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

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JUDICIAL ACCOUNTABILITY
IN THE NEW
CONSTITUTIONAL ORDER

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CHAPTER FOUR

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

Patricia Kameri-Mbote and Muriuki Muriungi

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

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

historically.¹³ Financial independence insulates the judiciary and courts from external control.¹⁴ Moreover, without judicial independence, hiring and firing of judicial officers; the assignment of cases; transfer of judicial officers from one work station to another; and preparation of cause lists can be remotely choreographed by external actors to achieve particular outcomes. Internal actors can also affect the independence of judicial officers. There have been instances in the past where Chief Justices in Kenya acted as monarchs¹⁵ ordering and directing the activities of judges with non-compliant judges risking transfers and denial of some privileges such as nice cars and houses.¹⁶

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

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

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

¹³ P Kameri-Mbote and M Akech, *Kenya: Justice Sector and the Rule of Law* (2011) A Review by AfriMAP and the Open Society for Initiative for Eastern Africa 79-81.

<https://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf>, accessed 28 September 2016.

¹⁴ Ibid 79.

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

¹⁶ Kameri-Mbote and Akech (n 13) 105.

¹⁷ Ibid.

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

¹⁹ Handberg (n 3) 134.

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

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

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

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

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

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

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

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

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

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

Normative Underpinnings of Independence and Accountability in the Judiciary

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

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

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

Global and Regional

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

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

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

Bangalore Principles

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

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

Latimer House Guidelines³²

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

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

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

³⁰ Clause 3.2 of the Bangalore Principles.

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

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

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

These Guidelines also outline accountability mechanisms: judges should be subject to removal or suspension for reasons that make them unfit to serve; court proceedings ought to take place in open court; and judicial decisions ought to be publicly available, accessible and issued timeously.³⁴ Principally, the Guidelines provide that judges are accountable to the Constitution and to the law, which they should apply impartially, honestly and with integrity³⁵ and underscore the point that judicial independence and accountability instil and inspire public confidence.³⁶ Further: judicial officers should not use criminal law and the law of contempt to stifle or restrict well-founded criticism of the performance of judicial duties.³⁷ This ensures that judicial officers are accountable to the public on whose behalf they adjudicate disputes.

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

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

With respect to judicial accountability, the Guidelines stipulate that the judiciary should develop a Code of Ethics and Conduct with both disciplinary mechanisms against judicial officers⁴² and a process for removal and suspension of

³³ Ibid. 11.

³⁴ Ibid.

³⁵ Ibid. 12.

³⁶ Ibid.

³⁷ Ibid. 13.

³⁸ Ibid. 18.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid. 20.

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

National

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

The Constitution of Kenya 2010

A number of provisions of the Constitution have impacts on judicial independence and accountability. Chapter 6 on leadership and integrity applies to judges and magistrates as state officers. Article 73 of the Constitution sets out various responsibilities of leadership and provides that all authority assigned to a state officer is to be exercised in a manner consistent with the objects and purposes of the Constitution; demonstrates respect for the people; brings honour and dignity to the office; and promotes public confidence and integrity in the office. It goes on to state that authority vests in the officers a responsibility to serve rather than to rule.⁴⁵ The guiding principles⁴⁶ of leadership and integrity, also laid out in the Leadership and Integrity Act 2012,⁴⁷ include: objectivity and impartiality in decision making; and in ensuring that decisions are not influenced by nepotism, favouritism and other corrupt practices; selfless service based solely on public interest; honesty in the execution of public duties and the declaration of any conflict of interest; accountability to the public for decisions and actions taken; and discipline and commitment in service to the people.⁴⁸

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

⁴³ Ibid.

⁴⁴ Ibid 21.

⁴⁵ Article 73.

⁴⁶ Article 73 (2).

⁴⁷ Section 3 of the Act.

⁴⁸ Ibid.

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

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

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

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

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

⁴⁹ Article 76(1) (2).

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

Judicial Service Act 2011

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

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

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

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

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

Procedural Requirements

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

Fair Administration Action Act, No. 4 of 2015

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

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

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

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

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

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

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

Internal Mechanisms for Ensuring Independence and Accountability

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

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

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

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

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

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

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

Institutional Organization

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

Strategic Plans

Strategic planning in the public sector in Kenya was introduced by the Government of Kenya Economic Recovery Strategy (ERS) 2003-2007 as one of the ways to enhance Economic recovery and has since become institutionalized in public institutions. The first ever Judiciary Strategic Plan 2005-2008 in Kenya was launched in March 2005.⁶¹

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

⁵⁹ *Ibid.*

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

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

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

⁶³ *Ibid.*

Judiciary Transformation Framework

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

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

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

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

⁶⁵ Ibid 13.

⁶⁶ Ibid 15.

⁶⁷ Ibid.

⁶⁸ Ibid.

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

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

⁶⁹ Ibid 16.

⁷⁰ Ibid 17.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 18.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

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

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

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

Court Administration and Case Management

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

The Role of the Chief Justice

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

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid 20.

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

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

The Chief Justice is also mandated under section 13 of the Act with the transfer and deployment of judges from one station or division to another for the purposes of promoting the effective, prompt and efficient discharge of judicial service. A critical point should be made with respect to the powers of the Chief Justice to transfer judges. In exercise of the powers conferred under section 13 of the Act, it has been argued by some that this could be abused and used as an informal disciplinary mechanism⁸² for wayward judges or those that issue unpopular judgments.⁸³ Such a view appears to have been expressed in the *Final Report of the Task Force on Judicial Reforms* popularly called the 'Ouko Report'.⁸⁴ For instance, some of the divisions of the court such as the Constitutional and Human Rights Division and the Judicial Review division are considered powerful as they invariably involve cases brought against the state. There is a perception that those who serve there are favoured and that being moved from these divisions is a demotion/punishment.⁸⁵ Similarly, the commercial division and courts located in main cities such as Nairobi are considered as more prestigious compared to other remote court stations. The view

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

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

⁸³ Yash Vyas, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third Legal Studies*, Article 6, 144. <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1060&context=twls>, accessed 08 October 2016.

See http://www.judiciary.go.ke/portal/assets/filemanager_uploads/News%20Downloads/LIST%20OF%20JUDGES%20JUNE%202016%20EDITION.pdf accessed 28 September 2016 for the latest transfer of judges that took place.

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

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

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

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

Role of the Presiding Judge and Principal Judge

The Constitution establishes the offices of the President of the Court of Appeal⁸⁷ and the Principal Judge⁸⁸ of the High Court. These offices are filled through election by the judges of the respective courts. The wisdom of the choice of election as opposed to other criteria such as seniority as the basis for filling these positions is open to debate. Elections are carried out within a competitive context which can affect civility and collegiality among judges. However, an elected judge is bound to remain accountable to the electorate (in this case the judges who elected them) and it is hoped that this will in turn lead to accountability to the larger society. The office of the Presiding Judge is established under section 7 of the High Court (Organization and Administration) Act 2015. The Presiding Judge whether of a court station or a division of the court is responsible and reports to the Principal Judge and is the chairperson and convener of the Court User Committee in their station.

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

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

⁸⁷ Article 164 (2).

⁸⁸ Article 165 (2)

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

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

Role of Divisional Heads

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

Section 11 (2) of the Act provides that each division of the court is to be headed by the Presiding Judge of that Division as designated by the Chief Justice with judges serving in the Division under the Presiding Judge. These divisions may be established in any court station in the country, the aim being to have a court station in each county also headed by a Presiding Judge of the Court Station.⁸⁹ A Deputy Registrar is also appointed and is responsible for the administration of the division⁹⁰ and the court station⁹¹ reporting to the Presiding Judge.

Performance Management

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

⁸⁹ Section 12(2) (a).

⁹⁰ Section 11 of the Act.

⁹¹ Section 12 (2) (c).

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

The judiciary had over the years resisted performance management measures arguing that they would interfere with judicial independence.⁹⁴ The Ouko Task Force on judicial reforms also noted that the judiciary was not part of the performance contracting programme for the public service and further that performance evaluation or appraisal system was technically non-existent as there was no evidence that case returns filed by judicial officers were used to improve performance.⁹⁵ As noted above, JTF identified 'performance management system to ensure accountability, improvement and transparency' as a critical issue.⁹⁶ It proposed the establishment of a Performance Management Directorate⁹⁷ recognising that the lack of a performance management affected the judiciary's leadership and management.⁹⁸

Kenya's judges and magistrates signed performance contracts in the 2015-2016 fiscal year and as from July 2015; they are required to submit a daily court return template to the Directorate of Performance Management which then analyses it to generate a judge's productivity index.⁹⁹ The performance measures and indicators used deal with 'case clearance rate' and 'integrity of court files' among others.¹⁰⁰ These are weighted to ensure proportionality¹⁰¹ and taking into account both quantity

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

⁹³ Ibid.

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

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

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

⁹⁷ Ibid 16.

⁹⁸ Ibid 17.

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

¹⁰⁰ Ibid.

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

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

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

Appellate Jurisdiction

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

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

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

¹⁰² Ibid.

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

¹⁰⁴ Article 163 (4).

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

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

An interesting issue on judicial independence with regard to appellate jurisdiction arose in the case relating to the retirement of judges which was filed challenging the constitutional requirement for judges to retire at 70 years of age.¹⁰⁷ The issue in question was whether judges who had been appointed under the repealed constitution which set the retirement age at 74 could cite security of tenure under that Constitution to defeat the provisions of the Constitution of Kenya 2010, which set new retirement age. It is instructive to note that all judges took their oaths to defend the new Constitution when it was promulgated in 2010.¹⁰⁸ The High Court had ruled that the retirement age was the constitutionally prescribed 70 years, a decision that was affirmed by the Court of Appeal.¹⁰⁹ In an unrelated matter touching on an election petition¹¹⁰, a section of the Supreme Court pronounced themselves on the issue of the retirement age. The Court of Appeal decision was challenged in the Supreme Court whereupon the judges recused themselves from hearing the matter on the basis that they had publicly aired their views before.¹¹¹ Recusal is an important accountability mechanism which ensures that a judge who has an interest in a matter or has aired their view on a matter coming before the court recuses himself/herself to remove the likelihood of bias.

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

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

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

¹⁰⁸ Article 167 (1).

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

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

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

¹¹² *Ibid.*

Ombudsperson

Distinct and separate from the office of the Ombudsperson created under the Constitution as a constitutional commission, also known as Commission on Administrative Justice, the Judiciary has also established the office of Ombudsperson. The Judiciary Ombudsperson is mandated to enforce administrative justice by addressing instances of maladministration by putting in place effective complaint handling structures.¹¹³ The office receives complaints from litigants who have grievances against members of the judiciary such as judicial staff, which it considers, and processes. The office also acts as a forum for resolving internal conflicts among staff at the judiciary. The Ombudsperson is empowered to investigate allegations of misconduct of judicial officers (judges and magistrates) and other judicial staff, either on its own initiative or upon a complaint being lodged by a member of the public. The measures taken by this office serve to ensure accountability of the members of the judiciary in the discharge of their functions. It also protects the independence of the judiciary by providing an internal mechanism for handling complaints. The Ombudsperson is required to publish quarterly reports on the complaints received and any action taken guided by the principles of impartiality, confidentiality and independence.¹¹⁴ The complaints relate to both behaviour of persons and to systemic issues. Examples of complaints acted on by the Ombudsperson include 'allegations of misuse of office, unethical conduct, corruption, lost files, maladministration, delayed cases, poor/slow service, cannibalized files, vindictiveness, incompetence, misbehaviour, inefficiency associated with courts, among others.'¹¹⁵ According to the State of the Judiciary and the Administration of Justice Report 2013-2014, the office of the Ombudsperson received up to a total of 2, 888 complaints during the period under review and processed and resolved 2, 013 cases out of the total.¹¹⁶ This translated to a 74% successful closure rate of the complaints on all complaints received in 2014/2015.¹¹⁷

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

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

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

¹¹⁷ *Ibid.*

Judiciary Training Institute

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

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

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

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

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

¹¹⁹ Ibid.

¹²⁰ Ibid.

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

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

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

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

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

¹²² Ibid.

¹²³ Ibid.

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

Court¹²⁵ while decisions of other tribunals and courts martial are usually challenged by way of judicial review,¹²⁶ or civil¹²⁷ or criminal appeals¹²⁸ to the High Court.

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

Indeed, as discussed above, the implications of the decisions of subordinate courts being subject to scrutiny by higher courts¹²⁹ are the same for tribunals and courts martial. The possibility of reversal in case of illegality or bias makes these bodies act in a manner that can stand up to scrutiny thus ensuring accountability, there is a good reason for the continued subjection of tribunals and courts martial by the regular courts either through the exercise of judicial review jurisdiction or appellate jurisdiction.

Lessons from the United States of America

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

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

¹²⁶ See *Republic v Public Private Partnerships Petition Committee (The Petition Committee) and 3 others Ex Parte A P M Terminals* [2015] eKLR; *Republic v Chairman, Mumias Land Disputes Tribunal and another Ex-Parte Appolo Osama Maindo and 2 others* [2014] eKLR; *Masagu Ole Koitelet Naumo v Principal Magistrate Kajiado Law Courts and another* [2014] eKLR

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

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

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

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

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

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

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

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

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

¹³³ Article III of the United States Constitution.

¹³⁴ Handberg (n 3 above) 127, 128.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

unpopular decisions. Indeed, the fact that the judiciary operates as a counter majoritarian institution is perceived as one of its strengths.¹³⁸ Making appointments to the judiciary dependent on majority rule as happens in majoritarian democracies¹³⁹ is likely to politicize the judiciary and cause an enforcement of the policy preferences of the majority to the possible detriment of the minority. This is inimical to the rule of law.¹⁴⁰

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

Conclusion

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

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

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

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

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

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

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

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

Change is not easy, and five years is not enough for real change to be realized. Allegations of graft among judges¹⁴⁴ and judicial staff¹⁴⁵ have resurfaced, raising the need for greater vigilance on the conduct of judicial officers and stricter adherence to public financial management and auditing mechanisms and set procurement processes. With regard to judges, it is disheartening to note that despite the vetting process by the Judges and Magistrates Vetting Board¹⁴⁶ and the rigorous appointment processes, there are still allegations of corruption. This has resulted in proposals for constant vetting of judicial officers.¹⁴⁷ There is no detailed analysis of the impact of the rigorous appointment and vetting processes on the performance of the judiciary. This is required for continuous improvement and learning. Other processes that need

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

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

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

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

¹⁴⁷ *Ibid.*

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

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

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