ‘Constitutional and Institutional Reform: What Role in Addressing Impunity.’ in *Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates*. (The Kenya Section of the International Commission of Jurists: Nairobi, 2009) 229-287.

⁴² See for instance, *Mecol Limited vs. Attorney General & 7 Others* [2006] eKLR; *Kenya Airways Limited vs. Kenya Airline Pilots Association* Miscellaneous Application No. 254 of 2001 (Unreported); and *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR.

⁴³ *Supra* n 8 at 141.

⁴⁴ *Supra* n 4.

⁴⁵ The Agreement on the Principles of Partnership of the Coalition Government, signed on 28th February 2008. The dispute mediation process was overseen by amongst others Dr. Kofi Annan under the auspices of the Kenya National Dialogue and Reconciliation.

⁴⁶ Signed on the 23rd of May 2008 on behalf of Party of National Unity and Orange Democratic Movement.

The Constitution of Kenya 2010 was promulgated as a consequence.⁴⁷ In its Transitional and Consequential Provisions, a provision is made for the legislation of a law making provision for the vetting of judges and magistrates who were in office on the effective date to determine their suitability to continue to serve.⁴⁸ It is this provision that requires the vetting of the judges and magistrates. Parliament subsequently passed the *Vetting of Judges and Magistrates Act*, in 2011. The Act sets out the procedure to be followed in the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. It is this process of vetting of judges and magistrates that will form the substance of the inquiry in this thesis.

1.4 Objective of the Research

The main objective of this study is to establish whether the proposed vetting of judges and magistrates will lead to the transformation of the judiciary. Three specific areas in which the judges and magistrates have been variously found to be wanting have been identified to form the core of the study. The problem areas that this study will focus on are: corruption, lack judicial independence and incompetence.⁴⁹ The research will also test, through interviews with a sample of the population, whether the perception of the judges and magistrates in those three identified areas will change as a consequence of the vetting process. The vetting process is intended to determine the suitability of judges and magistrates to continue serving in the Judiciary.⁵⁰ These three problem areas identified also form the core of the considerations to be used to determine suitability of the judges and magistrates.⁵¹

⁴⁷On 27th August 2010.

⁴⁸Section 23 of the 6th Schedule Constitution of Kenya, 2010.

⁴⁹*Supra* n 16.

⁵⁰*Supra* n 11, section 2.

⁵¹*Ibid*, section 18.

1.5 Statement of the Problem

The problem sought to be addressed in this research is whether the proposed vetting of judges and magistrates will deal with the problems of corruption, lack of judicial independence, and incompetence. Is there a reason that informed the choice of vetting? Are the characteristics sought from the judges and magistrates capable of ascertainment in an empirical manner? If not, how is the process shielded from personal prejudice or preferences of the Vetting Board members? This apprehension is real. In a similar process applied in the reform of the Eastern Germany judiciary in 1990, the vetting process lacked a clear statement of the criteria used in determining suitability. It appeared that the judges were “reduced to depending on the good will of their Western examiners”.⁵² Though it may be argued that the Kenyan vetting process has an objective criterion for determining suitability⁵³, this may not necessarily be so. As will be argued later, most of the criteria is subjective and incapable of empirical verification or ascertainment. Consequently, subjectivity could inevitably creep into the process.

Inextricably intertwined with this issue is the question of whether the vetting of sitting judges and magistrates only⁵⁴ as opposed to other actors in the justice system is sufficient to attain independence of the judiciary. Are there institutional maladies that also need to be addressed to transform the judiciary?

1.6 Research questions

The questions sought to be answered are:

⁵²Kommers, D.P., ‘Transitional Justice in Eastern Germany’, (1997) 22 *Law and Social Inquiry* 829.

⁵³*Supra* n 11, section 18 for the considerations to be met during the vetting process.

⁵⁴*Ibid.* Under section 2 “judge or magistrate” includes the Registrar of the High Court and the Chief Court Administrator and their deputies, and persons seconded to administrative tribunals, in their capacity as judges or magistrates.

- i. Will the process of vetting of judges and magistrates deal with the problems of corruption, lack of independence and incompetence that have bedeviled the judiciary?
- ii. Does the vetting of judges and magistrates represent the best strategy towards dealing with the problems of corruption, lack of independence and incompetence that have bedeviled the judiciary?
- iii. Will the vetting of judges and magistrates change the public perception about their being largely corrupt, lacking in independence and being incompetent?

1.7 Hypothesis

The hypothesis in this study is that the vetting of judges and magistrates is, on its own, unlikely to deal with the problems of corruption, lack of independence and incompetence. While the vetting is likely to go a long way towards the attainment of the stated objectives, there needs to be an all-inclusive and multi-sectoral approach in dealing with the problems facing the judiciary.⁵⁵ It is also posited that the vetting of judges and magistrates will largely change the perception in the public about the judiciary in the problem areas of corruption, lack of independence and incompetence.

First, the Kenyan judicial vetting process is limited to the judges and magistrates.⁵⁶ There are other judicial staff such as departmental heads, executive officers, court clerks librarians and secretaries;⁵⁷ these persons do not only form the bulk of the staff in the judiciary but there is

⁵⁵ Sue Ackerman, 'Judicial Independence and Corruption' in *Comparative Analysis of Judicial Corruption*, (Yale University School of Law: Connecticut, 2007) at pages 18-20. She argues that "in order to rid the Judiciary off corruption: we must overhaul the Judges, Court Organization and staffing, legal framework and legal profession."

⁵⁶*Supra* n 50.

⁵⁷*Supra* n 11. Section 20 which provides the order of the vetting starting from the Court of Appeal Judges, High Court Judges, Registrar of the High Court, Chief Court Administrators, Chief Magistrates and other magistrates. It therefore sidelines these other staff from the vetting process.

evidence of them being complicit in the maladies that afflict the judiciary.⁵⁸ As such, processes need to be put in place to vet or otherwise appraise the performance of material support staff in the judiciary.

Secondly, the effectiveness of the judiciary is impacted upon by various other bodies. These include the police in investigation and sometimes prosecution of crime; the Attorney General's office in representing the State in Court; the Director of Public Prosecution's office in the prosecution of crimes and the members of the bar in preparing for and representing clients in court. If the scrutiny towards institutional transformation is limited to the judges and magistrates then the entire vetting process may come a cropper because there is evidence of some of the other stake holders being involved in corruption.⁵⁹

In addition, there are those who hold the view that 'wholesale' vetting of judicial officers will result in blanket condemnation thereby denying some of them right to fair hearing contrary to the central tenets of judicial selection.⁶⁰ It is for this reason that I came up with the null hypotheses that "Should the vetting process succeed in removing the corrupt and incompetent judges, it is not a guarantee the country will get the kind of Judiciary it aspires for."

1.8 Methodology

The study was conducted through fieldwork and secondary research. Primary data was collected through face to face interviews with the persons selected in the sample. This mode of data collection was chosen given that the study seeks to determine whether the vetting of judges and magistrates will address the challenges of corruption, incompetence and partiality in the judiciary. To arrive at a reliable conclusion on this issue, the perceptions of the public are very

⁵⁸*Supra* n 16.

⁵⁹*Ibid.*

⁶⁰Principle 10 *UN Basic Principles on the Independence of the Judiciary.*

material. As such, a sample of the population was interviewed to determine the perceptions on whether the process of vetting will attain the intended objectives.

A sample size of 40 interviewees was initially selected for the interviews using the stratified sampling method. The population was divided into distinct categories out of which individual participants were selected at random to be part of the sample. The individuals in the sample to be interviewed included judges, magistrates, court registrars, advocates, law lecturers, members of the Council of the Law Society, members of the Vetting Board, members of the Advocates Disciplinary Committee, and other members of society. The rationale for this approach was to ensure that the stakeholders in the judicial reforms sector are included from various levels. Further, members of the public with no connection with the judiciary were also to participate in the interviews. The people to be interviewed covered both gender equally. They were drawn from different Counties in Kenya.

A structured questionnaire was prepared containing questions that covered the various issues that this study sought to investigate.⁶¹ The questionnaire was tested in a mock interview and necessary changes were effected to ensure that the questions captured, as best possible, the parameters sought to be tested. The interviewees were assured of anonymity in the analysis and presentation of the data collected in the study. Pseudonyms were applied in place of the actual names of the interviewees in the analysis and presentation of the data. Introductory letters were thereafter sent to the identified individuals to be interviewed together with the questionnaire. Follow up phone calls were thereafter made and physical visits to the respective offices of the prospective interviewees with a view to securing interview appointments.

⁶¹ The introductory letter and questionnaire are attached as appendices to this thesis.

One of the judges who were approached for an interview returned the questionnaire together with the introductory letter. In her letter, the judge regretted that, while she appreciated the “serious and noble work” that was being undertaken in the study, she could not participate in the interview. She indicated that as she was one of those who were to undergo the vetting process, it would be “inappropriate” for her to make any comments about the process. Most of the other judicial officers did not respond to the letter or follow ups for appointments for the interview. Efforts were thereafter made through the Judicial Training Institute to get the judicial officers to give the interviews. A suitably prepared concept note was prepared to accompany the introductory letter and the questionnaire. These were later forwarded by the Judiciary Training Institute to the respective judges, magistrates and court registrars. These efforts were made given the critical role that the input of the judicial officers would have had in the study. However, despite these efforts, the judges, magistrates and registrars approached through this process did not respond. Given the independence of the judges and magistrates, the Judicial Training Institute representative who was assisting in this regard indicated that all he could do was to request them to respond.

Ultimately, an interview was scheduled, with the assistance of the Supervisor of this study, with a judge. The interview was fruitful given that the judge had also gone through the vetting process. Interviews with members of the Vetting Board were problematic to arrange. The initial response received was that they could not respond to the questions as framed in the questionnaire. A special questionnaire had to be prepared suited to their circumstances and which would not require them to respond to questions that may be interpreted to mean that the members were biased. However, it was decided that only a specific member of the Vetting Board would respond to the questions once they had been vetted and approved. This was not to be by the time

this study was being completed. An informal interview was nevertheless held with a person who is involved with the Vetting Board. However, the person requested that the interview should not be recorded in any manner due to the sensitivity of the issues being discussed and that there was not official authorization for the interview. The information gathered from this informal session has in some instances informed parts of this study.

The total number of individuals interviewed in this study was 20 out of the 40 initially intended to be interviewed. Most of the persons earmarked for the interviews but who did not participate in the interviews either never confirmed an appointment for the interviews or confirmed and cancelled the various interviews that were scheduled. The interviews were conducted between March and October 2012 in various Counties in Kenya.

To supplement the primary data, reference has been made to secondary data. This was mainly obtained from the library and the internet.

1.9 Limitations of the study

The sample size selected in the fieldwork may not be as broad as to represent the entire Kenyan population. The sample size determination was influenced largely by lack of resources to have a much larger and more representative sample and the limited duration within which the research is required to be conducted. Further, as indicated in the Methodology section, some of the proposed interviewees (especially judges and magistrates) declined to participate in the interviews.

The secondary research material on vetting processes applied elsewhere in institutional transformation may be limited. This is so as not many countries have applied the vetting process in the process of transforming the judiciary.

1.10 Chapter Breakdown

1.10.1 Chapter 1 – Introduction: A General Overview and Outline

This chapter will give a road map to this study. An introduction about the role of the judiciary in the democratization process will be addressed. Thereafter, the Kenyan judiciary will be discussed with a view to identifying some of the main problems that have dogged it over the years. Corruption, lack of independence and incompetence will be identified in this respect. Thereafter, the objectives, research questions, hypothesis and methodology to be applied in this study will be framed and set out. The limitations of the study will also be identified. Concluding remarks will be made thereafter.

1.10.2 Chapter 2 – Vetting: An Objective Approach to Institutional Transformation?

This chapter will identify the concept of vetting as forming the core of this study. A conceptual analysis of vetting will be conducted. Lustration and purges as alternative options towards institutional transformation will be discussed. The purpose will be to ascertain whether vetting is the best and most objective option that would have been used to transform the judiciary. A theoretical framework analysis will be undertaken with a view to understanding the jurisprudential underpinnings of the vetting process in institutional transformation.

1.10.3 Chapter 3 – Corruption amongst Judges and Magistrates: Assessing the Efficacy of the Vetting Process in Kenya

Corruption was identified as one of the major challenges that have faced the judiciary. This chapter proposes to analyse whether the vetting process will be able to deal with this problem. Possible challenges in dealing with corruption through the vetting process will be discussed.

1.10.4 Chapter 4 – Lack of Independence and Incompetence

The Kenyan judiciary has been plagued with perceptions of partiality and lack of independence especially from the Executive. Incompetence has also been a challenge. These challenges have been linked, partly, to the past processes of appointment of the judges and magistrates which the Executive had absolute control over. The appointment process was neither objective nor competitive. An analysis will be conducted with a view to determining whether the vetting process will be able to identify and deal with partial and incompetent judges and magistrates.

1.10.5 Chapter 5 – Conclusions and Recommendations

This study started with the identifying some of the major problems facing the Kenyan judiciary. Thereafter, the vetting process will be analysed with a view to determining whether it will address the identified challenges. At the end of the journey, conclusions and recommendations will be made.

CHAPTER TWO

VETTING: AN OBJECTIVE APPROACH TO INSTITUTIONAL TRANSFORMATION?

2.1 Introduction

Vetting is a mechanism some societies have elected to use in reforming ineffective institutions.⁶² The focus of vetting is mainly on individuals who have substantive roles to play in the institutions being reformed. This chapter gives a conceptual analysis (Part 2.2) and theoretical framework of vetting (Part 2.3) as an institutional reform mechanism. In so doing, vetting as a concept will be discussed with a view to understanding what it means or should be understood to mean in the context of the vetting of judges and magistrates in Kenya. The theoretical framework will analyze if, and if so, what is a philosophical basis of vetting in institutional transformation.

This chapter will explore the different approaches that have been employed in institutional transformation in societies in transition. These include vetting, lustration and purges (dealt with more substantively in Part 2.2 of this Chapter). These approaches will be looked at against vetting with a view to determining an appropriate approach. The analysis will zero in on the vetting process as outlined in the Kenyan *Vetting of Judges and Magistrates Act, 2011* (hereinafter, “*the Act*”) with a view to assessing its efficacy in meeting the intended objectives (Part 2.4). This chapter argues that compared to lustration and purging, vetting is the most

⁶²Reben Zamora, ‘The Struggle for A lasting Reform: Vetting Process in El Salvador’, in Alexander Mayer-Rieckh and Pablo De Greiff, (eds), *Justice as Prevention Vetting Public Employees in Transitional Societies* (Social Science Research Council: USA, 2007) 80 to 120.

objective process that can be adopted to transform institutions of societies in transition from authoritarian or oppressive regimes to democratic societies under the rule of law.

2.2 Vetting Conceptualized

The expression ‘vetting’ is derived from the word ‘vet’ which means “to make a critical and careful examination of something.”⁶³ While the use of the word ‘vet’ is traced to early 17th Century, its known popular use dates back to the mid-19th Century, where it was understood to mean the process of ‘evaluating the suitability’ of something.⁶⁴ Today the term is used in different contexts but popularly to describe the process of assessing the suitability of a person for a job demanding secrecy, loyalty and trustworthiness.⁶⁵

The concept of vetting has been understood and presented differently.⁶⁶ For instance, vetting has been described as the process of screening a person by conducting interviews, police background checks, security checks, security clearance and proof of investigation of employees and investigative records to ensure that prospective employees do not pose a security threat.⁶⁷ This description takes a narrow view of vetting. As will be discussed below, security concerns are not the prime or only objective of vetting. Vetting processes are more holistic not focusing on only a single attribute.

This misconception of vetting can also be seen in legislation where the phrase has been used. The Wales *Independent Commission Against Corruption Act, 1998*, describes vetting as

⁶³ Oxford Dictionary, Oxford University press available at <http://www.oxforddictionaries.com/search/?region=ukDirect=1&q=vetting> (accessed on 24 March 2012).

⁶⁴ Juliet Lapidus, Vetting Vet, verb. Translation., available at http://www.slate.com/articles/news_politics/explainer/2008/09/vetting.html (accessed on 24 March 2012).

⁶⁵ *Ibid.*

⁶⁶ *Supra* note 62 at 16.

⁶⁷ See Robert Murrel, *Audit Report of the Special Inspector General Iraq Reconstruction*, 24th November 2004. Available at http://www.halliburtonwatch.org/news/CPA_audit_112304.pdf (accessed 24 March 2012).

“the independent process by which the Commission undertakes a background check of an employee to determine their suitability for employment.”⁶⁸ This description comes close to an apt definition of vetting save that it depicts the process as a pre-employment process. A process of reviewing the suitability of an individual for prospective employment would fittingly be called an interview. In the context of this paper, vetting is contemplated for persons already in employment to determine their suitability to continue serving. Vetting has been defined in *the Act* to mean the “process by which the suitability of a serving judge or magistrate to continue to serve is determined.”⁶⁹ Indeed, vetting in institutional transformation primarily entails screening of persons to establish their suitability to continue to serve.

Vetting, lustration and purges have been used by different countries in transition.⁷⁰ The main focus of these processes is to deal with institutions from past regimes which are perceived to have been undemocratic, authoritarian or to have abrogated people’s rights. These processes are fundamentally different. Duthie notes that there has been an interchangeable use of the terms “vetting”, “lustration”, and “purging” by scholars to refer to the same process.⁷¹ In the book *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Duthie substantiates the basis for his conclusion by quoting a number of scholars who use the term interchangeably.⁷² He then proceeds to describe vetting to mean “the screening process of public employees for criteria that do not include human rights considerations, but focusing instead on issues involving

⁶⁸Section 2.

⁶⁹*Ibid.*

⁷⁰ See *supra* n 62. For example, lustration laws were applied in Czechoslovakia, Hungary, Albania, Lithuania, Latvia and Estonia. Vetting legislation was used in Poland and Afghanistan.

⁷¹*Ibid* at 16.

⁷²*Ibid* at 18 where Duthie states:

“Jon. Elstr, for example, refers to “administrative Justice, that is, purges in the public administration,”....Kieran Williams, Brigid Fowler, and Alex Sczeerkbiak define lustration as ‘the systematic vetting of public officials for link to the communist-era community services. Jens Meierhenrich takes lustration to refer to the purification of state institutions from within or without.”

national security, such as in South Africa and Northern Ireland.”⁷³ The depiction by Duthie of what vetting is reflects the underlying process in vetting namely screening of employees. This conception of vetting however fails to disclose the object of the process, which object is useful in understanding the concept of vetting and its distinction with other processes wrongly used interchangeably with it.

It is this failure to contemplate the object of vetting in its conceptualization that has caused certain scholars to wrongly refer to vetting as lustration or purging. Inga Markovits for instance, while discussing the historical events flowing from the collapse of socialism, describes ‘lustration’ to mean “the vetting process by which former socialist officials are examined for their involvement in pervasion of justice under the old regimes and for their suitability to be employed by the new ones.”⁷⁴ Similarly, Minnow Martha, in her discussion of the process of removal of certain officials from public office uses the term “lustration” to mean “purging.”⁷⁵ Conceptually, lustration can be achieved through a purge.⁷⁶ Jirina Siklova notes in this respect that the word “lustration” is derived from the Latin “lustratio” meaning “put light on, or illuminate; purification by sacrifice or by purging”.⁷⁷

A process that involves lustration and purging cannot be equated to vetting.⁷⁸ Donald Kommers described the lustration in Germany as an “ordeal” which some judges opted to avoid by resigning.⁷⁹ Unlike vetting, which is arguably an objective process based on a predetermined

⁷³*Ibid.*

⁷⁴ Inga Markovits, ‘Children of a Lesser God: GDR Lawyers in Post-Socialists Germany’, (1996) 94 (7) *Michigan Law Review* 2270 at 2271.

⁷⁵ Gregory Naarden, ‘Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnia Police Officials’, (2003) 97 *American Journal of International Law* 342 at 343.

⁷⁶Jirina Siklova, ‘Lustration or the Czech Way of Screening’, (1996) 5 *Eastern European Constitutional Review* 57.

⁷⁷*Ibid.*

⁷⁸ See ‘Lustration’ available at www.webster-online-dictionary.org/definitions/lustration?CX=partners-pub-09 (accessed 20. March 2012).

⁷⁹Donald Kommers, ‘Transitional Justice in East Germany’ (1997) 22 *Law & Social Inquiry* 829.

criteria of evaluation, lustration is more of a “witch hunt” with the object of removing the officers in question merely due to their link with the past regimes that have been discredited.⁸⁰ According to Mark Ellis, following the 1989 “democratic revolutions” that swept through Eastern Europe, there was an immediate backlash against former communist regimes.⁸¹ This was so as it was perceived that the former Communists could not be trusted to carry out democratic reforms.⁸² The lustration laws that were subsequently passed and implemented in these countries were condemned by the international community for being discriminative and in breach of human rights standards by assigning collective guilt by prosecuting individuals solely on the basis of membership or affiliation.⁸³

In the instances where lustration and purging are undertaken, the institutions stand condemned at the outset of the process until the persons working in those institutions demonstrate that they are not part of the ‘dirt’ that should be ‘cleansed’ or ‘washed’ out.⁸⁴ While it may be argued that for a vetting process to be justified, there must be some form of condemnation of the institution, there is a fundamental practical difference between the two. For example, in the lustration processes in East Germany, all judges lost their powers and privileges at the start of the lustration process. They were only allowed to sit as judges in an acting capacity until they demonstrated their suitability to be redeployed.⁸⁵

⁸⁰*Supra* n 76.

⁸¹ Mark Ellis, ‘Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc’, (1996) 59 *Law and Contemporary Legal Problems* 181.

⁸²*Ibid.*

⁸³*Ibid.*

⁸⁴*Supra* note 76.

⁸⁵*Ibid.*

In contrast, under *the Act*, the judges and magistrates retain all the powers and privileges of their office until they are declared unsuitable to continue serving as such.⁸⁶ There is no blanket condemnation and withdrawal of all trappings of the powers once held by the person being vetted as happens when lustration or purges take place. Further, in vetting, the burden of proving that the individual is not suitable for the office is borne by the vetting body, not the person being vetted.⁸⁷ The individual being vetted is presumed to be fit to continue to hold the office unless and until evidence demonstrating their unsuitability is brought forth and proven to the required standard.⁸⁸

Under *the Act*, there is a criterion on the basis of which the Vetting Board is required to assess the suitability of the judges and magistrates to continue serving.⁸⁹ Though a laudable

⁸⁶*Supra* n 11, Sections 5, 21 and 24.

⁸⁷*Ibid.*

⁸⁸*Ibid*, Section 18. See also Judges and Magistrates Vetting Board Determinations Concerning Judges of the Court of Appeal delivered on 25th April 2012 at 1, available at <http://www.jmvpb.or.ke/> (accessed on 13th November 2012). See also the Dissent Determination Concerning Honourable Justice Alnashir Vishram, Judge of the Court of Appeal.

⁸⁹*Supra* note 11. Under section 18 of the Act, “*the Board shall, in determining the suitability of a judge or magistrate, consider—*

(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate;

(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;

(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;

(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and

(e) pending complaints or other relevant information received from any person or body, including the -

(i) Law Society of Kenya;

(ii) Kenya Anti-Corruption Commission;

(iii) Advocates Disciplinary Committee;

(iv) Advocates Complaints Commission;

(v) Attorney-General;

(vi) Public Complaints Standing Committee;

(vii) Kenya National Human Rights and Equality Commission;

(viii) National Intelligence Service;

(ix) Police; or

(x) Judicial Service Commission.

(2) In considering the matters set out in subsection (1)(a) and (b), the Board shall take into account the following -

(a) professional competence, the elements of which shall include –

(i) intellectual capacity;

(ii) legal judgment;

inclusion in *the Act*, the manner and the level of detail in which it is set out makes it problematic to apply in an objective manner. For instance, there are quite a number of considerations to be taken into account in determining suitability.⁹⁰ However, there is no prescribed matrix to determine their relative weight. It is inconceivable that a particular individual would possess all the attributes provided for in *the Act*. In this respect, a fairly large portion of subjectivity would come into play in deciding which considerations or attributes are more desirable or should have more weight than others. This appears to have happened during the vetting of the Court of

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- (iv) diligence;
 - (v) substantive and procedural knowledge of the law;
 - (vi) organizational and administrative skills; and
 - (vi) the ability to work well with a variety of people;
 - (b) written and oral communication skills, the elements of which shall include -
 - (i) the ability to communicate orally and in writing;
 - (ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and
 - (iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;
 - (c) integrity, the elements of which shall include -
 - (i) a demonstrable consistent history of honesty and high moral character in professional and personal life;
 - (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and
 - (iii) ability to understand the need to maintain propriety and the appearance of propriety;
 - (d) fairness, the elements of which shall include -
 - (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
 - (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;
 - (e) temperament, the elements of which shall include -
 - (i) demonstrable possession of compassion and humility;
 - (ii) history of courtesy and civility in dealing with others;
 - (iii) ability to maintain composure under stress; and
 - (iv) ability to control anger and maintain calmness and order;
 - (f) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;
 - (g) legal and life experience, the elements of which shall include -
 - (ii) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and
 - (iii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and
 - (h) demonstrable commitment to public and community service, the elements of which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.”

⁹⁰*Ibid.*

Appeal Judges by the Vetting Board.⁹¹ Not all the considerations listed in the *Act* were applied or referred to in the Determinations. For instance, the following attributes were not considered: demonstrable commitment to public and community service and history of courtesy and civility in dealing with others.⁹² Even assuming it were possible to apply a relative weight to all the attributes, *the Act* does not set a threshold to be applied to determine who has “passed” or “failed” the test.⁹³

It is critical to note here that, while the vetting process was ultimately adopted both in the Constitution of Kenya and *the Act*, there were quite a number of proposals made to the Committee of Experts on Constitutional Review to have a purge of all judges and magistrates.⁹⁴ It was proposed that all judges and magistrates be deemed to have lost their jobs upon the promulgation of the constitution. They would have been at liberty to apply for re-appointment.⁹⁵ The Committee of Experts opted for a more “gentle” approach. Judicial officers would remain in office but they would be required to take a new oath and to undergo a ‘vetting’ process.⁹⁶ According to the Committee of Experts, the vetting process in *the Act* was modeled on processes undertaken in Bosnia-Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe.⁹⁷ In my view, this statement by the Committee of Experts exemplifies the conceptual confusion in the processes of lustration and vetting. As stated above, the processes in East Germany, the Czech Republic and elsewhere in Eastern Europe were lustrations rather than vetting processes.

⁹¹ *Supra* n 88.

⁹² Section 18(2)(g)(ii) and (e)(ii).

⁹³ Migai Akech, ‘Is the Vetting Process Really Fair to Judges?’ *The Star*, June 25th 2012 at 28.

⁹⁴ Committee of Experts on Constitutional Review, Final Report of The Committee Of Experts on Constitutional Review, 11th October, 2010 at 75 (on file with the author).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

2.3 Vetting Theorized

Vetting is intended to respond and deal with a societal need.⁹⁸ In the Kenyan context, it was inspired by the need to ensure that the judiciary is effective and that it enjoys the confidence of the public, as the ultimate beacon of justice.⁹⁹ This is an aspiration a majority of Kenyans expressed by voting in the referendum for the Kenyan Constitution.¹⁰⁰ The Committee of Experts on Constitutional Review aptly captured the then prevailing attitude towards vetting as follows:

Happily as well, the Judiciary after considerable hesitation and misplaced suspicion finally accepted that the vetting of Judges and Magistrates was meant to re-invent integrity in the system of the administration of justice and to inject public confidence in the work of Judges and Magistrates. Because of well documented factual and historical reasons Kenyans would have been skeptical of any new constitutional dispensation which did not include some realignment of the Judiciary¹⁰¹

The rationale to transform the judiciary through the vetting process sanctioned by law can be hypothesized from different perspectives. Sociological jurisprudence, view law as an instrument for addressing the societal needs.¹⁰² Jhering, explains that law is intended to serve the needs of the human society.¹⁰³ His explanation accords with that of Roscoe Pound who argued that law as an instrument of social engineering is used to intermediate societal needs.¹⁰⁴ The needs alluded to are those that arise in the society as a result of the conflicting societal interests

⁹⁸*Supra n* 62 at 80.

⁹⁹See *Dennis Mogambi Magare v. The Attorney General & 3 others* Petition No.146 of 2011 eKLR.

¹⁰⁰ Constitution of Kenya, 2010 Sixth Schedule section 23 provides for the vetting of judges and magistrates to determine their suitability for continues service. For the results of the Referendum on the Constitution of Kenya in August 2010, see <http://www.iebc.or.ke/index.php/August-2010/final-referendum-results-are-gazetted.html> (accessed on 1st August 2012). The results were published through Kenya Gazette notice No. 10019, Vol. CXII-No. 84 of August 23rd, 2010.

¹⁰¹Committee of Experts on Constitutional Review, *Final Report of The Committee Of Experts on Constitutional Review*, 11th October, 2010 (on file with the author).

¹⁰²*Supra n* 5 at 835.

¹⁰³*Ibid* at 834.

¹⁰⁴*Ibid* at 849.

and the selfish individual interests. The law therefore comes in to intermediate these competing interests to ensure that individuals coexist in the society with little friction.¹⁰⁵

As stated by Roscoe Pound above, it can be argued that the need for vetting in Kenya was informed by the need to intermediate the interest of the wider Kenyan public of having an effective judiciary, on the one hand, and the interest of judges and magistrates to assert their constitutionally guaranteed security of tenure and claims of independence, on the other. To safeguard the interests of litigants and the public at large from the selfish individual interests of some judges and magistrates, whether real or perceived, the law has recommended vetting to ensure that the judges and magistrates who hold their positions in the new constitutional dispensation are suitable.¹⁰⁶ One of the objectives of the process includes addressing a complaint that the Kenyan public had a low opinion of judges and that they consider them as corrupt, spineless and playthings of the executive.¹⁰⁷

From the Utilitarian perspective, Jeremy Bentham, uses the ‘principle of utility’ to explain the foundation of every action of men and government.¹⁰⁸ To him, utility is the principle that approves or disapproves every action according to the tendency which it tends to produce benefit, advantage, pleasure, good or happiness and which helps prevent the happening of mischief, pain, evil or unhappiness.¹⁰⁹ Viewed from his perspective, the basis for vetting as an

¹⁰⁵*Ibid.*

¹⁰⁶*Supra* n 18.

¹⁰⁷*Supra* note 101 at 75. See also the Transparency International, *Corruption and Perceptions Index 2011 Report*, Kenya was ranked at number 154 out of 183 countries perceived to be the most corrupt in the World. In the years 2008, 2009, 2010 and 2011, Kenya was ranked at position 151, 158, 154 and 154 respectively. See Transparency International, *Corruption and Perceptions Index 2011 Report*, available at http://cpi.transparency.org/cpi2011/in_detail/ (accessed on 20th June 2012). See also *R v. David Makali & 3 Others* Criminal Appeal No. 4 & 5 1994.

¹⁰⁸*Supra* n 5 at 270-273 at 270.

¹⁰⁹*Ibid.*

action by the people of Kenya is to ensure that benefit and advantage (of justice) is conferred to Kenyans at the expense of benefits to a select few that may be corrupt, partial or incompetent.

Upon attainment of independence in 1963, the judiciary expected to check on the executive and legislative arm of the government lent itself to be used to achieve personal economic, social, political and religious interests.¹¹⁰ Consequently, the populace developed an unenthusiastic view of the judiciary as the beacon of justice.¹¹¹ Some of the accusations that were leveled against the judiciary included corruption, favoritisms, professional incompetence, bias, delayed judgments, unfair rulings, inflation of awards of damages, doctoring of proceedings occasioned great injustice and prejudice.¹¹² Essentially, the Kenyan society had experienced mischief and pain, in the words of Bentham, which necessitated legal intervention given the effect of the role of judges in interpreting the law. In his book, *Violence and the World*, Robert Cover wrote:

Legal interpretation takes place in the field of pain and death. This is true in various senses...A judge articulates her understanding of a text and as a result, someone loses his freedom, his property, his children even his life.¹¹³

If this exposition by Cover is correct, then the legal response by way of vetting was to safeguard the public against pain, suffering and mischief occasioned by judicial officers that were unsuitable to continue holding office. Only individuals who have the public confidence in their aptitude, independence and integrity should be allowed to sit in judgment on such crucial

¹¹⁰Ahmednasir Abdullahi, 'Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission's agenda for reform, available at <http://www.kenyalaw.org/klr/index.php?id=894> (accessed 27 February 2012).

¹¹¹ See the Chief Justice, Progress Report on the Transformation of the Judiciary the First Hundred and Twenty Days, 19th October 2011, available at <http://www.kenyalaw.org/kenyalawBlog/?p=227> (accessed 24 March 2012).

¹¹²See *The Report of the Integrity and Anti-Corruption Committee of the Judiciary*, Government Press, September 2003 – "the Ringera Report" available at <http://www.kenyalaw.org> (accessed on 25 March 2012).

¹¹³Robert M. Cover, 'Violence and the World' (1986) 95 *Yale Law Journal* 1601.

issues affecting the public. The impact that judges and magistrates have on the life, limb and property of the public explains the need to ensure that the institution enjoys public confidence.

The object of the process as stated by the Kenyan Constitution and *the Act* is to determine the suitability of judges and magistrates.¹¹⁴ It is anticipated that once the vetting process is concluded, the public perception of the judiciary will change. Courts have reiterated the public interest, when dealing with challenges to the vetting process. In disallowing a petition seeking to stop the vetting process, the High Court noted that vetting was a matter of great public interest both to the judges and the public who are consumers of justice.¹¹⁵ In declining to grant a stay of execution of the preceding High Court decision, the Court of Appeal stated:

No one denies that the Kenyan people resoundingly voted for the vetting process by approving the Constitution at the Referendum. The judicial officers themselves are not opposed to the process...There is undeniably a great public interest in the implementation of the Constitution that must override the private interest or right to halt possible prejudices to the administration of justice. Here there is a legitimate public expectation that vetting process must continue. We simply cannot halt its work.¹¹⁶

One of the concerns that have been raised by some interviewees during the interviews conducted by the author, are that vetting undermines judicial independence. Mr. Wesonga, for instance, was against the vetting process. He stated in response to a question whether he supports the vetting process:

I do not support it. The current judges and magistrates were hired on the basis of some law that had mechanisms for evaluating and impeaching their work. Subjecting them to a vetting law that is done retrospectively is wrong. It does not help that that law is the Constitution because it is weakening one of the branches of government, the judiciary when the other two, Parliament and the Executive are not vetted thereby offending the doctrine of separation of powers.¹¹⁷

¹¹⁴ *Supra* n 11, Section 2.

¹¹⁵ *Supra* n 99.

¹¹⁶ *Supra* n 99.

¹¹⁷ Interview with Wesonga in Eldoret, Kenya (31st May 2012).

This position was taken by a one Ibrahim Ahmed in his application before the High Court. Ahmed argued that by providing for vetting to determine the suitability of judges and magistrates to continue serving, the Constitution had stripped the judges of their independence and security of tenure. As such, he argued, they ought not to continue sitting unless and until they had been vetted. While dismissing the application Justice Ochieng' stated:

As far as this Court is concerned, it would be completely reckless for me to disregard the impact that my decision herein would have for this country. Kenya is greater than any judge; it is greater than the Committee of Experts; it is greater than the judiciary. It is for that reason and others stated herein that I decline to be a party to orders that will result into a crisis that would envelop this Country.¹¹⁸

Further, Ahmed, an interviewee during the study, spoke in support of the vetting process. He stated:

First, it is a constitutional requirement. Therefore, we have a duty to uphold the constitution. Secondly, there was a lot of disquiet on the suitability and competence of judges and magistrates [the process is therefore justified]. Thirdly, the vetting process will rebuild public confidence in the judiciary.¹¹⁹

From the interviews conducted, 80 per cent (16 out of 20 interviewees) supported the vetting process.

In the *Dennis Mogambi case*¹²⁰, the Court observed that, while it appreciated that vetting would occasion much anxiety to the judicial officers who will be subjected to the process, the outcome of the whole process would underpin the values of accountability and integrity and restore the judiciary to its respected place as an arbiter of justice in Kenya.¹²¹ These two pronouncements accord well with the utilitarian principle as what carried the day is the benefit that will fetch the greatest happiness to the greatest members of the community, namely, greater

¹¹⁸ *Ibrahim Ahmed v Samuel Mbugua & 2 Others*, Election Petition No. 35 of 2008 eKLR.

¹¹⁹ Interview with Ahmed in Nairobi, Kenya (11th July 2012).

¹²⁰ *Supra* n 99.

¹²¹ *Ibid.*

justice to all as distinguished with anxiety on the part of few members of the society being the judicial officers who are apprehensive that they may lose their jobs. Since confidence in the judiciary is based on the perceptions of the public, if the vetting process will lead to a change in that perception in a majority of Kenyans, then the process should be supported.

The vetting process may also be looked at from a Marxist philosophical standpoint. Karl Marx viewed the structure of society in relation to its major classes and the struggles between them as the engine of change in this structure.¹²² Though the original conception of the classes was based on property ownership (mainly capital, land and labour), as society matures and develops, some of these factors merge.¹²³ Class interest engenders struggles between the classes to be in control of the state and the powers it wields.¹²⁴ When class consciousness is increased, common interests and policies are organized, and the use of and struggle for political power occurs.¹²⁵ Classes become political forces or parties in the pursuit of power. In this respect, it is notable that the first major attempt at reforms of the Kenyan judiciary occurred in the year 2003. This was immediately after the National Rainbow Coalition of Kenya had taken over government from former President Daniel Moi. The second wave of reform in the judiciary came with the passage of the New Constitution of Kenya in the year 2010. It may therefore be argued that as the major reforms in the judiciary in Kenya occurred at major epochs in the Kenyan polity, they were driven by class struggles. The new order that has taken over the reins of power was intent at uprooting the vestiges of the old order to augment their hold onto power. This may

¹²² Rummel, R.J., *Conflict in Perspective (Understanding Conflict and War: Marxism, Class Conflict and the Conflict Helix)*, (Sage Publications: 1975 Beverly Hills, California) at 50.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

explain the largely unprocedural manner in which the ‘Radical Surgery’ was undertaken in the year 2003. Kameri Mbote and Migai Akech have described the process as follows:

While the purge of judges that followed the Ringera Committee’s recommendations was partially welcomed, and it fulfilled the technical letter of the 1963 constitution’s requirements for dismissal of judges, it was at the same time heavily criticised for failing to respect basic due process and therefore for implicating some judges who were not in fact guilty of corruption. Some judges were not even informed of the action that was to be taken against them.¹²⁶

As regards the current vetting process, class struggles may explain the very divergent views held by various protagonists and the efforts taken to stop the process through the court processes.¹²⁷ Indeed, as at the time of submitting this thesis, the removal of the judges declared unsuitable by the Vetting Board had been stopped by the High Court despite express ouster by the Constitution.¹²⁸

2.4 Are the objectives of vetting attainable?

In the succeeding chapters of this research paper, I will more specifically analyze the feasibility to attain some of the specific objectives of vetting. However, I venture here to generally discuss some thoughts on the vetting process generally as envisaged in *the Act*.

It has been argued that in their nature, human beings are selfish and that all their actions are intended to furthering their selfish interests.¹²⁹ This inclination to selfishness is probably

¹²⁶ *Supra* n 18.

¹²⁷ *Supra* n 99.

¹²⁸ *Hon. Lady Justice Jeanne Gacheche v The Judges and Magistrates Vetting Board and 2 others* JR Applc. No. 295 of 2012, consolidated with *Centre for Human Rights and Democracy and 2 others v The Judges and Magistrates Vetting Board and 2 others*, Eldoret Petition No. 11 of 2012, *Hon. Justice R.S.C. Omolo v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 433 of 2012, *Hon. Justice S.E.O. Bosire v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 434 of 2012, *Hon. Justice J.G. Nyamu v The Judges and Magistrates Vetting Board and 2 others* Nairobi Petition No. 438 of 2012 eKLR.

¹²⁹ See David Ursillo, *Human Nature according to Machiavelli and Thomas Hobbes*, available at www.daveursillo.com/politics/html (accessed 24 March 2012).

explained by the natural right to self-preservation.¹³⁰ In *The Leviathan*, Thomas Hobbes in his description of the ‘state of nature’ states that human beings have only two “cardinal virtues”, “force and fraud”. He states that all human beings do is that which goes to their preservation.¹³¹ John Finnis even considers this attribute as a virtue. In his reflections on the basic forms of human good, he lists life as the first basis for good and observes that it corresponds to the drive for self-preservation.¹³²

It is this circumspection by the law towards human beings that Thomas Aquinas attributes to the need for human laws.¹³³ In *Summa Theologica*, Aquinas observes that while there is in human beings a natural aptitude to virtuous action, individuals who can achieve the perfection of such virtues by practice of certain disciplines are extremely rare.¹³⁴ He observes that those who need aid to attain virtue are the majority.¹³⁵ This necessitates human law which comes into play to assist human beings live virtuous life through an aid he describes as the ‘discipline of the law’.¹³⁶

Given the focus of the law on the individual, its handicap in attaining its aspirations of having suitable persons serve in the judiciary and thereby transforming the judiciary are threefold. First, some of the values the law seeks to identify may be out of the reach of the law. For instance, attributes requiring high personal morality.¹³⁷ Some of these morality linked attributes are not easy to discern in the light of the legal philosophy which suggests that morality

¹³⁰ See Mutakha Kangu, ‘Social Contractarian Conceptualization of the Theory and Institution of law and Governance’ (2007) 2 *Moi University Law Journal* 1.

¹³¹ *Supra* n 5 at 146.

¹³² *Ibid* at 169.

¹³³ *Supra* n 5 at 142.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ *Supra* note 11. Section 18(2) of *the Act* requires the Vetting Board to look for a demonstrable consistent history of honesty and high moral character in professional and personal life from the candidates being vetted.

should not be a concern of the law.¹³⁸ Philosophers have argued that the law is incapable of enforcing morality and further that, if a man's actions cannot affect another's life, it should be none of the States' concern.¹³⁹ The difficulty is enhanced by the fact that the standards of morality differ from person to person. As such, those vetting the judges and magistrates may be in a difficulty to establish a uniform standard of morality to be applied. Such difficulty was experienced at the time Willy Mutunga, was being interviewed for the post of Chief Justice.¹⁴⁰ Since Mutunga wore studs, a debate arose on whether the studs were a sign that he was either gay or that he had beliefs that would be a bar to the discharge of his duties.¹⁴¹ There was no consensus on the issue for the reason that this assessment involved tapping into an individual's morality, which is neither objective nor uniform. This approach to vetting or indeed selection of judges has been critiqued as infringing on judicial independence by applying personal morality in interpretation of constitutional or legislative values.¹⁴²

Further, by insisting that a judge should have a high moral character in personal life, certain persons who possess the required professional competence and temperament, but who do not possess high moral character may be left out. One such person who is suspected of not having high morals, but who turned out to be a great judge is the United States of America Chief Justice Benjamin Cardozo. Having chosen celibacy, Cardozo denounced his Jewish religion and

¹³⁸Brian Bix, *Jurisprudence: Theory and Context*, 5th edition, (Sweet and Maxwell: London, 2009) at 104.

¹³⁹*Supra n 5* at 166.

¹⁴⁰ See Andrea Bonsted 'You Stud'

available at <http://www.andreabonsted.blog.com/2011/you-stud.html> (accessed on 20 April 2012).

¹⁴¹*Ibid.*

¹⁴² Susannah Cowen, 'Judicial Selection: What Qualities do we expect in a South African Judge?', May 2010, Democratic Governance and Rights Unit, University of Capetown Faculty of Law at page 17 (on file with the author).

pronounced himself agnostic, spent most of his life with Haratio Alger, a man with questionable conduct with young men. It was suspected that he was most likely a homosexual.¹⁴³

Secondly, some persons possess certain desirable personal attributes yet lack others. Some attributes are difficult to find in good judges. In his work, “the Good Judge” John Morden cites Lord Macmillan’s work “*Law and Other things*” who wrote that courtesy and patience are essential attributes of the courts if the judges are to enjoy public confidence. He however observed that:¹⁴⁴

Courtesy and patience must be more difficult virtues to practice on the Bench than may be imagined, seeing how many otherwise admirable judges have failed to exhibit them.

Clearly, many of the attributes listed in the *Act*, including demonstrable consistent history of honesty and high moral character in professional and personal life, demonstrable possession of compassion and humility and a history of courtesy and civility in dealing with others may be difficult to find in one person. An analogy can be drawn from Lord Denning.¹⁴⁵ He was described by Lord Devlin, as the judge who opened the door to the law above the law.¹⁴⁶ However, Lord Denning is said to have lacked the sense of fairness, courtesy, civility, and impartiality as a person and as a judge particularly to persons who were not of his race.¹⁴⁷ He is said to have discriminated against Asians and Blacks to the extent that at one time the Sikh Community organized a protest march following his interpretation of the Race Relations Act 1976.¹⁴⁸ Lord Denning was even sued by black jurors when he claimed in his book *What Next in*

¹⁴³Jeffrey Rosen, ‘The Hopeless Moralists’ *New York Times*, 2nd November, 1997.

available at www.nytimes.com/books/97/11/02/reviews/971102.02rosent.html (accessed on 20 April 2012).

¹⁴⁴John W. Morden “The ‘Good’ Judge”.

available at http://www.suc.on.ca/media/hon_jon_morden_thegoodjudge_mar0504.pdf (accessed on 20 April 2012).

¹⁴⁵Edmund Heward, *Lord Denning*, 2nded, (Universal Law Publishing: London, 1997) at 197.

¹⁴⁶*Ibid.*

¹⁴⁷*Ibid.*

¹⁴⁸*Ibid.*

the Law that the blacks, colored and brown people did not have the same standard of conduct as whites.¹⁴⁹

The other drawback in the realization of the objectives of the process is that, while it is contemplated as an objective process, there are no known ways of identifying or weighting some of the attributes.¹⁵⁰ Susannah Cowen notes that while the task of identifying the qualities we seek in our judges may not be illusory, it is a daunting one.¹⁵¹ Cowen argues strongly in this regard that “it also needs to be acknowledged that there is no algorithm that can be applied to test whether a candidate will be a good judge”.¹⁵² This problem is further compounded by the fact that the *Act* prescribes quite a number of attributes required of a judge or magistrate.¹⁵³ The *Act* does not however provide a matrix to be applied to weight the respective attributes against each other. There is no prescription on the attributes that must be present in a candidate and which ones can be overlooked. This is because, it is doubtful that any individual can possess all the attributes stipulated in the Act. The end result of this scenario is that bias and personal prejudice could creep into the process. Perhaps the words by Lord McMillan properly capture the irony of prescribing attributes that depict ‘superman’ as the perfect judge to dispense justice. He stated:

The judicial oath of office imposes on the judge a lofty duty of impartiality. But impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for warmer tints of

¹⁴⁹ *Ibid.*

¹⁵⁰ Philip Ochieng’, Kenya: ‘Passion’ Cannot be Certified, hence our Dilemma, *Daily Nation* on the web, available <http://www.allafrica.com/stories/201112270241.htm> (accessed 27 March 2012)

¹⁵¹ *Supra* note 142 at 3.

¹⁵² *Supra* note 143 at 3.

¹⁵³ *Supra* note 11, Section 18.

imagination and sympathy are needed to temper the cold light of reason if human justice is to be done.¹⁵⁴

The possible subjectivity and imperfections inherent in these processes may affect the final outcome. This is exemplified in the interviewing process of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya. The Deputy Chief Justice, Nancy Baraza, is said to have been rigorously interviewed by the Judicial Service Commission prior to her appointment in 2011.¹⁵⁵ However, less than a year later, when a special Sub-Committee of the Judicial Service Commission was constituted to deliberate on an incident in which she had allegedly assaulted a private guard, the Sub-Committee stated that her conduct “portrayed her as a person who was in utter contempt and flippant respect for the dignity of ordinary Kenyans”.¹⁵⁶ The subcommittee concluded that she had come out as “a person who could not handle prestige and power of the office of the Deputy Chief Justice to the extent of losing all senses of common rationality and was mesmerized and overwhelmed by trappings of office”.¹⁵⁷ Subsequently, the Tribunal to Investigate the Conduct of the Deputy Chief Justice of the Republic of Kenya, while recommending to the President that she be removed from office concluded that “she has shown an inability to control her behavior, demonstrating the strong likelihood she will continue to commit misconduct or misbehavior in future.”¹⁵⁸

A similar conclusion may be drawn from the vetting of Mr. Justice Ibrahim Mohammed and subsequent declaration that he was unsuitable to continue to serve.¹⁵⁹ Justice Ibrahim, then a

¹⁵⁴*Supra* n 6.

¹⁵⁵*Honourable Lady Justice Nancy Makokha Baraza v. The Judicial Service Commission & 9 Others*, Petition No. 23 of 2012 (Unreported).

¹⁵⁶*Ibid* at 38.

¹⁵⁷*Ibid* at 38-39.

¹⁵⁸ Report by the Tribunal to Investigate the Conduct of the Deputy Chief Justice of the Republic of Kenya to His Excellency the President of the Republic of Kenya, August 3, 2012 at 37 (on file with the author).

¹⁵⁹ Judges and Magistrates Vetting Board, Second Announcement on Determinations Concerning Former Judges of The High Court Who are Now Members of The Supreme Court, Friday, 20th July 2012 (on file with the author).

High Court Judge, had in 2011 been interviewed by the Judicial Service Commission for a position in the Supreme Court. Upon the recommendation of the Judicial Service Commission, he was appointed a Judge of the Supreme Court. These discrepancies in the processes aimed at the same end are an indictment to the objectivity and capacity of the processes to identify the attributes including diligence, demonstrable consistent history of honesty and moral character, demonstrable possession of compassion and humility, history of courtesy and civility in dealing with others, ability to maintain composure under stress and ability to control anger and maintain calmness and order, either during interviews or vetting processes. This calls to question the propriety of detailing a vast number of attributes when it is acknowledged that it is difficult to get all the attributes in one person.

However, it should be noted that the High Court authoritatively stated that the requirements stipulated under Chapter 6 of the Constitution are mandatory. In the *Mumo Matemu Case*, the High Court reiterated its authority to review decisions by the Executive or Legislature to test whether appointees to public office meet the ‘personal integrity, competence and suitability test’ set out in Chapter 6 of the Constitution by stating:

To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behavior, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the *Democratic Alliance* case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one’s integrity.

In this particular case, as outlined above, the Petitioner alleges that the Interested Party must have been involved in shady transactions which led to the approval of unsecured

loans and the loss of public funds at the AFC. Though the evidence the Petition relies on is yet to be tested in judicial proceedings and cannot be taken as the truth of the matter, the allegations are substantial enough that it is not possible for any appointing authority to rationally make a determination without the aid of proper inquiry to resolve the issue one way or the other, that the Interested Party has passed the integrity test demanded by our Constitution.¹⁶⁰

Being a constitutional imperative, the *Act* should give deference to the provisions of the Chapter 6 rather than give an arguably more stringent requirement.

2.5 Conclusion and further reflections

This chapter has taken the position that vetting, as opposed to lustration or purges, is arguably a good approach in transforming the judiciary during the transition from one constitutional order to the next. This is so as it is more objective than purges and lustration which involve an element of collective punishment.¹⁶¹ The process however faces various conceptual and practical challenges. Some of these challenges include lack of an objective criterion for assessment of the judges and magistrates. There is also the difficulty in wholly assessing human personality and behavior during a vetting or interview session. Further, the ideal attributes for a judicial officer are elusive. This takes cognizance of the fact that judges are human being and no human being is perfect. Further, judges are supposed to decide on matters affecting human beings and are must therefore at some level be able to associate themselves with the issues that come before them. This chapter has also demonstrated the failings of such processes by looking at the examples of the appointment and subsequent removal less than a year later of Deputy Chief Justice Nancy Baraza and Mr. Justice Ibrahim Mohammed.

¹⁶⁰ *Trusted Society of Human Rights Alliance v The Attorney General and 3 others and Mumo Matemu*, Nairobi High Court Petition No. 229 of 2012 eKLR at 52.

¹⁶¹ *Supra* n 74.

In the next two chapters, I propose to deal with three specific issues that the vetting process was intended to address. These are corruption, incompetence and partiality and lack of independence. I will endeavor to discuss the challenges that the vetting process may face in dealing with those issues with a view to making recommendations to improve the current framework.

CHAPTER 3

CORRUPTION AMONGST JUDGES AND MAGISTRATES: ASSESSING THE EFFICACY OF THE VETTING PROCESS IN KENYA

Yes, there was corruption in the Kenyan judiciary. Corruption is a systemic, societal problem in Kenya. The judges and magistrates were part of that system and they got mixed up in the culture of corruption in society.¹⁶²

3.1 Introduction

Corruption is a vice that has pervaded the Kenyan public and private sectors for a long time.¹⁶³ Allegations of corruption have dogged the Kenyan judiciary for some time.¹⁶⁴ Indeed, the judiciary was considered one of the most corrupt institutions in Kenya.¹⁶⁵ When the Chief Justice Willy Mutunga assumed office, he described the Judiciary as follows:

We found an institution so frail in its structures; so thin on resources; so low on confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.¹⁶⁶

When the new Constitution was enacted in Kenya, it provided for the vetting of all judges and magistrates to ensure their suitability to continue serving.¹⁶⁷ Vetting is one of the

¹⁶² Interview with Abdul in Nairobi, Kenya (6th July 2012).

¹⁶³ In the Transparency International, *Corruption and Perceptions Index 2011 Report*, Kenya was ranked at number 154 out of 183 countries perceived to be the most corrupt in the World. In the years 2008, 2009, 2010 and 2011, Kenya was ranked at position 151, 158, 154 and 154 respectively. See Transparency International, *Corruption and Perceptions Index 2011 Report*, available at http://cpi.transparency.org/cpi2011/in_detail/ (accessed on 20th June 2012).

¹⁶⁴ See for instance, Ahmednasir Abdullahi, 'Restoring Public Confidence in Kenya's Discredited, Corrupt, Inefficient and Overburdened Judiciary: Judicial service Commissions Agenda for the Judiciary available at <http://www.kenyalaw.org/klr/index.php?=894> (accessed 27 February 2012); Generally also see *International Commission of Jurists, Kenya: Judicial Independence, Corruption and Reforms Report* (2005) at 3 (On file with the author). See also *supra* n 16.

¹⁶⁵ According to Transparency International, the Kenyan Judiciary was ranked as No. 142 least perceived corrupt judicial system in the world. Johann Graph Lambsdoff, *Corruption Perception Index 2006*, available at <http://www.archive.transparency.org/publication/gcr-2007#10> (accessed on 26th May 2012).

¹⁶⁶ Willy Mutunga, *Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days*, 19th October 2011, available at <http://www.kenyalaw.org/kenyaLawBlog/?p=227> (accessed on 10th June 2012).

¹⁶⁷ Section 23 of the Sixth Schedule of the Constitution of Kenya.

institutional reform mechanisms through which incompetent, partial and corrupt public officers are removed from office.¹⁶⁸ In so doing, it was expected that corrupt judges and magistrates would be precluded from holding judicial offices.¹⁶⁹ It was also anticipated that the vetting process would change the perception that the judiciary was corrupt.¹⁷⁰

This chapter examines the effectiveness of the vetting process in addressing the problem of corruption amongst judges and magistrates. In so doing, I will start with a conceptualization of corruption. I will thereafter assess the efficacy of the process as prescribed by the *Act* in dealing with corruption. The analysis will draw largely from the fieldwork undertaken in this study. It will be argued that the vetting process as structured under the *Act* may not be able to deal directly with corruption amongst judges and magistrates. This is partly due to the nature of corruption and the attendant evidential difficulties that it poses.

3.2. Understanding corruption and its nature

Corruption has no singular usage or meaning. For instance, moral purists use the word corruption to refer to any conduct that does not accord with good morals.¹⁷¹ Religious fundamentalists equate corruption to sin.¹⁷² On the other hand corruption is, in law, a crime.¹⁷³ Thomas Aquinas, a leading proponent of the natural law school of thought, used the term

¹⁶⁸United Nations Development Programme, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, 2006, available at <http://www.ictj.org/publication/vetting-public-employees-post-conflict-settings-operational-guidelines> (accessed 10th June 2012).

¹⁶⁹ Judges and Magistrates Vetting Board Determinations Concerning Judges of the Court of Appeal delivered on 25th April 2012 at 1, available at <http://www.jmvpb.or.ke/> (accessed on 13th November 2012). See also the Dissent Determination Concerning Honourable Justice Alnashir Vishram, Judge of the Court of Appeal.

¹⁷⁰*Ibid.*

¹⁷¹Banfield Edward, *The Moral Basis of a Backward Society* (New York Free Press: New York, 1958) 3.

¹⁷²Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1996) 75 *Yale University Law Journal* 986.

¹⁷³ See Chapter 3 of the United Nations Convention against Corruption, adopted by the UN General Assembly by resolution 58/4 of 31st October 2003, Section 38 of the Anti-Corruption and Economic Crimes Act, Cap. 65 of the Laws of Kenya. See also Kaufmann, Daniel and Vicente, Pedro C., *Legal Corruption*, available at <http://ssrn.com/abstract=829844> (accessed on 25th May 2012).

corruption to describe laws that did not accord with “reason”.¹⁷⁴ The user of the term corruption is thus contextual.

The use of the term corruption in institutional malfunction is in respect of abuse of office or authority for private gain. McMullan in *A Theory of Corruption*, describes a corrupt public officer as a person who:

A public officer is corrupt if he accepts money or money’s worth for doing something that he [or she] is under a duty to do anyway, that he [or she] is under a duty not to do or to exercise a legitimate discretion for improper reasons.¹⁷⁵

McMullan’s description captures the essence of corruption in the judicial context. However, it depicts corruption as an act that can only be done by a public official. This depiction is narrow. Corruption should ideally dovetail both the public official and the purveyor of the corrupt inducement. This is so as the drivers of corruption are mainly those willing to offer corrupt inducements for certain actions or omissions by the public officials. By the law and prosecutions focusing mainly on the public officials who receive the corrupt inducements, the main cog that drives the corruption wheel forward is left intact. This allows the perpetration of corruption by the purveyor of corruption through a different public official when the last one is removed from office for such conduct. In the absence of the inducement, corruption would not be as prevalent. Further, the description focuses on monetary gain only with the risk that those who receive a benefit which is non-monetary may be not be considered corrupt. Indeed, Crispine was of the view that until the recent conviction and imprisonment of former Tourism Ministry Permanent Secretary Mrs. Rebecca Nabutola for corruption and abuse of office together with the

¹⁷⁴Thomas Aquinas, “Summa Theologica” in *Supra* n 5 at 143.

¹⁷⁵McMullan, M., ‘A Theory of Corruption’ (1961) 9 (2) *Sociological Review* 181 at 183.

purveyor of the corrupt inducement from the private sector, Mr. Duncan Muriuki, there had been impunity on the part of the private sector when it came to prosecution in this regard.¹⁷⁶

The Vetting of Judges and Magistrates Board (hereinafter “the Board”) alluded to corruption numerous times in its determinations on the Court of Appeal Judges.¹⁷⁷ However, the word corruption is not mentioned in *the Act*. It is curious why this would be the case yet corruption was one of the main issues that was sought to be dealt with during the vetting process. Indeed, as the fieldwork conducted in this study confirmed, 90 per cent (18 out of 20 interviewees) of the interviewees were of the view that corruption was rampant amongst judges and magistrates.

Nevertheless, corruption has been described in the Kenyan *Anti-Corruption and Economic Crimes Act, 2003*, to include bribery, fraud, embezzlement and misappropriation of funds, breach of trust, offences involving dishonesty and offenses described in sections 39 to 44, and 46 to 47.¹⁷⁸ The offenses alluded to relate to bribing agents, secret inducement for advice, deceiving principals, conflict of interest, and improper benefit for trustee for appointment, bid rigging, abuse of office and dealing with suspect property.¹⁷⁹ The description is wide since the use of the term ‘abuse of office’ in itself covers many facets of corruption.

¹⁷⁶ Lucy Nyambura, Principal Magistrate handed down her sentence as follows: Dr. Achieng, erstwhile CEO of the Kenya Tourist Board, was sentenced to three years in jail with an added fine of 1.5 million Kenya Shillings, and failure to pay would add a further 3 years to his sentence. Ms. Nabutola, then Achieng’s superior as PS in the line ministry, got four years in jail for her part in the scheme and was given a 2 million Kenya Shillings fine. Duncan Muriuki, the apparent beneficiary of the conspiracy and himself a former KTB member of the board of directors, was in turn handed a 7 years in jail and has to repay some 18.3 million Kenya Shillings, the sum in question which was paid out by KTB, when Achieng and Nabutola connived in clear violation of laid down procurement and payment rules and caused the transaction to go ahead, see *R v Dr. Achieng Agonga and 3 others* ACC No. 1347 of 2008.

¹⁷⁷ *Supra* n 88 at 1, 3, 5, and 11.

¹⁷⁸ Kenyan *Anti-Corruption and Economic Crimes Act, 2003*, Section 2.

¹⁷⁹ *Ibid* at sections 39, 40, 41, 42, 43, 44, 46 and 67.

This paper adopts, with modifications, the description of corruption given by Joseph Nye. In his *Corruption and Political Development*, Mr. Nye described corruption as:

A behavior which deviates from the formal duties of a public role (appointive or elective) because of private-regarding (personal, close family, private clique) wealth or status gain, or violates rules against the existence of certain types of private-regarding influence.¹⁸⁰

Reference to corruption in this thesis shall thus mean any act or omission whether by a judicial officer, litigant or other person which makes a judicial officer deviate from the formal discharge of their duties in exchange for gain, whether personal or not.

The nature of corruption

Corruption is cross temporal, cross-systemic and cross-cultural.¹⁸¹ According to McMullan, corruption can exist under any form of government, in any country and at any time.¹⁸² Indeed, history shows that corruption existed as early as 2400 years ago. Kautilya, the advisor of the Indian Emperor Maurya is said to have advised the emperor that corruption was inevitable but that there was need to restrain it.¹⁸³ There is also evidence that corruption existed in the early civilizations. In his *Corruption and Decline of Rome*, MacMullen writes that corruption was the major cause of the decline of the Roman Empire and that even the Athenian democracy was not free from corruption.¹⁸⁴ Aristotle, in his discussion of the Council of Areopagus, stated that corruption was one of the major problems in Athens and that in fact, the

¹⁸⁰Nye Joseph 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417-427 at 2.

¹⁸¹*Supra n* 164 at 4.

¹⁸²*Ibid.*

¹⁸³Kautilya Visnugupta, *The Arthashastra* (Penguin Books: New Delhi, 1991) at 281.

¹⁸⁴MacMullen Ramsay, *Corruption and the Decline of Rome* (University Press: New Haven, 1998) at 28.

Council of Areopagagus was established with one of its duties being to report corrupt behavior.¹⁸⁵ Indeed, corruption dates back to the biblical times.¹⁸⁶

The fact that corruption existed in medieval societies as well as modern societies leads to one conclusion: corruption will always be present in any society. Such conclusion may be explained by legal theory. Thomas Hobbes in his *The Leviathan*, stated regarding his hypothetical 'state of nature', that man had only two cardinal virtues, 'force' and 'fraud.'¹⁸⁷ Further, it has been argued that selfishness, the human attribute that breeds corruption, is inherent in all human beings.¹⁸⁸ Consequently, that corruption is to be found in any society should not be surprising. However, as these are undesirable attributes in society, they have to be suppressed through training or penalty.

Robert Neild, a leading sociologist argues that corruption has been the norm of the society for most of human history.¹⁸⁹ He further argues that the successful anti-corruption efforts in the 19th and 20th Century are but exceptions to the norm.¹⁹⁰ In his *The Politics of Corruption*, Gardiner observed that corruption is a persistent and practically ubiquitous aspect of political society.¹⁹¹ He observed that no reform can eliminate corruption because there is always a temptation by men and women when competing for valuables to resort to corruption when all efforts fail.¹⁹² The Ringera Committee indeed found that human greed is one of the greatest

¹⁸⁵ *Supra n* 183 at 89.

¹⁸⁶ See for instance Romans 8.21, *The Holy Bible, The English Standard Version* (Good News Publishers: London, 2001).

¹⁸⁷ *Supra n* 5.

¹⁸⁸ *Ibid* at 81.

¹⁸⁹ Neild Robert, *Public Corruption: The Dark side of Social Evaluation* (Anthen: London, 2002) at 1.

¹⁹⁰ *Ibid*.

¹⁹¹ Gardiner John, *The Politics of Corruption* (Russell Sage Foundations: New York, 1970) at 93.

¹⁹² *Ibid*.

causes of corruption in the Kenyan judiciary.¹⁹³ The Committee made the following comments in this regard:

[G]reed is a predominant cause of corruption and that the other factors cited are excuses, rationalizations or opportunities and loopholes which afford corruption a chance. Greed is innate in human beings. However, the density varies from individual to individual....in the judiciary, greed of officers opens them to temptation to indulge in corruption, the greed of prosecutors make them broker corrupt transactions between themselves and members of the publicand greed on the part on the part of litigants drives them to corrupt judicial officers. Indeed, the depressing reality of the matter is that to the greediest, no amount of money is enough, not even all the money in the world.¹⁹⁴

From the foregoing, it is apparent that corruption is ubiquitous in any society. This is based on the nature of all human beings. It has been there since time immemorial despite efforts to eradicate it. It would therefore be naïve to expect that the vetting process will *guarantee* that judges and magistrates will all not be corrupt. The vetting process can help identify and remove judicial officers implicated in corruption. This may also go a long way in changing the public perception that corruption is endemic in the judiciary thereby restoring confidence in it.

3.3. Limitations of the vetting process in dealing with alleged corrupt judges and magistrates

3.3.1 Perceived vis-à-vis actual corruption

In Kenya, corruption amongst judges and magistrates takes two forms: actual and perceived corruption.¹⁹⁵ Actual corruption occurs in instances where money or money's worth is used to influence a decision or conduct of a judge or magistrate. This is what has been dealt with above. Perceived corruption on the other hand is:

¹⁹³Supra n 28.

¹⁹⁴*Ibid at 17.*

¹⁹⁵Supra n 31.

A state of affairs where a person feels some corruption has taken place because of misplaced or lost file, in a situation where a hearing has taken place in chambers, where there is a delay in trial, ruling or judgment, where there is a misunderstanding of the rules of the legal process, or existence of “pop in” litigants and/or self-appointed brokers within the court corridors and precincts.¹⁹⁶

The loss of public confidence in the judiciary on account of corruption was largely attributed to perceived corruption.¹⁹⁷ However, the vetting process under *the Act* is not tailored to substantively deal with perceived corruption. The Board in its Determinations Concerning the Court of Appeal Judges made it clear that it could only deal with evidence of corruption before it.¹⁹⁸ In this regard, the Vetting Board stated:

In the nature of things, people who offer bribes are unlikely to come forward, knowing that they may both face sanctions for what they have done and see judgments in their favour set aside. This does not, however, allow the Board to act on the basis of perceptions of bribe-taking in general. It must be guided by evidence in each particular case. Should it happen, then that an individual judge who is widely accepted as having been “on the take” ends up being declared suitable to remain in office, that would be the result of the requirement to base the Board’s determination on evidence, and not general perception. If those who know of corrupt behavior do not themselves come forward, they cannot complain when persons they are sure are corrupt, pass through the vetting net.¹⁹⁹

Since perceived corruption is based on an inference from a set of circumstances rather than actual evidence or knowledge that a judicial officer has been influenced through inducement to make a decision, the vetting process is unlikely to be able to deal with it. From the interviews conducted, over 90 per cent (18 out of 20 interviewees) of the interviewees were not able to state for a fact that they were aware of facts that could establish that corruption had taken place involving a judge or magistrate. Most of the respondents’ knowledge of corruption amongst judicial officers was based on an inference or at best, hearsay. In response to the question

¹⁹⁶ *Ibid* at 8.

¹⁹⁷ *Supra* n 88 at 1-3.

¹⁹⁸ *Ibid* at 7.

¹⁹⁹ *Ibid* at paragraph 31.

whether there was corruption in the judiciary before the promulgation of the new Constitution of Kenya, Ahmed responded as follows:

Yes. It was the culture of the judiciary. Considering the nature and process of the appointments [of the judges and magistrates] a lot was done to reward political masters which was corrupt.²⁰⁰

David was of the following view on the same point:

Yes. First corruption was documented across many institutions and Kenyan society as a whole. Secondly, reports by the Ringera, Kwach and other Judicial Committees conceded it.²⁰¹

Wesonga's response to the same question was that "Yes there was: because the litigants wanted quick fix solutions."²⁰² 80 per cent (16 out of 20 interviewees) of the interviewees were of the view that corruption was more pervasive before the passage of the new Constitution in Kenya than after. According to Abdul:

After the passage of the new constitution there is still corruption. There are still the old elements [who perpetrated the corruption before the passage of the new constitution]. In some of the people, old habits die hard. However, the corruption is not in the same scales as before. [There is] more oversight.²⁰³

However, Wesonga and David thought otherwise. In response to the question whether corruption was more pervasive amongst judges and magistrates before or after the passage of the new Constitution of Kenya, Wesonga said:

There are no tools to measure that. Anecdotes seem to suggest that it is more after the passage of the Constitution because the new [judges and magistrates] feel protected by the civil society. So, from patronage by the State, we have gone to patronage by the civil society.²⁰⁴

David, on the other hand, said:

²⁰⁰ Interview with Ahmed in Nairobi, Kenya (11th July 2012).

²⁰¹ Interview with David in Nairobi, Kenya (3th August 2012).

²⁰² Interview with Wesonga in Eldoret, Kenya (31st May 2012).

²⁰³ *Supra* n 162.

²⁰⁴ *Ibid.*

Yes. As long as corruption is prevalent across other segments of the Kenyan society, it is safe to assume, in the absence of evidence to the contrary, that the judiciary is no exception.²⁰⁵

It is clear from the foregoing, that the interviewees made deductions as regards whether there was corruption. None of these interviewees had hard evidence to support their perception of corruption amongst judges and magistrates.

Perceived corruption requires multifaceted institutional transformation. For instance, judges and magistrates should be disciplined and systems put in place to ensure that they deliver judgments and rulings on time. In the event that they are not able to do so, proper notices to all parties in a suit should be given in advance. Secondly, the Civil Procedure Rules²⁰⁶ should be amended to bar the conduct of ordinary civil proceedings in chambers at all or in the absence of all the parties. Only matters or applications that require privacy given the nature of the matters being canvassed should be held in camera. This would include matters involving minors, divorce petitions or matters related to national security issues. Applications brought under certificate of urgency should be dealt with in open Court. This is more so given the recent amendments to the Civil Procedure Rules that have effectively done away with the use of Chamber Summons applications to obtain interim relief in the absence of the other side in a case.²⁰⁷ However, applications of such and other nature are still heard in chambers. Thirdly, to deal with the problem of disappearance of files, the filing system should embrace technology. Electronic copies should be maintained to ensure that a backup of all files is at all times available. The Chief Justice has reported that the judiciary is undertaking a scanning process for all files in

²⁰⁵ *Supra* n 201.

²⁰⁶ Promulgated under the Civil Procedure Act, Cap 21 of the Laws of Kenya.

²⁰⁷ Order 51 Rule 1 of the Civil Procedure Rules, 2010 published under Legal Notice No. 151 of 2010.

order to build data base with electronic copies of all files.²⁰⁸ Further, as regards the problems related to delays in typing of proceedings for purposes of appeal, the judiciary should embrace stenography or electronic recording of proceedings. In this respect, it is noted that the assistance of typists from the National Youth Service was recently enlisted by the judiciary to type all outstanding proceedings. From the interviews conducted, 80 per cent (15 of the 20 interviewees) of the interviewees were of the view that the efforts being undertaken should in the long run improve service delivery in the judiciary and reduce the incidence of corruption.

3.3.2 Lack of objective evaluation criteria

The vetting of judges and magistrates focuses mainly only on actual corruption. *The Act* lists a number of attributes to be considered by the Board while determining the suitability of a judicial officer.²⁰⁹ While *the Act* does not mention corruption as one of the considerations to be taken into account in determining the suitability of the judges and magistrates to continue to serve, there are considerations that cover it. For instance, the Board is required to take into account the integrity of the judicial officer.²¹⁰ The elements of integrity to be considered include a demonstrable consistent history of honesty and high moral character in professional and personal life, respect of professional duties arising under the codes of professional and judicial conduct, the ability to understand the need of propriety and to maintain the appearance of propriety.²¹¹ It is not clear what is meant by ‘demonstrable consistent history of honesty and high moral character’. How this attribute is required to be demonstrated by a person being vetted is difficult to comprehend.

²⁰⁸ *Supra* n 166. The Chief Justice noted that the Judiciary had completed digitizing 60 million pages of cases for the High Court across Kenya. The Court of Appeal had digitized 10,000 records of appeal covering 1999 to 2010.

²⁰⁹ Kenyan *Vetting of Judges and Magistrates Act, 2011*, Section 18.

²¹⁰ *Ibid*, at Section 18(2) (c).

²¹¹ *Ibid*.

Questions of honesty and moral character are mostly subjective and difficult to define with specificity or a generally applicable criterion. This will no doubt bring to the fore individual biases and prejudices by members of the Board thereby making the assessments subjective. Further, whether a person understands the need for propriety and maintenance of an appearance of propriety is problematic. How is a judge or magistrate expected to demonstrate that they possess this attribute? What is decent or appropriate in a set of circumstances depends on many things including a person's morality, upbringing and the like. As such, it is difficult to fathom a situation where the same test is applied by the Board consistently on all the judges and magistrates who appear before it.

Further, in determining the suitability of a judge or magistrate, the Board is required to take into account a wide array of considerations and attributes.²¹² As was the case in the screening conducted on the public sector in East Germany after the fall of the Berlin Wall, there is no prescribed matrix to inform the Board on hierarchy of the considerations to be applied. As argued by Christiane Wilke, the lack of a "norms pedigree" leaves it open to the vetting tribunal to decide which norms or considerations are more important than others.²¹³ A norms pedigree gives a hierarchy to the considerations and the relative weight to be applied to them as against each other to enable a more objective determination whether an application has reached the required threshold for appointment.²¹⁴ This would, to a great extent, do away with the *carte blanche* that has been left to the Vetting Board to decide which considerations are more important than others during their review. In East Germany like in Kenya, the push for vetting

²¹²*Ibid* at Section 18.

²¹³ Christiane Wilke, "The Shield, the Sword, and the party: Vetting the East German Public Sector", in Alexander Mayer-Rieckh and Pablo De Greiff, (eds), *Justice as Prevention Vetting Public Employees in Transitional Societies* (International Center for Transitional Justice: New York, 2008) at 355.

²¹⁴ *Ibid*.

was championed mainly by the civil rights activists.²¹⁵ In East Germany, the push for vetting was initially as a reform move but later, it turned out to be a form of civil sanction for past misconduct.²¹⁶ This rationale is self-consciously retributive.²¹⁷ Given this lack of a norms pedigree, the Board members may in applying the considerations pursue a collateral agenda and justify the same within the norms matrix. This renders the process subjective despite the setting out of the normative structure to be applied. This is more so given the fact that it is inconceivable that any individual would possess all the norms or considerations set out in *the Act*. On the other hand, a norms pedigree would in a sense put the Vetting Board in a “box”. They require some level discretion in making their assessments. Given the rigorous appointment process for some of the members of the Vetting Board and that others were elected by their professional bodies, it is expected that this discretion will be exercised judiciously and not capriciously.²¹⁸

3.3.3 Evidential difficulties

The Board has stated in its determination that it would not be conducting investigations during the vetting process.²¹⁹ According to Amina, privy to the workings of the Vetting Board, the rationale for this was to maintain their independence. The Vetting Board did not wish to be viewed as the accuser, prosecutor and judge in the process.²²⁰ However, before the Board started its sittings to vet the Court of Appeal judges, the Board went round the country calling for information, memoranda and complaints against the judges and magistrates. In any event, this is not an entirely correct interpretation of the Board’s mandate. The powers of the Board include gathering relevant information, interviewing individuals, holding inquiries, inform itself in a

²¹⁵ *Ibid.*

²¹⁶ *Ibid* at 152.

²¹⁷ *Ibid.*

²¹⁸ Sections 7, 8 and 9 of the Act.

²¹⁹ *Supra* n 88.

²²⁰ Interview with Amina in Nairobi, Kenya (25th June 2012).

manner that it deems fit and may receive oaths and written or oral testimonies or statements.²²¹The Vetting Board's mandate is wide enough as to envisage it conducting investigations. This is more so given that it is mandated to make inquiries, summon witnesses and inform itself of such matters as it deems fit. This narrow interpretation of its mandate may affect its ability to deliver on its objectives.

Be that as it may, evidence to prove corruption is hard to come by. This is because, by its very nature, it is conducted in secret and involves the person giving the incentive and the judge or magistrate or their agents. According to David, the problem of corruption is unlikely to be addressed through the vetting process. He continued to say, “[s]o far, no judge has been found guilty of corruption. This is largely because of the inherent difficulty of proving corruption.”²²² Ahmed was of the view that for the vetting process to succeed in dealing with corruption against judges and magistrates, “advocates and parties must speak out” about the corruption they are aware of.²²³ According to Abdul, though the process may not identify and remove judges and magistrates implicated in corruption, it will “send out a signal” to the judicial officers of the paradigm shift in the manner of conducting business in the judiciary. This will act as a deterrent especially given that other judges and magistrates have been removed for other reasons.²²⁴ The problem is aggravated given that the Board interpreted its mandate as not requiring it to conduct its own investigations.²²⁵ Relevant information on the conduct of the judge or magistrate from which corrupt conduct could be deduced was to be provided by the judge or magistrate.²²⁶ It is inconceivable that any judge or magistrate would knowingly implicate themselves in any corrupt

²²¹Section 14 of the Act.

²²² Interview with David in Nairobi, Kenya (3rd August 2012).

²²³ *Supra* n 223.

²²⁴ *Supra* n 162.

²²⁵ *Ibid.*

²²⁶ *Supra* n 88 at 7. The judge or magistrate was required to fill in a questionnaire and a wealth declaration form.

activities while filling the forms. Crispine, who attended the vetting process, confirmed having not received a bribe before.²²⁷ He also confirmed that none of his colleagues had admitted having taken a bribe. He stated that it was unlikely that any judge or magistrate would make this concession out of self-interest. Consequently, the Board must of necessity rely on information from complainants or other government agencies that may have such information.²²⁸ None of those bodies gave any complaint or information that would implicate the judicial officers.²²⁹ In the absence of any concrete proof from a complainant against a judge or magistrate, it is unlikely that any judge or magistrate would be found complicit in corruption.

In most instances, only the perpetrators of the corrupt conduct know of it but are fearful to come forward. Victims would easily come forward but mostly they are unaware of the evidence of the corrupt conduct. This evidential difficulty is manifested in the Boards' Determinations Concerning the Court of Appeal Judges. The Board stated:

In the nature of things, people who offer bribes are unlikely to come to come forward knowing that they may face sanctions for what they have done and see judgments granted in their favor set aside.²³⁰

These evidential problems gravely limited the effectiveness of the process in Kenya particularly when addressing judicial corruption. The Board commented in that regard in the following manner:

In spite of the widespread public perception of continuing corruption in the judiciary, relatively few comments were received in regard to Court of Appeal judges.²³¹

²²⁷ Interview with Crispine in Nairobi, Kenya (3rd October 2012).

²²⁸ The Board sought information from the Advocates Disciplinary Committee, Advocates Complaints Commission, Attorney General, Public Complaints Standing Committee, Kenya National Human Rights Commission, National Intelligence Service and the police when vetting Court of Appeal judges.

²²⁹ *Supra n* 88 at 6.

²³⁰ *Ibid* at 10.

²³¹ *Ibid* 88 at 7.

The Vetting Board further stated that the few complaints received alleging corruption, did not meet the evidentially threshold to be sustainable.²³² Given the apathy from the citizenry in filing complaints against judges or magistrates, it is unlikely that corruption will be one of the standout reasons why judges or magistrates are asked to step aside. This is tragic considering the high levels of corruption in the country in general and the judiciary in particular.²³³ It remains to be seen whether the vetting process will tackle corruption robustly within the judiciary to give the country the much needed transformed judicial system.

3.3.4 Reform of the Bar

A lot has been said about the problems facing the judiciary and the need for reform. The bar has however not been the subject of this discourse. In my view, many of the problems facing the judiciary are either contributed or aggravated by the members of the legal fraternity. Chief Justice Willy Mutunga in his speech to the Law Society of Kenya aptly captured the position thus:

After successfully campaigning for the reform of the Judiciary, it is lamentable that the Law Society of Kenya has not been too keen to embrace a transformative culture within its ranks.

[I]sn't it time the law society did an introspection with a view to finding out if and how its members contribute to the perversion of justice in the Court Corridors? In what ways do lawyers, for example, contribute to the case backlog through frivolous interlocutory applications that are designed to defeat the ends of Justice? In what ways do your members participate in the disappearance of Court Files from the registries? Lawyers who are engaged in acts such as these should be banished from your ranks.²³⁴

In the 2010 International Bar Association Report, it was noted that;

²³² *Ibid.*

²³³ *Supra* n 163.

²³⁴ Chief Justice's remarks made at the Law Society of Kenya Luncheon, Hilton Hotel, Nairobi, 26th April 2012, available at <http://www.kenyalaw.org/Forum/?p=441> (accessed on 9th July 2012).

As individuals with public responsibilities, advocates must conduct themselves according to ethical standards. Regrettably, the delegation did receive some complaints regarding unethical behaviour on the part of some practicing advocates, including a willingness to participate in corruption. The need for a robust and independent disciplinary process in respect of advocates is therefore paramount.²³⁵

Indeed, in Post-Socialist Germany, lawyers were amongst the people who had to undergo vetting.²³⁶ The lawyers were examined for their contact with the State security apparatus (*Stasi*)²³⁷ and other transgressions.²³⁸ In the Kenyan context, the lawyers under umbrella body of the Law Society of Kenya are not subject to the reform initiatives currently underway in the new constitutional dispensation. The Advocates Complaints Commission and the Advocates Disciplinary Committee are the only entities that deal with errant lawyers from a professional perspective.²³⁹ Their performance has been criticized by some organizations as being below expectations.²⁴⁰ Given the role that lawyers play in the dispensation of justice and specifically in this respect, the perversion of it through facilitating corruption of judges and magistrates, it is imperative that the Law Society of Kenya undertakes stringent reforms in keeping with the reforms in other sectors. In this respect, the Chief Justice has indicated that the Attorney General is currently drafting a draft Vetting of Advocates Bill for presentation to Parliament.²⁴¹ It remains

²³⁵ International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya*, February 2010, at 70, available at <http://www.scribd.com/doc/26989486/Kenya-Judicial-Reform-2010-%C2%A6-Restoring-integrity-An-assessment-of-the-needs-of-the-justice-system-in-the-Republic-of-Kenya> (accessed on 9th July 2012).

²³⁶ Inga Markovits, "Children of a Lesser God: GDR Lawyers in Post-Socialist Germany", *Michigan Law Review*, Vol 94, No. 7 (June, 1996) 2270 at 2271.

²³⁷ *Stasi* stands for Ministry for State Security which employed an army of secret informers who kept tabs on the population.

²³⁸ *Supra* n 236.

²³⁹ The Advocates Complaints Commission is a statutory body established under Section 53 of the Advocates Act (Cap. 16 of the Laws of Kenya) to inquire into any complaints against practicing advocates, firm of advocates or any member or employee thereof. See http://www.attorney-general.go.ke/index.php?option=com_content&task=blogcategory&id=24&Itemid=53 and <http://www.lsk.or.ke/index.php/our-organisational-structure/131> (accessed on 11th July 2012).

²⁴⁰ *Supra* n 216.

²⁴¹ Willy Mutunga in a talk show called "Cheche" on *Citizen TV* on 10th October 2012.

to be seen what areas this Bill will deal with and whether they will contribute to the overall transformation of the judicial system.

3.3.5 Private Hearings

The vetting process was intended to change the public perception about the judiciary.²⁴² This required that the public be intricately involved in this process. However, from the unraveling process, the public has not been so involved. This became apparent during the interview process where most interviewees who were not involved in one way or another with the justice system were not aware that the vetting process was underway until the decisions by the Vetting Board on the Court of Appeal judges was issued. 85 per cent (17 out of 20 interviewees) of the interviewees confirmed that they were aware of the process of vetting of judges and magistrates. Rono, for instance, stated that he has only heard of the vetting of judges and magistrates. He was not aware of what it entailed. He further stated that “he does not follow [the vetting process] keenly”.²⁴³

The Act provides for vetting hearings to be conducted in private save where the judge or magistrate opts for public hearings.²⁴⁴ As of 15th of October 2012, only 2 judges out of 27 have so far opted for public hearings.²⁴⁵ One of the justifications that have been advanced in support of the private vetting is that scrutiny of judicial officers in public could make them lose the command and respect expected from the public after the process.²⁴⁶

²⁴² *Supra* n 158.

²⁴³ Interview with Rono in Kitale, Kenya (24th June 2012).

²⁴⁴ See Section 19(1).

²⁴⁵ Martha Koome and David Maraga, JJA.

²⁴⁶ Domino Michael, ‘The Worst Way of Selecting Judges-Except all the Others That Have Ever Been Tried’ (2005) 32 (2) *Northern Kentucky Law Review* 267-304 at 268.

However, in order to get the public buy into the process of transforming the judiciary and to restore public confidence in the judiciary, the process needed to be public. This could explain the public's buy-in on the appointment of the Chief-Justice which was conducted in public. From the interviews conducted, 40 per cent (8 out of 20 interviewees) of the interviewees were of the view that the interviews should be conducted in private. Andrew was in favour of public hearings for the vetting of judges and magistrates because "the vetting proceedings are for the benefit of the entire public".²⁴⁷ Angela was also of the same persuasion. She said:

The vetting proceedings should be conducted in public so as to create a good impression of the whole process to the public.²⁴⁸

Cyril had this to say with regard to the same question:

[The vetting process] should be done in public and not in private to avoid corruption and poor methods of choosing judges and magistrates. This will [ensure that] the best qualified persons are selected.²⁴⁹

Consequently, it may be appropriate to reconsider the justification of holding private hearings vis-à-vis the benefits of a public hearing. Given that the change of public perception may be said to be an overarching aim of the vetting process, it may have been prudent to conduct the hearings in public.

3.4. Concluding remarks

In this chapter, it has been demonstrated that in view of the nature of corruption that it has been present in society since biblical times to date, the attendant evidential difficulties in proving it, the forms and limitations of the vetting process as undertaken in Kenya, with regard to dealing with corrupt conduct of judicial officers; it is unlikely that vetting will completely

²⁴⁷ Interview with Andrew in Mombasa, Kenya (28th June 2012).

²⁴⁸ Interview with Angela in Nairobi, Kenya (3rd July 2012).

²⁴⁹ Interview with Cyril in Nairobi, Kenya (20th June 2012).

curtail corrupt conduct or the perception of corruption. This is because of the evidential problems that are implicit in proving corruption. Further, given the structure, mandate and workings of the Board, it is unlikely that evidence of corruption would be forthcoming. This is especially so when there is no amnesty provision in the *Act* to allow those implicated in corruption to come forward to testify with a guarantee that they will not be prosecuted. Further, the holding of the vetting hearings in private will also have a negative impact in changing the public perception that the judiciary is corrupt or getting a public buy-in into the process. Finally, for the process to be effective, it must involve the reform of other sectors, processes and procedures.

In the next chapter, I propose to revisit the vetting process with the intention to determine whether as structured, the challenge of partiality and incompetence will be addressed.

CHAPTER 4

LACK OF INDEPENDENCE AND INCOMPETENCE

4.1 Introduction

The primary function of the judiciary is the fair and impartial resolution of disputes between individuals on the one hand and between individuals and the State on the other in accordance with the law.²⁵⁰ An independent, impartial and competent judiciary holds a central place in the realization of just, honest, open and accountable government.²⁵¹ In order to carry out this critical role, the independence of the judges and magistrates is of critical importance. It is this independence and the competence of a judicial officer that instills confidence in the public that a judge hearing a case will do so objectively, according to law and will not be subject to influence by the parties, the government, a group within civil society or even other judges.²⁵²

Kenyan judges and magistrates have repeatedly been found to be largely partial and incompetent.²⁵³ Given this persistent finding about the judges and magistrates, the reform of the judiciary pays specific attention to the attributes of independence and competence. This is reflected in the considerations that the Vetting Board is required to look for in determining the suitability of judges and magistrates to continue serving under *the Act*.²⁵⁴ These concerns were

²⁵⁰ Declan Morgan, 'Judicial Independence in the Twenty-First Century', a speech delivered at the Attorney General's Conference on Judicial Independence, Inn of Court, Royal Courts of Justice, Belfast, 24th June 2011, available at http://www.attorneygeneralni.gov.uk/lord_chief_justice_speech_pdf_115kb_.pdf (accessed on 10th August 2012).

²⁵¹ Jeremy Pope, *Transparency International Source Book 2000 - Confronting Corruption: the Elements of a National Integrity System*, Transparency International, available at <http://archive.transparency.org/publications/publications/sourcebook2000> (accessed on 12th September 2012).

²⁵² *Supra* n 251.

²⁵³ *Supra* n 16.

²⁵⁴ See Section 18(2).

reiterated by the Vetting Board in its determinations as being one of the main focus of the vetting process.²⁵⁵

This chapter discusses the concepts of judicial independence (4.2) on the one hand and competence (4.3) of judicial officers on the other, as areas of focus by the Vetting Board. Indeed, Competence of judicial officers is a component of judicial independence.²⁵⁶ That for the concept of judicial independence to be effective, the judges and magistrates must be competent. Secondly, an assessment will be undertaken to find out whether the vetting process will be an effective tool in ensuring that the judges and magistrates who continue serving are independent and competent to discharge their duties (4.4). Interviews conducted for this study confirmed the public perception that the judges and magistrates were largely partial, lacked independence and some were incompetent. However, though vetting was seen as going a long way in dealing with incompetence, partiality and incompetence, it was not the only solution. Other institutional and structural reforms would have to go hand in hand with it in order to achieve the intended objective.

4.2 Judicial independence

The concept of judicial independence has both international and national recognition. At the international level, the Universal Declaration of Human Rights (hereinafter ‘UDHR’) provides that:

²⁵⁵ *Report of the Vetting of Judges and Magistrates Board on the Determination on Court of Appeal Judges* (2012) at 2.

²⁵⁶ Principle 10 of the *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[E]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.²⁵⁷

Though not originally legally binding on states, the UDHR has acquired binding effect as international customary law as an authoritative interpretation of the human rights provisions of the UN Charter.²⁵⁸ The Constitution of Kenya recognizes general rules of international law as forming part of Kenyan law.²⁵⁹ As such, this right forms part of Kenyan law. The scope of this right is expanded by the International Covenant on Civil and Political Rights (hereinafter, 'ICCPR'). Article 14(1) of the ICCPR provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The right to an independent, impartial and competent judiciary in the resolution of disputes is also reiterated under regional treaties.²⁶⁰ These treaty provisions have been domesticated in Kenya. The independence of the judiciary has been asserted in the Kenyan Constitution.²⁶¹ Further, the right to a fair hearing before any court or, if appropriate, before another independent and impartial tribunal or body is also given constitutional underpinning.²⁶²

Though the foregoing provisions assert the right to an independent, impartial and competent judiciary, they do not provide a definition. The question that begs an answer is: this independence is from who or what? Judges and magistrates should be free from certain kinds of pressures or influences and free to envision and realize certain goals.²⁶³ Judicial independence is most important in those cases where courts are called upon to resolve disputes between

²⁵⁷ Article 10.

²⁵⁸Violaine Autheman, *Global Best Practices: Judicial Integrity Standards and Consensus Principles*, (IFES Publishers: Geneva, 2004) at 1.

²⁵⁹Article 2(5) of the Constitution of Kenya.

²⁶⁰African Charter on Human and People's Rights at article 7(1), the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 6(1) and the Inter-American Convention on Human Rights at articles 8(1).

²⁶¹Article 160 of the Kenyan Constitution 2010.

²⁶²*Ibid*, Article 50.

²⁶³Pamela Karlan, 'Two Concepts of Judicial Independence', (1999) 72 *Southern California Law Review* 535 at 536.

individuals and the state or between different branches of government. Judges should be free to rule against the government if the law so dictates without any fear of reprisals. Judicial independence is underpinned by the concept of separation of powers. Alexander Hamilton *The Federalist Papers* stated in this respect as follows;

There is no liberty, if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with other departments of government.²⁶⁴

In this respect, Dennis Lloyd (later Lord Lloyd of Hampstead) in his classic, *The Idea of Law*, wrote in support of separation of powers and independence of the judiciary:

If the laws are to be fairly interpreted and impartially applied it is obviously important that the judiciary should enjoy an independent status and be free from the political pressures engendered by association with either the executive or even the legislature itself, dominated as the latter is likely to be by the divisions of party politics.²⁶⁵

Judicial independence has two facets, individual and institutional.²⁶⁶ Institutional independence connotes that the judiciary is a distinct branch of the government, which must be respected as such and not interfered by with other organs of the state in the discharge of its mandate.²⁶⁷ Individual independence on the other hand means that a judge should be free from all political and outside pressure to decide cases in a wholly impartial manner. Deanell Reece equates these external political and outside pressures to ‘afflictions’ and notes that a judge should resign from such afflictions that would call his/her partiality into question.²⁶⁸

²⁶⁴ Roy Fairfield (ed), *The Federalist No. 78*, 2nd ed, (Johns Hopkins University Press: Maryland, 1981 at 226-27. See also Clifford Wallace, ‘An Essay on Independence of the Judiciary: Independence from What and Why’, (2001) 58 *NYU Annual Survey of American Law* 241 at 243.

²⁶⁵ Dennis Lloyd, D., (ed) *The Idea of Law*, (Penguin Books: London, 1973) at 256.

²⁶⁶ Deanell Tacha, ‘Independence of the Judiciary for the Third Countries’ (1994-1995) 46 *Mercer Law Review* 645 at 647.

²⁶⁷ *Supra n* 264.

²⁶⁸ *Supra n* 265.

Impartiality is a component of judicial independence. Impartiality means that judges should perform their judicial duties without favor, bias or prejudice.²⁶⁹ International practice posits that judges must ensure that in their conduct, both in and out of court, they maintain and enhance the confidence of the public, the legal profession and litigants in their impartiality.²⁷⁰ It is also recommended that a judge should, so far as is reasonable, exhibit such conduct as to minimize the occasions on which it will be necessary for the judge to disqualify themselves from hearing or deciding cases.²⁷¹

However, judicial independence has negative aspects. Pamela Karlan warns against too unconditional a commitment to judicial independence, particularly in its most positive forms, at the expense of other values.²⁷² In this respect, it is important for judges and magistrates to be independent of the self. Personal preferences and prejudices should not inform judicial decisions. Judicial decisions should be based on the rule of law and dictates of fairness.²⁷³ According to the *Bangalore Principles of Judicial Conduct*, “it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.”²⁷⁴ As such, while discussing the concept of judicial independence, it should be recognized that there are obligations on the shoulders of the judges that justify the grant of judicial independence by the public. As argued by Clifford Wallace, for instance, a justification of judicial independence is that neither justice nor human rights guaranteed by the Constitution become secure for the people without a free and independent

²⁶⁹*The Bangalore Draft Code of Judicial Conduct 2001*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, available at http://www.unodc.org/pdf/corruption/bangalore_e.pdf (accessed on 10th September 2012).

²⁷⁰*Ibid.*

²⁷¹*Ibid.*

²⁷²*Supra n 264.*

²⁷³*Supra n 270.*

²⁷⁴*Ibid.*

judiciary.²⁷⁵ The justification only holds true if the judges are indeed independent, competent and adherent to the rule of law.

This calls for some form of accountability by the judges for their actions and conduct. It has been argued that judicial independence goes hand in hand with judicial accountability.²⁷⁶ Indeed, the two concepts reinforce each other. While other arms of government are accountable to the people, the Judiciary is accountable to a higher value and to standards of judicial rectitude.²⁷⁷ The central question then becomes how to hold judges accountable without interfering with their independence? Judges are, for instance, required to give reasons for their decisions. Their decisions are subject to appeal or review, except for final courts of appeal. Judges are also subject to recusal from handling matters in which they are either biased or perceived to be biased.²⁷⁸ Finally, and probably most importantly, in the event that they misconduct themselves, a process is stipulated through which they can be removed from office.²⁷⁹ This may be the process through which judges in the final appellate courts are to be held accountable for their decisions.

Apart from the individual aspect of judicial independence that has been discussed above, institutional independence is critical. The judiciary should not be dependent on the executive for financial allocations to run its services and implement its policies. This would impact on the independence of the judiciary. In this respect, it is notable that the Constitution of Kenya now establishes a Judiciary Fund to be used for administrative expenses of the Judiciary and such

²⁷⁵ *Supra* note 265 at 1.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ As was remarked in the English case of *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 258, “[i]t is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”.

²⁷⁹ See Article 168 of the Constitution of Kenya on the process for the removal from office of the judges of the Superior Court including the Chief Justice and the Deputy Chief Justice.

other purposes as may be necessary for the discharge of the functions of the Judiciary.²⁸⁰ Of particular importance in this respect is that the annual estimates for the expenditure for the following year by the judiciary shall, once approved by the National Assembly, be a charge on the Consolidated Fund and the funds so approved shall be paid directly into the Judiciary Fund.²⁸¹ This provides the judiciary with financial independence which is a critical component of judicial independence. Along with financial independence, judicial independence requires that the tenure of office by judges be secured. In this respect, the Kenyan Constitution provides that the office of a judge shall not be abolished when there is a substantive holder thereof.²⁸²

Judges and magistrates should also be well remunerated. This plays a part in dealing with the problem of corruption. According to Crispine, magistrates and other judicial support staff have for a long time been poorly remunerated. He was of the view that this may have played a big role in the pervasive corruption and lack of commitment to their duties in the magistracy.²⁸³ The Chief Justice of Kenya noted that the “disparities in pay between judges and magistrates, on one hand, and judicial officers and administrative staff, on the other, were acute.”²⁸⁴ The Judicial Service Commission has since reviewed the terms and conditions of judicial officers and its proposals are awaiting the approval of the Salaries and Remuneration Commission.²⁸⁵

In response to the question what should be in place for the judiciary to discharge its mandate, Abdul was of the view that “a strong institutional framework with good corporate

²⁸⁰Article 173 of the Constitution of Kenya.

²⁸¹*Ibid.*

²⁸²Article 160(2).

²⁸³Interview with Crispine in Nairobi, Kenya (3rd October 2012).

²⁸⁴Willy Mutunga, *Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days*, 19th October 2011, available at <http://www.kenyalaw.org/kenyaLawBlog/?p=227> (accessed on 3rd October 2012).

²⁸⁵*Ibid.*

governance structures backed by a strong enabling legal framework”.²⁸⁶ All these institutional and systemic changes will go a long way in entrenching judicial independence. Crispine was of the view that the backlog in cases and delays in delivery of judgments were mainly caused by excessive workload on the few judges and magistrates. He noted that given the financial autonomy now enjoyed by the judiciary, research assistants have now been hired to assist the judges. This, he stated, would go a long way in improving the quality and ensuring timely delivery of decisions rendered.

4.3 Professional Competence

The *Act* requires the *Vetting Board* to satisfy itself about the judge or magistrate’s professional competence.²⁸⁷ Competence has been defined as the “ability to do something in a satisfactory or effective way”, or as “a person’s range of skills or knowledge”, or “a skill needed to carry out a particular job or task.”²⁸⁸ The *Blacks Dictionary of Law*, defines competence as “the basic minimum ability to do something” or as “the capacity of an official to do something”.²⁸⁹ Competency on the other hand refers to the mental capacity to understand problems and make decisions.²⁹⁰ One would therefore say that a competent judge is one who possesses the ability, skills and knowledge to serve as a judge. Competence is a component of suitability since to be suitable is to be “right for purpose”.²⁹¹

According to the *Act*, the elements to be considered in determining professional competence include:

²⁸⁶Interview with Abdul in Nairobi, Kenya (6th July 2012).

²⁸⁷ Section 17(2)(a).

²⁸⁸*Macmillan English Dictionary For Advanced Learners*, 2nded, (Macmillan Publishers: Oxford, 2007) at 297.

²⁸⁹ Bryan Garner, ed, *Blacks Dictionary of Law*, 8thed, (West Publishing Co: Minnesota, 2007) at 302.

²⁹⁰*Ibid.*

²⁹¹*Supra n 5* at 1499.

[I]ntellectual capacity, legal judgment, diligence, substantive and procedural knowledge of the law, organizational and administrative skills and the ability to work well with a variety of people.²⁹²

The *Act* sets a far higher threshold for determining professional competence of a judge or magistrate as compared to the general considerations of competence. Indeed, whether a judge or magistrate meets the constitutional criteria for appointment as a judge of the superior court or as a magistrate has been stipulated as an independent attribute from professional competence.²⁹³ It is however difficult to conceive the possibility of a single individual possessing all these attributes. How the Vetting Board decides on apportioning relative weight to the respective attributes during the vetting process brings into play some subjectivity into the process.

However, from the foregoing analysis, the minimum threshold for appointment as judge or magistrate is not the same thing as being competent to serve as judge or magistrate. Professional competence is a wholesome attribute that includes various capacities. This approach appears to be the proper one considering that when examining the value of competence in a judge or magistrate the focus should not be merely on the intellectual capacity of the judge, but also on other attributes that may have nothing to do with his or her intelligence quotient.²⁹⁴ A competent judge would ostensibly be one who is not only intelligent and knowledgeable in legal principles and procedures but also one with the relevant organizational skills to manage their daily cause lists and the conduct of proceedings in their courts. A competent judge would also be able to prepare and deliver judgments or rulings on time.

The data collected during the fieldwork showed that only 35 per cent (7 out of 20 interviewees) of the interviewees were of the view that all judges and magistrates in office at the

²⁹² Section 18(2)(a) of *the Act*.

²⁹³ Section 18(1)(a).

²⁹⁴ *Supra n 7*, Principle 6.

time of the promulgation of the new Constitution of Kenya were competent as they met the minimum constitutional and statutory requirements for appointment as judges and magistrates, respectively. On the other hand, 75 per cent (15 out of 20 interviewees) were of the view that the judges and magistrates appointed after the promulgation of the new Constitution in Kenya were competent. This difference in perception between the competence of the judges and magistrates appointed before and after the promulgation of the new Constitution in Kenya was explained by Gabriel thus:

[W]ith the new constitutional dispensation, there is a clear, objective and transparent process of appointment of judges of magistrates which I even witnessed publicly.²⁹⁵

In response to the same question, Abdul stated:

The majority of the newly appointed judges and magistrates are competent but a good number of them lack experience which they will gain. Overall, there is a breath of freshness in the judiciary.²⁹⁶

Ahmed was more emphatic in this respect. He said in response to the question whether the judges and magistrates appointed after the promulgation of the new Constitution in Kenya were competent:

Yes. The mode of appointment by the Judicial Service Commission is open, transparent and competitive. Applications are received and vetting of candidates was done in a public interview therefore, the best got selected.²⁹⁷

4.4 Lack of Independence and Incompetence: The Vetting Process at Work

This part of the project paper seeks to interrogate the vetting process as undertaken in Kenya vis-à-vis the problems of lack of independence and incompetence. The purpose of this analysis is to assess whether the vetting process will deal with the problems of impartiality and

²⁹⁵Interview with Gabriel in Nairobi, Kenya (24th June 2012).

²⁹⁶Interview with Abdul in Nairobi, Kenya (6th July 2012).

²⁹⁷Interview with Ahmed in Nairobi, Kenya (11th July 2012).

incompetence. The analysis will draw from the results of the fieldwork conducted. Topical areas for discussion will be identified separately and the analysis undertaken thereafter.

4.4.1 Historical Institutional Deficiencies

50 per cent (10 out of 20 interviewees) of the interviewees during the field study were of the view that most judges and magistrates were partial and lacked independence. The reasons advanced for this perception were varied. Anderson, for instance, was of the view that “there was impartiality because the judges were handpicked by the executive. They therefore had to be compromised in one way or another.”²⁹⁸ Rono, on the other hand, was of the view that many judges and magistrates were impartial because they were corrupt.²⁹⁹ Ahmed, in response to the question whether judges and magistrates were competent for the work for which they were appointed said:

Yes partly. A good majority of judges who came up through the magistracy were competent. However, some judges were political appointees, made to reward cronies. These were in some cases not competent. As regards the magistrates, though most met the minimum qualifications, they were not appointed on merit.³⁰⁰

In response to the question whether judges and magistrates were impartial in the discharge of their duties before the passage of the new Constitution of Kenya, Ahmed said:

It depends on whether the judge or magistrate had any vested interests, especially political interests. Where such interests existed, there was no impartiality.³⁰¹

David responded as follows to the same question on partiality of judges and magistrates before the promulgation of the new Constitution of Kenya:

²⁹⁸ Interview with Anderson in Bondo, Kenya (23rd June 2012).

²⁹⁹ Interview with Rono in Nairobi, Kenya (24th June 2012).

³⁰⁰ *Supra n* 200.

³⁰¹ *Ibid.*

They were largely perceived to be partial, especially in cases touching on the rich and powerful persons. The pattern of cases decided on technicalities in favour of such people across many years' points to bias.³⁰²

As to whether the vetting process will deal identify and deal with incompetent judges, David was of the view that it will. However, he was of the view that many of those who will pass the competency test, will likely fail in other parameters in the vetting exercise.³⁰³

According to Paul:

The judges and magistrates were partial because no serious action was taken against culprits of some cases e.g. the Goldenberg and Anglo Leasing sagas. Most of the accused persons cleared their names under circumstances which depict lack of partiality. Only those unable to buy their freedom have remained behind bars while those capable are free to continue with their day to day activities.³⁰⁴

From the interviews conducted, it appears that the lack of independence and partiality is mainly attributed to institutional and systemic deficiencies in the previous constitutional dispensation. As argued by Anderson above, since judges were appointed by the president who also possessed the powers to dismiss them, they were prone to serve executive interests. In 1998, the provision entrenching security of tenure of judges in the constitution was deleted.³⁰⁵ The then Attorney General remarked when moving the amendment motion that "judges' security of tenure

³⁰² Interview with David in Nairobi, Kenya (3rd August 2012). For example in the *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Civil Application No. Nai 307 of 2003 (154/03 UR)* the presiding judge in the first appeal, a retired Judge of Appeal, had acted in what on the face of it was a serious conflict of interest situation, giving rise to a strong and reasonable perception of bias. In essence, the issue was whether the Court of Appeal should re-open a matter in which it had given a final determination, on the grounds that the interests of justice so required. The Court decided that in the special conditions of Kenya the overall need for finality had to take precedence over the interests of justice in a particular matter.

³⁰³ *Ibid.*

³⁰⁴ Interview with Paul in Nairobi, Kenya (27th June 2012). For examples, cases in which prominent personalities cleared from the Goldenberg and Anglo leasing sagas include *R v The Judicial Commission of Inquiry into the Goldenberg Affair and 2 others ex parte Prof. George Saitoti* [2006] eKLR and *Deepak Kamani and another v Kenya Anti Corruption Commission and 3 others* Nairobi High Court Petition No. 199 and 200 of 2007 eKLR.

³⁰⁵ Constitution of Kenya Amendment Act no. 4 (1988).

was inconsistent with powers of the President to hire and fire”.³⁰⁶ The provision entrenching the security of tenure of judges was subsequently restored in 1990.³⁰⁷ Given that the process of appointment of judges was under the direct control of the President, it was inevitable for the judges to be subservient to the Executive.³⁰⁸ This therefore made it possible for the appointment of judges who were not competent.

From the interviews conducted, the interviewees attributed the problem of partiality to the then existing institutional framework that made it difficult for judges to be independent. The Kenyan Constitution has dealt with most of these issues from an institutional level. As noted above, the judiciary now has financial independence. The appointment process for judges and magistrates has been insulated from Executive influence and the public is now involved in the process of interviewing the judges for appointment. As confirmed by at least 75 per cent (15 out of 20 interviewees) of the interviewees, competent judges were appointed due to the transparent and objective processes in the Constitution. This is more so given that their interviews were conducted in public and the public was able to form an opinion as regards their competence. Further, for those interviewees like Abdul, who has interacted with the newly appointed judges and magistrates in practice, he is of the view that their competence is not in doubt. Security of tenure and the concept of judicial independence have also been entrenched in the Constitution.

Another aspect of the historical institutional deficiencies impacting on judicial independence has got to do with the authoritarian regime that was in place in the 1980s. A judge during the vetting process was asked about his role in dealing with accused persons who had

³⁰⁶ Henry Omusundi, ‘Secure from Public Scrutiny? A Critical Analysis of Security of Tenure in Kenya’, *Adili*, available at http://www.tikenya.org/index.php?option=com_docman&task=doc_download&gid=26&Itemid=146 (accessed on 1st October 2012).

³⁰⁷ Constitution of Kenya Amendment Act (1990).

³⁰⁸ See Sections 61 and 68 of the repealed Constitution of Kenya.

been tortured by State agents in the aftermath of the 1982 attempted military coup against the then President Moi's government.³⁰⁹ The judge was accused of not raising questions about the apparently tortured accused persons presented before him and the inordinately long periods that the accused had been held incommunicado before being presented to Court.³¹⁰ Was it fair or proper for the Vetting Board to have expected the judge to have dealt with the accused persons in any other manner contrary to what the executive demanded? Migei Aketch notes in this regard that:

[T]he Board may be demanding perfection in judges in circumstances which were far from perfect. Kenya's history demonstrated rather vividly that heroes have been a rare commodity and the few heroes we have had tend to end their lives tragically. When confronted with intimidating powers of government, most public officers whether in the judiciary or elsewhere have chosen the path of self-preservation. Yet the Board now singles out one judge and castigates him for failing to respond publicly to President Moi when the latter predicted the outcome of the case he was handling...No one, leave alone a judge, criticized President Moi and the few heroes who did suffered serious consequences.³¹¹

It is true that the authoritarian regimes in Kenya's past had a great influence in most spheres of public and private life. However, to argue that that conduct by judges and magistrates during these times should be excused for the reason that they acted in self-preservation would lead to an absurdity. This is because the new constitutional dispensation is intended to create a paradigm shift in administration of public affairs in general and dispensation of justice in particular. This argument would render such judges and magistrates who supported and facilitated the authoritarian regime suitable to continue serving. The change that was anticipated in the new constitutional dispensation could be lost, if this position is adopted. Indeed, as argued

³⁰⁹Judges and Magistrates Vetting Board Determinations Concerning Judges of the Court of Appeal delivered on 25th April 2012 at 1 (on file with the author).

³¹⁰Ibid.

³¹¹Migai Aketch, 'Is Vetting Process Really Fair to Judges?', *The Star*, June 25, 2012 at 28.

by a respondent, this is the justification for the payment of full benefits to judges and magistrates who are deemed not fit to continue serving to reduce the sense of 'victimization'.³¹²

4.4.2 Evidential difficulties

55 per cent of the interviewees (11 out of 20 interviewees) were of the view that the vetting process would be able to identify and deal with incompetence and partiality amongst the judges and magistrates. The time span that the judge or magistrate spends before the Vetting Board may not be sufficient for them to make this determination. Further, evidence of partiality may not be readily available. According to Crispine, most complainants who made allegations of partiality against him had lost their cases and may have had axes to grind.³¹³ Crispine, who attended the vetting process, stated that some of the allegations of partiality raised were by losers in cases where appeals had already been preferred. The questions being asked by the complainants as regards those matters were questions for the Courts sitting on appeal against his decision; not the Vetting Board. Further, there was no actual evidence of partiality. The complainants basically said that they felt that they lost the cases because the judge was biased. This brings to focus the question of whether there is a preliminary assessment within the vetting process intended to do away with frivolous or vexatious complaints. Though a respondent knowledgeable with the goings on within the Vetting Board confirmed that there was such a process, the fact that such frivolous allegations made it to the hearings calls into question the efficacy of this preliminary evaluation process for the complaints. Abdul identified this as a difficulty he had with the vetting process as structured. He had this to say:

The [vetting process] is not well conceived especially where a judge is confronted with raw un-sieved accusations. In my view, one needs a structure that vets the complaints to

³¹²Section 24.

³¹³Interview with Crispine in Nairobi, Kenya (3rd October 2012).

ascertain their integrity before you bring them out to the public or against a particular judge involved. Any accusation against a judge, true or untrue, creates a certain level of public perception [against the judge as relates to the allegation]. That public perception even after a judge is cleared remains with the public.³¹⁴

In making its assessments and determinations, the Vetting Board proceeded on the basis that there was no one-size-fits all formula applicable in all cases.³¹⁵ It has been argued by some respondents that this rendered the process unfair since different standards were applied to different judges. During the vetting process, the Vetting Board considered prior judgments and rulings made by the judges. Though some of the judgments were submitted by the judges themselves, it was unclear how the Vetting Board settled on some of the judgments that were put to the judges and used to declare them unfit. Migei Aketch has noted in this respect:

[T]he Board may be applying the vetting criteria selectively. In all its determinations concerning court of appeal judges, the Board did not evaluate the vetting criteria in their totality. For example, the Board would have treated the judges more fairly had it evaluated all their decisions, but not just ones it deemed problematic or those which were brought to its attention. Instead, its decisions were based on selected decisions of the judges (some of whom had over 40 years experience) and its own perception.³¹⁶ [Emphasis supplied]

It is however difficult for this proposition to be implemented. This is given the number of cases that may require to be reviewed, the number of judges and magistrates being interviewed and the limited timeline that the Vetting Board has to complete its work.

Evidential threshold and assessment of the evidence is a problematic issue not only in this vetting process. This is more so as there is no matrix to be applied to the various attributes being sought. However, it may not be prudent to unduly fetter the discretion of the Vetting Board by

³¹⁴Interview with Abdul in Nairobi, Kenya (6th July 2012).

³¹⁵*Supra n* 88 at 9.

³¹⁶*Supra n* 311.

providing a strict matrix to be applied during the process. Indeed, in South Africa, the constitutional criterion for the selection of judges does not have detailed minimum requirements for competence.³¹⁷ Instead of a detailed criteria or matrix, the South African Constitution provides that a person must be “appropriately qualified” and “a fit and proper person” to be a judge.³¹⁸ This leaves a wide discretion to the persons conducting the interviews and making the nominations to interpret these provisions and create a normative structure to be applied.³¹⁹ According to Susannah Cowen, this has enabled a continuous development and improvement of the various qualities that are required of judges and magistrates for appointment depending of the current circumstances.³²⁰ Like in civil proceedings, the assessment of evidence and probative value thereof is not necessarily scientific.³²¹ It is a judgment call and it may be judging the Vetting Board too harshly to nitpick through their decisions for minute evidential gaps.

4.4.3 Philosophical dilemma

Another difficulty attendant to the question of impartiality is whether a judge or magistrate who has a particular philosophy can be said to be completely impartial. It has been suggested that an impartial judge should determine a case by applying the law to the facts without more. According to John Kang “the insistence that a judge be impartial is fraught with theoretical difficulties.”³²² He notes in this regard that he does not know how a completely impartial judge would look like and what kind of judgments would qualify as impartial.³²³ At a

³¹⁷ Article 174(1) of the Constitution of South Africa.

³¹⁸ *Ibid.*

³¹⁹ *Supra n* 142 at 10.

³²⁰ *Ibid.*

³²¹ See *Ezekiel Ngare Wanjohi v Leba Inyangala and others* Civil Appeal No. 44 of 2002 (Unreported) where the Court of Appeal reiterated that in order for a plaintiff to succeed in a claim, he/she ought to prove the claim against the defendant on a balance of probabilities.

³²² John M. Kang, ‘John Locke’s Political Plan or there is no such thing as Judicial Impartiality (and it’s a good thing too)’ (2004) 29 *Vermont Law Review* 7.

³²³ *Ibid.*

theoretical level, it is possible that a judge can be impartial particularly if his/her role was to be looked at from a positivist perspective.³²⁴ Positivists argue that a judge's role is to merely look at the sources of the law, discern what the law is and what it is not.³²⁵ The judge is then expected to determine the dispute based on what the law is and not what the law ought to be. If that was practically the case, it would be easy to tell that a given judge was partial because the test would simply be whether the decision was influenced by anything else other than the law. In practice however, it is rare that the law is easily discernible or that it fits tidily with the facts.

Theoretically, judges in the civil law jurisdictions may be said to be more impartial than in the common law jurisdictions.³²⁶ In civil law jurisdictions, the role of the judge is simply to apply the Code to the facts in a syllogistic manner.³²⁷ Should the deductive reasoning fail to apply or where there is ambiguity, the judge, guided by the doctrine of separation of powers is theoretically required to refer the matter back to the legislature. To do otherwise would be to violate the principle of separation of powers by venturing into law making.³²⁸

In common law countries, it may be argued that it is difficult for a judge not to be influenced by external factors other than the facts and the law in arriving at decisions. Common law draws from natural law school of thought. From a natural law perspective, when judges are interpreting the law, they are expected to be guided by other values, not necessarily the law, like reason and divine providence.³²⁹ Certain theorists even suppose that there is a criterion for establishing the validity of laws that a judge should apply. Thomas Aquinas, for instance,

³²⁴H.L.A Hart, *The Concept of Law*, 2nd ed., (Calderon Press: Oxford, 1994) pp. 126-129.

³²⁵William Casto, 'The Erie Doctrine and the Structure of Constitutional Revolutions', (1987-1988) 62 *Tulane law Review* 907.

³²⁶ Merryman Henry, *The Civil Law Tradition* (Stanford University Press: Stanford, 1985) at 5.

³²⁷*Ibid.*

³²⁸*Ibid.*

³²⁹Rothbard Murray, 'Natural Law versus Positive Law', (1997) *The Ethics of Liberty* at 17.

maintained that a law that does not accord with reason is a ‘corruption’ of the law.³³⁰ A judge who applies the law with such a mindset, is unlikely be strictly impartial as he [she] will be influenced by other values. Looked at also from a realists perspective, even if a judge is expected to decide cases guided by the law only, they seldom do so. Oliver Wendell Holmes, for instance noted:³³¹

[T]he felt necessities of time, the prevalent moral and political, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with the simple men have more to do than syllogism in determining the rules by which men are to be governed.³³²

Judges in common law jurisdictions do make law as they decide cases. This is more so when the law does not cover the fact pattern before the Court. In so doing, they must of necessity consult other values outside the law.³³³ Cardozo in his *The Nature of the Judicial Process* underscored this fact when he observed that in judicial decision making many people think, wrongly, that the judge is simply to compare the facts at hand and the legal sources.³³⁴ To him, judges are confronted with situations not provided for by the legislature and it is in fact only when they deal with those situations that in fact their judicial roles begin.³³⁵ Lord MacMillan noted in this respect that though the oath of office imposes on judges the duty of impartiality, this duty is difficult to attain.³³⁶ This is because, a judge does not on appointment shed their attributes of common humanity.³³⁷ They have acquired convictions, preferences and prejudices over the years. In fact, Lord MacMillan is of the view that a totally impartial and neutral judge would not

³³⁰ Lloyd of Hampstead Freeman MDA, *Lloyds Introduction to Jurisprudence*, 8th ed., (Sweet & Maxwell: London, 2008) 142-146.

³³¹ *Ibid* at 966.

³³² *Ibid* at 968.

³³³ Graham Mayeda, ‘Uncommonly Common: The Nature of Common Law Judgment’ (2006) 19 (1) *Canadian Journal of Law and Jurisprudence* at 107.

³³⁴ Benjamin Cardozo, *The Nature of the Judicial Process* (1921) available at http://www.constitution.org/crnt/cardozo/jud_proc.html (accessed on 23 August 2012).

³³⁵ *Ibid*.

³³⁶ *Supra* n 6.

³³⁷ *Ibid*.

make a good judge.³³⁸ To him, “warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done.”³³⁹

In conclusion, given the environment under which the judges served and the fact that Kenya is a common law country where judges make law, it is difficult that the judges would be free from any form of external influence.³⁴⁰ Indeed the difficulty in establishing an impartial judge was noted by the Vetting Board. According to the Vetting Board: “in each jurisdiction some judges are liberalist in their interpretation of the law, some are purposive, some are executive minded, some do not favor the executive and that while others are hard on crime and others are soft.”³⁴¹ Judicial philosophy and approach can vary from a judge to another, from country to country and from decision to decision.³⁴²

Even though vetting and interviews appear similar 75 per cent (15 out of 20 interviewees) of the interviewees took the view that the newly appointed judges were impartial. As stated above, the reasons given by a majority of them is not that the newly interviewed judges are impartial because they cannot be influenced but because there are new structures in place because of the new constitution and that as a result of those structures, judges are capable of discharging their mandates impartially. They also mainly believe that they are impartial because the levels of corruption have been reduced.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ See also Brian Leiter, ‘Rethinking Legal Realism: Towards a Naturalized Jurisprudence’ (1997) 76 *Texas Law Review* 267 at 278.

³⁴¹ *Supra* n 88 at 9.

³⁴² *Ibid.*

4.4.4 Change in public perception

80 per cent (16 out of 20 interviewees) of the interviewees supported the vetting process. They were of the view that the vetting process would go a long way in changing the perception about the judiciary about incompetence and partiality. Further, the determinations regarding the Court of Appeal Judges in which four judges were found to be unsuitable was a clear indication that the vetting process was effective.³⁴³ 60 per cent (12 out of 20 interviewees) of the interviewees were of the view that public hearings of the interviews would have made the vetting process more effective in changing the public perception about the judiciary. Anderson for instance, was of the view that the vetting proceedings should be held in full view of the public to allow the public to participate in the process. Anderson justified this position on the premise that the judiciary is a public institution using public resources. Its reform should therefore be done in public.³⁴⁴ David was of a similar persuasion. He said that the hearings should be held in public “since the office of judge is public and they usually administer justice in public, vetting should be in public.”³⁴⁵ It could be argued in this respect that since the judges and magistrates are paid from the public purse to discharge a public function, their vetting should be conducted in public. Asked whether the vetting should be conducted in public, Wesonga replied:

I think all of the hearings should be conducted in private. This is not a circus to entertain bored Kenyans! It is a serious process affecting peoples’ lives.³⁴⁶

Crispine was also in favour of private hearings.³⁴⁷ Crispine, who attended the interviews, was of the view that until the vetting process deals with procedural lapses which affect the right

³⁴³ *Ibid.* Omolo, Borise, Okubasu and Nyamu JJA were found to be unsuitable to continue serving as judges of the Court of Appeal. Mr. Justice Nyamu has since instituted proceedings before the High Court challenging the proceedings by the Vetting Board.

³⁴⁴ *Supra* note 298.

³⁴⁵ *Supra* note 201.

³⁴⁶ *Supra* note 202.

to a fair hearing, it may be unwise to have automatic public hearings given the impact that they may have on the reputation of affected persons. For instance, there are cases in which complaints are brought to the judge's attention for the first time during the interview. Further, he was of the view that some of the complaints are so patently frivolous that if only the Vetting Board reviewed the complaints vis-à-vis the responses by the judges before they are brought to the interview, they should be able to summarily reject some of the complaints. This will enable only prima facie legitimate complaints to be heard by the Vetting Board. Without this sieving safeguard, Crispine argued, public hearings would have an undue negative impact on the reputation of the judges and magistrates who may eventually found suitable to serve which may affect the public confidence in them.

4.5 Conclusions

The first part of this chapter discussed the concept of judicial independence. Judicial independence has two facets: institutional and individual independence. Institutional independence is concerned with institutional and systemic structures intended to make the judiciary independent as an institution from other arms of government. Institutional independence requires the judiciary to have a budget that is prepared by the judiciary and charged directly on the Consolidated Fund. The executive has no right to veto the judiciary budgetary vote. This enables the judiciary to function independent of the executive to implement its policies. Other aspects of institutional independence include constitutional provision for the security of tenure of judges and proper remuneration of judges and magistrates. Individual independence requires judges and magistrates to be impartial in arriving at their decisions by

³⁴⁷ Interview with Crispine in Nairobi, Kenya (3rd October 2012).

applying the law to the facts. Personal prejudices or external influences should not inform decisions arrived at by the judges or magistrates.

The second part of this chapter dealt with the question of professional competence of judges and magistrates. It was noted that professional competence is a wider concept compared to the minimum qualifications for judges and magistrates. A professionally competent judge or magistrates is fit to sit as such. This requires intelligence, legal judgment, diligence, substantive and procedural knowledge of the law, organizational and administrative skills and the ability to work well with a variety of people. It is all encompassing.

The third part of this chapter looked at the vetting process in action to assess whether it would deal with the questions of lack of independence and incompetence in the judiciary. Some of the challenges discerned were the impact of historical institutional deficiencies that characterized most of the previous constitutional dispensation. This is in light of the fact that a large part of the previous constitutional dispensation was under an autocratic regime with laws to match. Would it be fair to judge the judges and magistrates for their actions at a time when the institutional framework allowed for executive and other external interference in judicial work? Further, evidential threshold problems were identified on how to determine the evidence to look at in making these assessments and how much information should be looked at to make the determination. The question of whether judges and magistrates should have a philosophy and its impact on impartiality was also identified as a challenge to the vetting process. Can a judge or magistrate who has a philosophy that is pro executive be said to be truly impartial? Finally, it was seen that from the interviews conducted, it was apparent that the vetting process would largely change the public perception about the judiciary.

The next and final chapter will wrap up this study with conclusions and recommendations.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Judicial transformation in Kenya was inevitable. The persistent calls for institutionalization of the rule of law in the past two decades ushered in a new constitutional order through the Constitution of Kenya 2010. The pre-2010 judiciary had lost the public confidence as an independent and competent arbiter of disputes.³⁴⁸ This lack of confidence in the judiciary largely contributed to the post election violence in period between December 2007 and April 2008.³⁴⁹ The ODM party declined to take their electoral dispute to Court for resolution citing the appointment of pliant judges by the PNU government.³⁵⁰

The passage of the new Constitution of Kenya 2010 heralded a paradigm shift in the judicial institutional framework, amongst others. The process of appointment of judges and magistrates was made public, competitive and objective.³⁵¹ The independence of the judiciary (both institutional and individual) was entrenched in the Constitution.³⁵² The vetting process got underway as prescribed in the Constitution.

In a recent Gallup survey titled *Kenya Votes 2013: Attitudes Towards the Election, Judicial System and Security*, it was found that 67 percent of Kenyans had confidence in the

³⁴⁸ *Supra* n 163 and 165.

³⁴⁹ *Supra* n 8.

³⁵⁰ *Ibid.*

³⁵¹ Article 166 of the Constitution of Kenya.

³⁵² *Supra* n 260-261.

judiciary and the judicial system.³⁵³ The judiciary was ranked second, after the military, as the public institution in which Kenyans had the highest confidence in.³⁵⁴ This is looked at against a public confidence level of 27 per cent in April of 2009.³⁵⁵ The questions this research sought to answer were whether vetting would address the maladies of corruption, independence and incompetent that dogged the pre-2010 judiciary. It also sought to find out whether the process would change the perception of the public on the judiciary. The major findings of this research were as follows.

5.2 Conclusions and Recommendations

5.2.1 Vetting will not, on its own, transform the judiciary

As forecast in the hypothesis of in this study, research has shown that, on its own, the vetting process is unlikely to achieve the aspiration of having an independent, competent and corruption free judiciary. However, vetting is will go a long way towards ensuring that the said aspirations are attained.³⁵⁶ 80 per cent (16 out of 20 interviewees) of the interviewees supported the vetting process. They were of the view that the vetting process would go a long way in changing the perception about the judiciary about incompetence and partiality. Failure on the part of the judiciary was not on the part of judges and magistrates only. Members of the public deal mostly with other players in the justice system. The other players in the judiciary whose role cannot be ignored are the executive officers, court clerks and secretaries to the judges and

³⁵³ Bob Tortora, *Kenya Votes 2013: Attitudes Towards the Election, Judicial System and Security*, Gallup, Survey conducted between 26th July and 17th August 2012, available at www.gallup.com/file/poll/157898/Gallup_Kenya_Presentation_5thOct.pdf. (accessed on 21st October 2012).

³⁵⁴ *Ibid.*

³⁵⁵ *Supra* n 30, 163 and 165.

³⁵⁶ S. R. Ackerman 'Judicial Independence and Corruption' in *Comparative Analysis of Judicial Corruption*, Yale University School of Law, Connecticut, at pages 18-20. She writes in order to rid the Judiciary off corruption; we must overhaul the Judges, Court Organization and staffing, legal framework and legal profession.

magistrates and those who do general typing of proceedings.³⁵⁷ Some of the allegations against the judiciary as established by the earlier Committees such as disappearance of files, doctoring of court records, alteration of judgments, to mention but a few, were perpetrated by these subordinate members of staff.³⁵⁸ There are also other players in the justice system whose role is very critical. These are the police, the staff at the Attorney General's office, and the Director of Public Prosecution's officers.³⁵⁹

For a wholesome institutional transformation of the judiciary, these other players in the judiciary will need to be vetted in one way or another. While it is conceded that this will be a challenging undertaking given the number of employees in question, it is imperative that processes be put in place to reappraise the competence, performance levels and integrity of the executive officers, court clerks and secretaries to judges and magistrates. Further, hiring of new officers in these cadres should be through objective, open and competitive processes.

Further, earlier attempts at reforming the judiciary attributed some of the maladies that characterized the judiciary to the institutional weaknesses of the judiciary.³⁶⁰ Corruption was attributed to poor remuneration, appointment and promotion policy, deployment policies and the environment that encouraged corrupt practices.³⁶¹ On the other hand, incompetence was attributed to poor appointment criterion.³⁶² The current institutional changes that are underway in the judiciary will go a long way towards bridging the gap that may be left by the vetting process

³⁵⁷ See Section 20 of the Act which provides the order of the vetting starting from the Court of Appeal Judges, High Court Judges, Registrar of the High Court, Chief Court Administrators, Chief Magistrates and other magistrates.; It therefore sidelines these other staff from the vetting process.

³⁵⁸ *Supra* n 16.

³⁵⁹ Nation Reporter 'Corrupt magistrates will be fired, says CJ' Saturday Nation (Nairobi 9 July 2011) 8. Where the CJ warned magistrates who collude with the police prosecutors to charge excessive fees for traffic offences will be sacked, this was after numerous complaints by the Matatu Owners Association.

³⁶⁰ *Supra* n 16.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

in achieving the transformation of the judiciary.³⁶³ This calls for the full implementation of the Constitution. This will enable other institutional changes to feed into and augment the process of transformation of the judiciary. For instance, the reform and revamping of institutions intended to deal with corruption, will go a long way in dealing with societal corruption. the trickle effect will be to reduce the incidence of corruption in the judiciary.

5.2.2 Vetting will largely change the perception about the judiciary

One of the questions that the objectives of this study sought to answer was: whether the vetting of judges and magistrates change the public perception about their being largely corrupt, lacking in independence and being incompetent? As this study has shown in chapters 3 and 4, the perception about the judiciary will largely be changed positively. However, given the structure of the vetting process where the default position is that the hearings are conducted in private, this will largely reduce the impact that the vetting process will have in changing the public perception about the judiciary. 60 per cent (12 out of 20 interviewees) of the interviewees were of the view that public hearings of the interviews would have made the vetting process more effective in changing the public perception about the judiciary.

It is recommended that since the main purpose of the vetting process is to change the public perception about the judiciary and restoring confidence in it, the hearings should have been conducted in public. Appropriate safeguards should be put in place to ensure that only legitimate complaints are put to the judges for them to respond. Complaints sieving mechanism is recommended to ensure that frivolous and unsubstantiated complaints do not make it to the hearings. This will ensure that judges and magistrates reputations are not unduly tarnished based

³⁶³ Willy Mutunga, 'State of the Judiciary Report 2011-2012', 19th October 2012 (available at www.standardmedia.co.ke/?articleID=2000068789&pageNo=1&story_title.State-of-the-Judiciary-Report), accessed on 21st October 2012.

on frivolous and unfounded allegations. Further, to avoid ‘ambushing’ the judges with fresh complaints during the hearings, all complaints that will be put to the judges should be notified to them in advance and responses received.

At the time of handing in this thesis, the High Court rendered a decision that asserted its jurisdiction to review the decisions by the Vetting Board.³⁶⁴ The decision stopped the President from de-gazetting the names of the judges who had been found unsuitable to continue serving by the Vetting Board. The High Court construed strictly the ouster clause in Schedule 6, Section 23 of the constitution to allow it residual jurisdiction to review the legality of the decisions of the Vetting Board including whether the processes followed in that regard met constitutional standards of human rights. This decision may have an impact in the perception of the public about the judiciary. This is given that in some instances in the Kenyan judicial history when the judiciary has dealt with matters involving prominent personalities, the courts have tended to favour them.³⁶⁵ It is hoped that this will not be the case given the new constitutional dispensation.

5.2.3 The Vetting Process and Corruption

As was evident in chapter 3 in this study, evidence of corruption was not forthcoming to the Vetting Board. Further, in the cases where some evidence was provided, it was either not of probative value or it did not meet the evidential threshold. As noted by the Vetting Board, it given the nature of corruption, the persons who may be privy to the evidence of corruption are unlikely to lodge a complaint as they may well be implicated in the corruption.³⁶⁶ Consequently, as at the time of finalizing this thesis, no valid complaint alleging corruption against the judges

³⁶⁴ *Supra* n 128.

³⁶⁵ *Supra* n 304.

³⁶⁶ *Supra* n 182.

and magistrates had been presented during a hearing before the Vetting Board. No judge had been implicated in corrupt practices. This is despite the fact that corruption is one of the main complaints that the judges and magistrates have been accused of.³⁶⁷

To ensure that persons privy to credible evidence about corruption can come out and present it to the Vetting Board without a fear of self incrimination, it is recommended that an amnesty be legislated in the *Act*. As such, persons with credible evidence of corruption of a judge or magistrate would be entitled to an amnesty in the event that they are implicated in the corruption. This may be subject to an obligation that they testify and provide such proof as may be required in the circumstances. This will ensure that the judge or magistrate implicated in the corruption is identified and dealt with accordingly. In so doing, the amnesty will achieve a greater public good in not having a corrupt judge or magistrate continuing to serve at the lesser cost of letting the implicated ‘whistle blower’ avoid prosecution.

Further, as noted in chapter 3 of this thesis, corruption has always been with all societies since the biblical times.³⁶⁸ It cannot be eliminated in any society.³⁶⁹ It may only be minimized. As pointed out, scholars have hypothesized that corruption is timeless, it exists in every society.³⁷⁰ It follows therefore that the vetting process cannot be expected to completely do away with corrupt practices by judicial officers. The vetting process may instill fear into judicial officers from engaging in corrupt practices.

Further, as this study confirmed (see chapter 3), corruption in the judiciary was more of a perception than an actual fact. The perception arose out of certain facts or circumstances such as

³⁶⁷ *Supra* n 147.

³⁶⁸ *Supra* n 159 and 169.

³⁶⁹ *Ibid.*

³⁷⁰ *Supra* n 167.

disappearance of files, delay in judgments or typing of proceedings for purposes of appeal. The current institutional changes at increasing the number of judges and magistrates, employing researches for the judges, digitalizing the proceedings will go a long way in dealing with the causes of this perception of corruption.³⁷¹

5.2.4 Vetting is not entirely objective

Vetting, lustration and purges are options that are used to transform institutions in societies in transition. It was noted in the second chapter of this study the major distinction between vetting on the one hand and lustration and purges on the other, is that vetting is an objective process. Unlike lustration and purges where everyone associated with or who worked under the former systems are declared unfit until they prove otherwise: vetting allows the office holders to retain their officers and all the trappings thereof until the vetting body establishes that they are unsuitable to continue serving.³⁷² A criterion is set out in the vetting legislation stating an apparently objective process to determine suitability to continue to serve. However, as noted in chapter 3 above, some of the considerations set out in the *Act* are difficult to ascertain. For instance, it is difficult to fathom how the Vetting Board would determine that a judge had a “history of courtesy and civility in dealing with others, demonstrable compassion and humility, demonstrable consistent history of honesty and high moral character in professional and personal life.”³⁷³ The considerations set out in the *Act* are quite a number. It is further problematic whether it is possible for a single individual to possess all those attributes. It was noted that in the Determinations on the Court of Appeal judges, the Vetting Board did not make reference to all the considerations set out in the *Act*. This is despite the fact that the *Act* does not set out an

³⁷¹ See *Supra* n 345.

³⁷² *Supra* n 74.

³⁷³ Section 18 of the *Act*.

evaluation matrix to be applied. How does the Vetting Board decide which consideration is of higher importance than the other is the Act does not stipulate this? This inevitably leads to subjectivity to creep into the process.

As this study has revealed, in practice, it is not possible for a judge to possess all these attributes. Lord Denning and Justice Ben Cardozo are salient examples. They are acclaimed to have been one of the best judicial minds this world has ever had.³⁷⁴ Both of them contributed immensely to the development of common law.³⁷⁵ However, their personal lives left much to be desired as to whether any of them would be found suitable if vetted under the *Act*. Possibly they would not.

Consequently, it is recommended that rather than have a detailed set of attributes that the Vetting Board is to look at to determine suitability, when in actual fact it does not: suitability should be based on general criteria such as “appropriately qualified” and “a fit and proper person” as stipulated in the South African Constitution.³⁷⁶ It is thereafter for the Vetting Board to determine the actual parameters including any evaluation matrix to be applied. The Act should not set out unattainable attributes. It should not be a search for an ideal candidate, as this may prove impossible to accomplish. It ought to be a search for the best and appropriately qualified candidates. As it stands today, the *Act* sets out a set of considerations which are not all looked at when vetting the candidates. There is therefore a big gap between the stipulations in the *Act* and the practice. This is undesirable and could lead to challenges to or critiques of the process.

³⁷⁴ See *Supra* n 129 and 131.

³⁷⁵ *Ibid.*

³⁷⁶ *Supra* n 299.

5.2.5 A Drawn Out Vetting Process Undermines Judicial Independence

As opposed to lustration and purges, judges and magistrates in a vetting process are presumed suitable to continue serving until evidence to the contrary is established to the required threshold. The judges and magistrates retain all their powers and privileges during the vetting process until they are declared unsuitable to continue serving. As noted by Crispine, during the period when he was waiting to be vetted, he experienced great anxiety and mental stress. He was unable to concentrate on his work. Crispine stated that this was the same with other judges. The continued delay of this process due to court orders and other institutional delays greatly put the judges and magistrates under undue pressures. Though the initial vetting process was intended to be conducted for a period of 1 year, this has not been the case.³⁷⁷ This inevitably interferes with their independence.³⁷⁸ It is therefore important that a process of vetting be structured in such a manner that once it commences, it should be concluded speedily.

5.2.6 Focus on other players in the judicial system

Judges and magistrates are only a part of the justice system. Though judges and magistrates are a critical component of the justice system, advocates are a critical component of the system. Their conduct plays a big role in ensuring the speedy and just (or unjust) determination of disputes. Their failure to act speedily or in a legal manner would of course have the opposite effect. This will have a trickledown effect on the perception of the judicial system. Consequently, the transformation of the judicial system would be incomplete if the legal sector is also not transformed to accord to the values and principles entrenched under Chapter 10 of the Constitution. Though advocates run private practices, and are therefore not part of the public

³⁷⁷ Section 23 of the Act.

³⁷⁸ *Supra* n 239.

bodies that are to be transformed under the Constitution, the fact that they discharge duties to the public and as officers of the Court, the manner in which they do their work should inspire public confidence.

It is recommended that the professional bodies that are in place to discipline advocates should be more revamped. It has been noted that the Advocates Disciplinary Committee and the Advocates Complaints Commission are understaffed, underfunded and have a big backlog of cases.³⁷⁹ These bodies need to be better financed and staffed. Institutional changes should be effected to bring about a capacity to deal with the back log of complaints pending before them. This will go a long way in changing the negative perception about the judiciary.

³⁷⁹ *Supra* n 30.

BIBLIOGRAPHY

A. BOOKS

- 1 A. Laibuta, 'Constitutional and Institutional Reform: What Role in Addressing Impunity.' in *Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates*. (ICJ: Nairobi, 2009).
- 2 Alexander Mayer-Rieckh and Pablo De Greiff, (eds), *Justice as Prevention Vetting Public Employees in Transitional Societies* (International Center for Transitional Justice: New York, 2008).
- 3 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed, (Oxford: London, 1914).
- 4 Banfield Edward, *The Moral Basis of a Backward Society* (New York Free Press: New York, 1958).
- 5 Bryan Garner, ed, *Blacks Dictionary of Law*, 8thed, (West Publishing Co: Minnesota, 2007).
- 6 Christopher Hill, *The English Revolution 1640* [(1940) (trans.) 2002: Andy Bluden).
- 7 Dennis Lloyd, D., (ed) *The Idea of Law*, (Penguin Books: London, 1973) at 256.
- 8 Dutchie Roger, 'Introduction' in Alexander Mayer-Rieckh and Pablo De Greiff, (ed), *Justice as Prevention Vetting Public Employees in Transitional Societies* (International Center for Transitional Justice: 2006).
- 9 Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence*, 8th Edition, (Sweet and Maxwell: London, 2008).
- 10 Gadiner John, *The Politics of Corruption* (Russell Sage Foundations: New York, 1970) at 93.

- 11 H.L.A Hart, *The Concept of Law*, 2nd ed., (Clarendon Press: Oxford, 1994).
- 12 Huntington, S., *The Third Wave of Democratization in the Late Twentieth Century*, 1991, University of Oklahoma Press, Oklahoma.
- 13 Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa: Johannesburg, 2011)
- 14 Kautilya Visnugupta, *The Arthashastra* (Penguin Books: New Delhi, 1991) at 281.
- 15 Koudheka, et al, (1993) *Soudnipezkeucepolickepovay vs. Ceskoslovensku 1948-1989: Statistickeudaje* (Judicial Prosecution of a Political Character in Czechoslovakia) Statistics Overview.
- 16 Lewis, T. Charleton, et al *A Latin Dictionary* (Clarendon Press: London, 1879).
- 17 MacMullean Ramsay, *Corruption and the Decline of Rome* (University Press: New Haven, 1998) at 28.
- 18 Merryman Henry, *The Civil Law Tradition* (Stanford University Press: Stanford, 1985) at 5.
- 19 Neild Robert, *Public Corruption: The Dark side of Social Evaluation* (Anthen: London, 2002) at 1.
- 20 Teitel Ruti, *Transitional Justice* (Oxford University Press: London, 2000).

B. JOURNAL ARTICLES

- 1 Archibad Cox, 'The Independence of the Judiciary: History and Purposes' (1995-1996) 21 (3) *University of Dayton Law Review* 569-574.
- 2 Brian Leiter, 'Rethinking Legal Realism: Towards a Naturalized Jurisprudence' (1997) 76 *Texas Law Review* 267.
- 3 Clifford Wallace, 'An Essay on Independence of the Judiciary: Independence from What and Why', (2001) 58 *NYU Annual Survey of American Law* 241 at 243.
- 4 David Roman, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in Czech Republic and Poland' (1989-2001) *Law and Social Inquiry* 392.
- 5 Deanell Tacha, 'Independence of the Judiciary for the Third Countries' (1994-1995) 46 *Mercer Law Review* 645.
- 6 Domino Michael, 'The Worst Way of Selecting Judges-Except all the Others That Have Ever Been Tried' (2005) 32 (2) *Northern Kentucky Law Review* at 268.
- 7 Graham Mayeda, 'Uncommonly Common: The Nature of Common Law Judgment' (2006) 19 (1) *Canadian Journal of Law and Jurisprudence* at 107.
- 8 Gregory L. Naarden, 'Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnia Police Officials', (2003) 97 *American Journal of International Law* 97.
- 9 Inga Markovits, 'Children of a Lesser God: GDR Lawyers in Post-Socialists Germany', (2006) 94 (7) *Michigan Law Review* 2271.
- 10 Inga Markovits, "Children of a Lesser God: GDR Lawyers in Post-Socialist Germany", *Michigan Law Review*, Vol 94, No. 7 (June, 1996) pp. 2270-2308 at 2271.

- 11 John M. Kang, 'John Locke's Political Plan or there is no such thing as Judicial Impartiality (and it's a good thing too)' (2004) 29 *Vermont Law Review* 7.
- 12 Kommers, D.P., 'Transitional Justice in Eastern Germany', *Law and Social Inquiry*, Vol. 22.
- 13 Larkins, C.M., 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law*, 1996 Vol. 44 at page 605.
- 14 McMullan, M., 'A Theory of Corruption' (1961) 9 (2) *Sociological Review* 181-201 at 183.
- 15 Nye Joseph 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417.
- 16 Pamela Karlan, 'Two Concepts of Judicial Independence', (1999) 72 *Southern California Law Review* 535.
- 17 Roman David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland' (2989-2001) 28 (2) *Law & Social Inquiry* 387.
- 18 Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1996) 75 (6) *Yale University Law Journal* 986.
- 19 Rothbard Murray, 'Natural Law versus Positive Law', (1997) *The Ethics of Liberty* at 17.
- 20 Ruti G. Teitel, 'Transitional Justice Genealogy' (2005) 38 *Cornell International Law Journal* 832.
- 21 S. R. Ackerman 'Judicial Independence and Corruption' in *Comparative Analysis of Judicial Corruption*, Yale University School of Law, Connecticut.

- 22 Stribopoulos, J. and Yahya, M.A., 'Does a Judge's Party of Appointment or Gender Matter to Case outcomes? An Empirical Study of the Court of Appeal for Ontario', *Osgoode Hall Law Journal*, 2007 Vol. 45, No. 2.
- 23 William Casto, 'The Erie Doctrine and the Structure of Constitutional Revolutions', (1987-1988) 62 *Tulane law Review* 907.

C. REPORTS

- 1 *Dissenting Report on the Determination Concerning Honourable Justice Alnashir Vishram, Judge of the Court of Appeal* delivered on 25th April 2012.
- 2 *International Commission of Jurists, Kenya: Judicial Independence, Corruption and Reforms Report* (2005) (On file with the author).
- 3 *Jury Service (Consultation Paper)* (LRC CRC CP 61-2010) 2010 IELRC 61.
- 4 *Mbithi Committee Report* 1991.
- 5 *National Assembly Official Record (Hansard)* 24 July 2007, Question No. 232, Cancellation of Judges' Swearing in Ceremony.
- 6 *Report of Judges and Magistrates Vetting Board on Determinations Concerning Judges of the Court of Appeal* delivered on 25th April 2012.
- 7 *Report of the Committee on Ethics and Governance of the Judiciary in October 2008* (The Kariuki Report).
- 8 *Report of the Committee on the Administration of Justice*, 1998 (The Kwach Report).
- 9 *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary Committee*, 1991-1992 (The Kotut Report).
- 10 *Report of the Independent Review Commission on the General elections held in Kenya on 27 December 2007* ('Kriegler Commission Report').
- 11 *Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya* (Vol. 1) (The Ringera Report), September 2003.
- 12 *Report of the Integrity and Anti-Corruption Committee of the Judiciary*, 2003.
- 13 *Report of the Sub-Committee on the Ethics and Governance of the Judiciary*, January 2006 (The Otieno Report).

- 14 *Task Force on Judicial Reforms Report 2010* (The Ouko Report).
- 15 *Transparency International Report on 'Radical Surgery in Kenya's Judiciary.'* in *Global corruption: Corruption in judicial systems.* (Cambridge University Press: Cambridge 2007), 221.
- 16 *Transparency International, Corruption and Perceptions Index 2011 Report.*
- 17 *Waruhiu Committee Report 1979/1980.*

D. REFERENCE MATERIALS

- 1 Lewis, T. Charleton, et al *A Latin Dictionary* (Clanderon Press: London, 1879).
- 2 *Macmillan English Dictionary For Advanced Learners*, 2nd ed, (Macmillan Publishers: Oxford, 2007) at 297.

E. NEWSPAPER ARTICLES

- 1 Migai Aketch, 'Is Vetting Process Really Fair to Judges?', *The Star*, June 25, 2012 at 28.

F. OTHER SOURCES (ON FILE WITH AUTHOR)

- 1 L. Kambuni, 'Judicial reforms at crossroads.' in *The dawn of a new political era: Consolidating Kenya's democratic gains* (Law Society of Kenya: Nairobi 2004) 63.
- 2 Munabi O'kubasu, *Transitional Justice in Kenya: The Role of the Youths for Sustainable Peace*, (2010) Presented at the Indiana University-Moi University 2010 International Symposium on Peace.

- 3 Ochich, G. 'The Changing Paradigm of Human Rights Litigation in East Africa.' Reinforcing judicial and legal institutions: Legal institutions. Nairobi: International Commission of Jurists Publication, 2007 (5): 29.
- 4 P. Kichana, 'The administration of justice in Kenya.' A Paper presented at the Symposium on the Administration of Justice in the Southern African Development Community, Crowne Plaza Hotel, Harare, 9– 10 September 2004.
- 5 Susannah Cowen, *Judicial Selection: What Qualities Do We Expect In A South African Judge?* (Democratic Governance and Rights Unit Press: University of Capetown, 2010).
- 6 The Agreement on the Principles of Partnership of the Coalition Government, signed on 28th February 2008.
- 7 Thongori, J. 'The Gender Aspects of Corruption.' in *Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform*, (Law Africa Publishers (K) Ltd: Nairobi, 2007).
- 8 Violaine Autheman, *Global Best Practices: Judicial Integrity Standards and Consensus Principles*, (IFES Publishers: Geneva, 2004).

G. INTERNET SOURCES

1. Transparency International's *Global Corruption Barometer 2010*, the judicial system is perceived by households to be one of the most corrupt institutions in Kenya, ranked joint second behind the police in the survey. See J. Riaño, F. Heinrich and R. Hodess, *Global Corruption Barometer 2010*, Transparency International, 2010. Accessed at <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/kenya/corruption-levels/judicial-system/>.
2. Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (Vol. 1) (The Ringera Report), September 2003 submitted to the Hon. Mr. Justice Johnson Evans Gicheru. Available at http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf.
3. Juliet Lapidos, Vetting Vet, verb. Translation., available at http://www.slate.com/articles/news_politics/explainer/2008/09/vetting.html/ (accessed on 24 March 2012).
4. Robert M, Murrel, *Audit Report of the Special Inspector General IRAQ Reconstruction*. Available at <http://www.dtic.mil/cgi-bin/GetTRDoc53455> (accessed 24 March 2012).
5. Jose Miguel Fabbri, *Corruption in Bolivia: Reforming the Judicial System*, available at <http://www.cipe.org>.
6. Makau Mutua, 'Transitional justice and Gender based Violence' (2008) *Buffalo Legal Research Papers* available at <http://www.ssrn.co.abstract=1162240> (accessed 26 March 2012).
7. Ahmednasir Abdullahi, 'Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission's agenda for

- reform, available at <http://www.kenyalaw.org/klr/index.php?id=894> (accessed 27 February 2012).
8. Progress Report on the Transformation of the Judiciary the First Hundred and Twenty Days, 19th October 2011, the Chief Justice. available at <http://www.kenyalaw.org/kenyalawBlog/?p=227> (accessed 24 March 2012).
 9. Philip Ochieng, Kenya: 'Passion' Cannot be Certified, hence our Dilemma, Daily Nation on the Web, available <http://www.allafrica.com/stories/201112270241.htm> (accessed 27 march 2012).
 10. Willy Mutunga, *Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days*, 19th October 2011, available at <http://www.kenyalaw.org/kenyaLawBlog/?p=227> (accessed on 10th June 2012).
 11. United Nations Development Programme, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, 2006, available at <http://www.ictj.org/publication/vetting-public-employees-post-conflict-settings-operational-guidelines> (accessed 10th June 2012).
 12. Kaufmann, Daniel and Vicente, Pedro C., *Legal Corruption*, available at <http://ssrn.com/abstract=829844> (accessed 25th May 2012).
 13. Chief Justice's remarks made at the Law Society of Kenya Luncheon, Hilton Hotel, Nairobi, 26th April 2012, available at <http://www.kenyalaw.org/Forum/?p=441> (accessed on 9th July 2012).
 14. International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya*, February 2010, at 70, available at:

- <http://www.scribd.com/doc/26989486/Kenya-Judicial-Reform-2010-%C2%A6-Restoring-integrity-An-assessment-of-the-needs-of-the-justice-system-in-the-Republic-of-Kenya> (accessed on 9th July 2012).
15. Advocates (Disciplinary Committee) Rules.
- http://www.attorneygeneral.go.ke/index.php?option=com_content&task=blogcategory&id=24&Itemid=53 and <http://www.lsk.or.ke/index.php/our-organisational-structure/131> (accessed on 11th July 2012).
16. Declan Morgan, 'Judicial Independence in the Twenty-First Century', a speech delivered at the Attorney General's Conference on Judicial Independence, Inn of Court, Royal Courts of Justice, Belfast, 24th June 2011, available at http://www.attorneygeneralni.gov.uk/lord_chief_justice_speech_pdf_115kb_.pdf (accessed on 10th August 2012).
17. Jeremy Pope, *Transparency International Source Book 2000 - Confronting Corruption: the Elements of a National Integrity System*, Transparency International, available at <http://archive.transparency.org/publications/publications/sourcebook2000> (accessed on 12th September 2012).
18. *The Bangalore Draft Code of Judicial Conduct 2001*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, available At http://www.unodc.org/pdf/corruption/bangalore_e.pdf (accessed on 10th September 2012).
19. Henry Omusundi, 'Secure from Public Scrutiny? A Critical Analysis of Security of Tenure in Kenya', *Adili*, available at

http://www.tkenya.org/index.php?option=com_docman&task=doc_download&gid=26&Itemid=146 (accessed on 1st October 2012).

20. Benjamin Cardozo, The Nature of the Judicial Process (1921) available at http://www.constitution.org/crnt/cardozo/jud_proc.html (accessed on 23 August 2012).

APPENDIX 1

SCHEDULE OF INTERVIEWS

INTERVIEW PARTICIPANT NO.	PSEUDONYM	SEX	PLACE OF INTERVIEW	OCCUPATION OF THE PARTICIPANT	DATE OF THE INTERVIEW
1.	Andrew	Male	Busia	Peasant	28 th June 2012
2.	Paul	Male	Busia	Secondary School Teacher	27 th September 2012
3.	Angela	Female	Mombasa	Student	3 rd July 2012
4.	Patrick	Male	(Uasin Gishu) Eldoret	Wheat Farmer	28 th July 2012
5.	Wesonga	Male	(Uasin Gishu) Eldoret	Advocate/Lecturer in Law	31 st May 2012
6.	Cyril	Male	Nakuru	Student	20 th August 2012
7.	Mary	Female	Nairobi	Legal Officer	22 nd June 2012
8.	Sheila	Female	Nairobi	Lawyer /Student	22 nd June 2012
9.	Anderson	Male	Bondo	Claims officer	23 rd June 2012
10.	Muiruri	Male	Nakuru	Businessman	24 th June 2012
11.	Rono	Male	Nairobi	Self Employed	25 th June 2012
12.	Gabriel	Male	Nakuru	College Instructor	24 th June 2012
13.	Tom	Male	Nakuru	Laboratory Technologist	24 th June 2012
14.	Wanjiku	Female	Nairobi	IT Officer	26 th June 2012
15.	Moses	Male	Uasin Gishu (Eldoret)	Businessman	28 th July 2012
16.	Abdul	Male	Nairobi	Advocate	6 th July 2012
17.	Ahmed	Male	Nairobi	Advocate	11 th July 2012
18.	Patricia	Female	Nairobi	Primary School Teacher	29 th July 2012
19.	David	Male	Nairobi	Lawyer /Lecturer	3 rd August 2012
20.	Crispine	Male	Nairobi	Judge	3 rd October /12

APPENDIX 2

QUESTIONNAIRE BACKGROUND

Study Title: The Vetting of Judicial Officers in Institutional Transformation: Lessons from Kenya

Researcher: Geoffrey Silas Imende, LL.M Candidate, University of Nairobi

Supervisor: Dr. Edwin Abuya

Introduction

Good day Sir/Madam,

Thank you for accepting to participate in this interview. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. As indicated above, my topic of study is “The Vetting of Judicial Officers in Institutional Transformation: Lessons from Kenya”.

This questionnaire is administered as part of a study on the efficacy of the vetting processes stipulated under the Vetting of Judges and Magistrates Act, 2011 in the transformation of the Kenyan Judiciary. The study is intended to assess the problems that have dogged the Kenyan judiciary since independence, learn from the deficiencies of the solutions proposed in the past to reform the Judiciary and finally review the process of vetting as stipulated in the Vetting of Judges and Magistrates Act, 2011 to determine whether the objectives in the Act will be achieved.

As a participant in this interview, please note the following:

- Your participation is entirely voluntary. You may at any time withdraw from the interview;
- The interview is intended to take approximately 1 hour;
- In the event that any question administered during the interview is not clear, feel free to ask for clarification;
- Your responses will be recorded on the questionnaire; and
- Your identity as a participant in this interview will be protected by an identifying number known only to the researcher. You will not be named in any study reports, presentations or publications.
- Do you agree to participate in this study?

Yes: _____

No: _____

Please sign below confirming your decision:

Signature: _____

(Accept/Decline)

QUESTIONNAIRE

SECTION 1: BACKGROUND INFORMATION

Name _____

(Name to remain confidential if provided)

Age: _____ Sex: (Male/Female)

Occupation _____ Date of employment/engagement _____

Date of interview: _____

Time of interview: Start _____ End _____

Language of interview, if not English _____

SECTION 2: GENERAL QUESTIONS ON THE JUDICIARY

1. What in your view is the role of the judiciary in any country?
2. What in your view should be in place in order for any judiciary to discharge its mandate?

SECTION 2: PERCEPTIONS ON THE KENYAN JUDICIARY

1. Before the promulgation of the Constitution of Kenya 2010;
 - a. Do you think the judges and magistrates were competent to do the work for which they were appointed? Why?
 - b. Do you think that there was corruption in the judiciary? Why?
 - c. Were judges and magistrates impartial in the discharge of their duties? Why?
2. Since the passage of the Constitution of Kenya 2010;

- a. Do you think the newly appointed judges and magistrates are competent?
Why?
 - b. Do you think that there is corruption in the judiciary? Why?
 - c. Are the judges and magistrates impartial in the discharge of their duties?
Why?
3. Comparing the time before and after the passage of the Constitution of Kenya 2010, in which period would you say that corruption was more pervasive? Why?
 4. What challenges in your view face the judiciary today?
 5. What proposals would you make towards addressing these challenges?

SECTION 3: EFFORTS AT REFORMING THE JUDICIARY

1. Are you aware of any previous efforts at reforming the judiciary? Please explain.
2. What was your understanding of the purpose of the efforts you have identified?
3. Were these efforts effective in realizing their goal? Please expound.

SECTION 3: TOWARDS ADDRESSING INCOMPETENCE, CORRUPTION AND PARTIALITY IN THE JUDICIARY

1. Are you aware of the proposed vetting of judges and magistrates?
2. Do you support the process of vetting all the sitting judges and magistrates? Why?
3. What attributes do you believe are necessary to make a good judge?
4. Do you think that these qualities would be easily discernible through the vetting process?
5. Will the vetting process be able to identify and remove the incompetent judges and magistrates? Why?

6. Do you think that the corruption problem within the judiciary will be addressed during the vetting process? Please explain.
7. Do you think that any part of the vetting proceedings should be conducted in private? Please explain.
8. Do you think that after the conclusion of the vetting process, the judiciary will have been transformed to your expectation? Please explain.
9. The process of vetting is largely dependent on the public participation in making complaints against Judges and Magistrates to the Vetting Board. In the event that such participation is not forthcoming, would the process have in any event achieved its intended objective?
10. If not, what else do you think should be addressed to achieve the complete transformation of the Kenyan judiciary?
11. Is there anything else you wish to add?

That concludes our interview. I wish to thank you very much sparing your time to participate in this interview. Good day/evening.

APPENDIX 3

[Name, address of interviewee]

Dear Sir/Madam,

My name is Geoffrey Imende. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. My topic of study is “*The Vetting of Judicial Officers in Institutional Transformation: Lessons from Kenya*”.

As part of this research, I would like to interview judicial officers, legal practitioners and other members of the public in various capacities who are either part of or interact with the judiciary in one way or another. The interview will be study on the efficacy of the vetting processes stipulated under the Vetting of Judges and Magistrates Act, 2011 in the transformation of the Kenyan Judiciary. The study is intended to look at the challenges of incompetence, corruption and partiality of judges and magistrates which have dogged the Kenyan judiciary for a long time. The solutions proposed to deal with these challenges will be reviewed with a view to learning from their deficiencies. Finally, a review of the process of vetting as stipulated in the Vetting of Judges and Magistrates Act, 2011 will be done to determine whether the objectives in the Act are likely address the highlighted challenges. If you would be willing to be interviewed as part of this research project, it would be much appreciated.

Interviews should take no more than one hour, and can be conducted at a location and time that is convenient for you. Interviewees WILL NOT be asked to divulge any information regarding individual judicial officers, complaints against them or any other sensitive information. Rather, this research intends to ascertain the perception of various actors in the judicial system and the public in general as regards the process of vetting of judicial officers that is to get underway anytime now.

If you would be willing to take part in this research project, or require any additional information about the interviews, please contact me on imende@mohammedmuigai.com or gsimendez@yahoo.co.uk. Alternately, if you have any thoughts on my research, or points that you think may be of interest, your input would be much appreciated.

Yours

Geoffrey Silas Imende

LL.M Candidate, University of Nairobi