Assessing the Impact of Vetting on Trust in Public Institutions: A Case of the Judiciary in Kenya

Gloria Mmoji Vuluku: C50/68734/2013

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Declaration

I declare that this project is my own original work and has not been submitted to any other institution for the award of a diploma or degree.

Signed: _____ Date: _____

Gloria Mmoji

This project has been submitted for examination with my approval as the University Supervisor:

Signed: _____ Date: _____

Dr. Justine Magutu

Lecturer

Department of Political Science and Public Administration

Signed: _____ Date: _____

Mr. Mwachofi Singo

Lecturer

Department of Political Science and Public Administration

Dedication

To my parents,

Who are my source of motivation and inspiration…

Acknowledgments

Glory and honour to you Almighty God! I will never lose sight of the fact that it is by your Grace I have come this far. Thank You!

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Table of Contents

List of Figures

Abbreviations/Acronyms

ADR	Alternative Dispute Resolution
CEE	Central and Eastern Europe
CIC	Commission for the Implementation of the Constitution
CJ	Chief Justice
COE	Committee of Experts
COK	Constitution of Kenya
GJLOS	Governance, Justice, Law and Order Sector-wide Reform Program
GOK	Government of Kenya
GPPAC	Global Partnership for the Prevention of Armed Conflict
IACC	Integrity and Anti-Corruption Committee
ICJ	International Court of Justice
ICTJ	International Centre for Transitional Justice
JMVB	Judges and Magistrates Vetting Board
JSC	Judicial Service Commission
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KNDR	Kenya National Dialogue and Reconciliation
LSK	Law Society of Kenya
NARA	National Accord and Reconciliation Agreement
NARC	National Rainbow Coalition
NGO	Non-Governmental Organisations
NPI-Africa	Nairobi Peace Initiative-Africa
TI	Transparency International
UNDP	United Nations Development Programme

Abstract

Institutional reforms are meant to inject a sense of accountability in transitioning societies laced with human rights abuses and poor governance structures. Increasingly, vetting has become the most common institutional reform mechanism for transitional reforms meant to hold bad actors accountable; rid public institutions of bad leaders and more importantly (re)building public trust of such tainted institutions.

The main objective of this study was to assess vetting as a mechanism for institutional reform in Kenya taking the case of the vetting exercise in the judiciary. Specifically, the study sought to establish whether there were changes in the levels of public trust in the judiciary since the vetting exercise began and what factors account for the changes experienced. The study relied on primary and secondary data. Primary data was sourced from Afrobarometer survey data for Round 4, 5 and 6. In addition, interviews were conducted with key informants who had been purposively selected. Interview guides were developed in line with the objectives of the study.

The results show that immediately after the vetting started, there was a significant increase in public trust in the judiciary, with those trusting the judiciary a lot increasing from 14% in 2008 to 24% in 2012. However, this was negated as trust in the judiciary decreased to 19% in 2014. The study will show that three main factors account for this downward trend: resistance to reforms by key institutions; state capture of accountability institutions and failure of other attendant reforms.

The study concludes that in the course it is now, the vetting exercise is experiencing a number of challenges that, if left unchecked, are likely to reverse gains made earlier on in the process. To deter against such an outcome, the study recommends, among others, for the better coordination between institutions undertaking the exercise.

CHAPTER ONE: INTRODUCTION

1.1 Background

There is broad agreement that institutional reforms are fundamental in any transitioning country (Crook, 2010; Elster, 2004), but it is less clear the prerequisites for effective institutional reforms, how they should be carried out and by whom. Scholars argue that successful institutional reforms that are able to increase citizen trust in public institutions are achieved in a problem-solving, interactive, learning-oriented and most importantly with government's willingness (Booth, 2014). However, relatively little is known about the political feasibility of reforms because in transitional countries, the greatest obstacle to institutional reform is often the opposition of powerful political elite who stand to lose from a changed institution (Booth, 2014). Former rulers frequently hold on to power in the post-authoritarian context and have little interest in supporting the transitional agenda. Rather, they will often aim to maintain the status quo and hold on to the gains they made during the authoritarian rule (Arenhovel, 2008).

In any transitioning country, institutional reforms are important for a number of reasons. Generally, institutional reforms play a pivotal role in regime rebuilding (Olsen, Payne, & Reiter, 2010). By reforming key institutions, a society can confront the wrongdoings in its past with the goal of obtaining some combination of truth, justice and the rule of law (Kritz, 1994). Institutional reforms in a transitioning country also mean a shift towards new norms and practices of providing accountability (Sikkink & Walling, 2007). Politically, institutional reforms are claimed to promote democratization (Arenhovel, 2008; Huntington, 1991; McAdams, 2001). For instance, using reform mechanism to demonstrate tangibly a break with the

past and to refocus citizens on the future allegedly creates a solid foundation for promoting democratization (Kritz, 1994).

According to International Centre for Transitional Justice (ICTJ) (2015), there are varied measures for institutional reform in transitioning countries. These measures include; educating public officials and employees on applicable human rights and international humanitarian law standards; creating publicly visible oversight bodies within state institutions to ensure accountability to civilian governance; disbanding armed actors such as paramilitary groups and providing justice-sensitive processes and means by which such groups can re-join civil society; reforming or creating new legal frameworks, such as adopting constitutional amendments or international human rights treaties to ensure protection and promotion of human rights, and; vetting which is examining personnel backgrounds during restructuring or recruitment to eliminate from public service or otherwise sanction abusive and corrupt officials (ICTJ, 2015).

Of the above mentioned institutional reform mechanisms vetting is the most commonly applied in transitioning countries. However, it is also among the most complex to achieve. This is because transitional contexts are often politically volatile. Former rulers frequently hold on to power in the post-authoritarian context and have little interest in supporting the transitional agenda (Ayub, Deledda, & Gossman, 2009). Former elites who risk losing power through a vetting process are likely to resist it being established and to obstruct its implementation (Mayer-Rieckh, 2007). Reform-minded constituencies may not have the upper hand in these environments and may have to tread carefully to avoid a resumption of authoritarian rule.

Existing literature presents numerous objectives for vetting, which vary according to the context of the political transition and the time period (Duthie, 2007). In general, the immediate objective for engaging in such a process is to neutralize the influence of the former regime in the new political situation. The broader and long-term objectives are to transform institutions to facilitate the democratic transformation and to prevent future human rights abuses so as to regain public trust in these institutions. Even though these short-term and long-term objectives are the common motivation, each country and each interested party might have individual and unique reasons for adopting a vetting process.

For a vetting exercise to be deemed successful it must, as much as possible, achieve the objectives it set out to do. For instance, after the fall of the Berlin Wall and the unification of Germany in 1990, the country sought to vet members of the security and public sector to rid them of communists, communist sympathisers and the dreaded secret police (*stasi*) (Wilke, 2007). Sufficient resources were set aside and proper institutions were created that could perform credible checks on the ones being vetted. The exercise was completed in 1994. Opinion surveys done after the exercise was completed indicated that the people believed the dreaded secret police had been eliminated from public service and public trust in the police greatly increased (de Greiff, 2007). Generally, the opinion polls showed people had more trust in security institutions as compared to before the vetting exercise was done.

On the contrary, during the Bosnian civil war, the police did not enforce the law impartially and the courts did not fairly render justice and consequently, public confidence in the rule of law remained low (Mayer-Rieckh, 2007). Hence, its vetting processes focused on the police and the judiciary with the main objective of building

fair and effective institutions that would prevent future recurrences of human rights abuse. However, lack of proper rues and regulation to conduct the exercise and insufficient allocation of funds led to constant delays leading to the eventual collapse of the exercise (UNDP, 2006) and therefore it not achieving its intended objectives. Likewise, in Liberia, its vetting exercise also failed to meet its main objective of a militia-free public sector largely because of the government's reluctance and unwillingness to deploy the necessary resources (financial and technical) and to support a rigorous vetting process. This allowed for unnecessary delays and accusations of sabotage between the elite in an attempt to gain political clout (Mayer-Rieckh, 2006).

In Kenya, vetting as an institutional reform mechanism was as a result of the disputed results of the presidential election in 2007. This led to unprecedented violence, ethnic animosity and mass displacement in what was previously considered a peaceful and stable country. Between December 2007 and February 2008, 1,133 people lost their lives, 3,561 sustained serious injury and over 300,000 were displaced from their homes (GoK, 2008). Although the causes of the crisis were diverse, the tendency to violence among members of the public was exacerbated by a perception that government institutions and officials, including the judiciary, were not independent of the presidency and lacked integrity (GoK, 2008). In the aftermath of the violence, Kenya instituted a programme of fundamental reforms to deliver sustainable peace, stability and justice through rule of law and respect for human rights. The government committed itself to addressing long-term issues that may have constituted underlying causes of the prevailing social tensions, instability and cycle of violence, including the

need for constitutional, legal and institutional reforms (Kenya National Dialogue and Reconciliation (KNDR), 2008).

1.2 Problem Statement

Kenya suffers from a legacy of different colonial and post-colonial governance systems under which gross human rights violations and crimes were committed with no recourse for effective redress (United Nations, 2005). For many years, a culture of impunity prevailed, as the public institutions and public servants only served at the behest of the executive. This is because successive constitutional amendments since independence had resulted in an imperial and an all-powerful president. Other key government institutions like the judiciary had been reduced to rubber stamps of the executive. The above maladies contributed to a public perception of weakness, ineffectiveness and political manipulation of public institutions. For instance, appointment, promotion and discipline of judicial officers had been the preserve of the executive and had not always been on the basis of merit and integrity.

Between 1960 and 1998, eight different committees and/or commissions1 were established to examine the state of the judiciary and to make proposals for reform. Each of these commission/committee reports recommended reforming the judiciary (Oseko, 2011). However, most were ignored (Oseko, 2011). Beginning in the early 2000s, various politicians and members of the legal community called for extraordinary measures to address problems in the judiciary, and in 2003 this led to the so-called 'radical surgery' in which large numbers of judges were pressured to resign or face tribunals over allegations of corruption (GoK, 2008). However, the

[1]Flemming Commission Report, 1960; Pratt Commission Report, 1963; Miller-Craig Commission Report, 1967; Ndegwa Commission Report, 1971; Waruhiu Committee Report, 1979/80, Ramtu Committee Report, 1985; Mbithi Committee Report, 1990/91; Kotut Report, 1991/92.

aftermath of the ‘radical surgery’ seemed only to fuel further mistrust of the judiciary (ICJ, 2005).

The post-election violence in 2007/2008 served as the final catalyst to spur overarching reforms in the Judiciary. Following the outright rejection of the judiciary as an impartial and independent arbiter to resolve the dispute arising from the presidential election results, public confidence in the judiciary was greatly undermined. To address this situation, the grand coalition government resolved under Agenda Item IV of the National Dialogue and Reconciliation Agreement to undertake comprehensive reforms of the judiciary (KNDR, 2009). The Kenya National Dialogue and Reconciliation process prioritised a number of steps to reform the judiciary among them being constitutional review to anchor judicial reforms (KNDR, 2008).

Consequently, after the constitutional review was done and Kenya adopted a new constitution in 2010, it directed that all judicial officers in the country undergo a vetting process. The constitution provided that within one year from its operative date, Parliament should enact legislation establishing mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office at the time the constitution came into effect (that is on 27 August 2010) (GOK, 2010). As a result, vetting commenced in 2012. The main reasons for vetting were that the Kenya Judiciary had been grappling with three major problems, inefficiency, incompetence and corruption (ICJ, 2007). These problems had resulted in case delays and backlog; limited access by the public; lack of adequate facilities; allegations of corrupt practices; cumbersome laws and procedures; questionable recruitment and promotional procedures; and, weak or non-existence of sanctions for unethical behaviour (ICJ, 2007). Generally, the inefficiency, incompetence and corruption in

the judiciary had resulted in a loss of public trust in the institution. Therefore, the immediate objective was to determine the suitability of serving judges and magistrates to continue serving in the judiciary. The long term objective was to increase public trust in the institution (Wahiu, 2012).

By April 2014, vetting had been completed for Court of Appeal judges and the High Court judges. By, May of 2015, the vetting exercise was almost complete. A total of 303 judicial officers had undergone vetting, accounting for 90% of the process (JMVB, 2015). The remaining 40 judicial services are expected to be completed by end of 2015 (JMVB, 2015). Given the importance of institutional reforms in Kenya and the value of an independent, functioning judiciary, informed by the principle of separation of powers, how successful has the vetting exercise in Kenya been?

1.3 Research Questions

The study sought to answer the following specific questions:

1. To what extent has vetting in the Judiciary influenced public trust in the institution?

2. What factors are responsible for the increase or decrease of public trust in the judiciary?

1.4 Study Objectives

The overall objective of the study was to establish whether judicial vetting has had an impact in the levels of public trust in the institution.

The study was guided by the following specific objectives:

1. To establish the level of public trust in the Judiciary since the vetting began in 2012.

2. To establish the factors responsible for the increase or decrease of public trust in the judiciary.

1.5 Justification of the Study

Countries in transition need institutional reforms so that they can be able to break from the past and shift towards new norms and practices that provide accountability. One mechanism for doing so, that has become very popular is vetting. However, vetting exercises have not been easy to implement. Because of this difficulty, it becomes important to examine whether they are able to achieve their objectives. If the exercise has met its objectives, it can form a foundation for improving the overall institutional reform environment in Kenya. The elements for success or failure identified in the study can be pursued utilizing the careful partnering of the stakeholders to ensure current and future institutional reforms are insulated from failure which is a useful finding to the policy makers.

To the academic field, the study will add to the knowledge of institutional reform measures adopted by a transitional society and the conditions necessary to ensure the reforms are successful. It is hoped that the study will fill the gap in contemporary literature that has not focused on the details of Kenya's vetting processes, but rather generalized this in terms of transitioning countries.

1.6 Scope and Limitations

The research was a single case analysis. Therefore, was confined to studying the vetting exercise in the Judiciary between 2011 and 2015. One of the limitations encountered was that interviews with some Key Informants took longer than anticipated due to bureaucratic procedure in scheduling interview. This delayed the period within which the study was to be completed.

1.7 Definition of Concepts

This section deals with the operationalization of key terms used in the study.

1.7.1 Transitional Country

O'Donnell and Schmitter (1986) define a transition as the interval between one political system and another. A transitioning country is a country trying to break from the past and shift towards new norms and practices that provide accountability to the people (Kritz, 1994). For this study, Kenya is defined as a transitional society as it is trying to break away from two phases in its past. First, a long authoritarian rule characterised by human rights violations, crimes committed with no recourse for effective redress, a culture of impunity and public institutions that served at the behest of the executive. Second, the post-election violence in 2007-2008 that brought to fore the deep rooted divisions in the country.

1.7.2 Institutional Reforms

The process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents (ICTJ, 2015). In this study, institutional reforms are taken to mean any intentional administrative procedures initiated by the government to rectify mistakes that certain institutions undertook in the past.

1.7.3 Vetting

The study adopts the UNDP's definition of vetting which is assessing a person's suitability and competence to hold public office, the focus being on professionalism, performance, discipline, human rights record and qualifications (academic and training) (UNDP, 2006).

1.7.4 Success of a vetting exercise

Success of vetting as a mechanism for institutional reform is a contested concept (Duthie, 2007). There are no agreed parameters to measure as to when an exercise is deemed to have succeeded. The most common measure for success is the extent to which such exercises have achieved their intended objectives (Meierhenrich, 2006). Therefore, for the Kenyan case, the success of the vetting exercise will be operationalised as the extent to which public trust in the judiciary has increased as this was the general objective.

1.8 Literature Review

1.8.1 Introduction

This section starts by giving theoretical literature that explains why institutional reforms are conducted in transitional countries. These reasons are divided into two broad categories, trust building and consolidation of democracy. It also gives empirical literature testing these reasons in countries that have conducted institutional reforms. It is followed with empirical literature on vetting as one of the mechanisms of institutional reform employed in transitional countries highlighting vetting exercises elsewhere and their experiences. Finally, it discusses theoretical literature highlighting how successful vetting exercises are conducted. This set of literature is relevant because, it will help build the theoretical framework that is used for the study.

1.8.2 Institutional Reforms

A substantial body of literature has developed highlighting the pivotal role that a variety of reform measures play in a transitioning society. While in transitional societies reforms are broadly and contentiously defined, they can be understood as the

way a society confronts the wrongdoings in its past with the goal of obtaining some combination of truth, justice and the rule of law, (Kritz, 1994). It is a shift towards new norms and practices of providing accountability for past wrongs (Sikkink & Walling, 2007).

Establishing a trustworthy political system is a common cited reason for institutional reforms. Some argue that in the absence of reforms, feelings of cynicism, distrust towards the political system may be generated, and the principles of competence, fairness, honesty, accountability, and dedication to the public interest may be compromised (Horne & Levi, 2004; Wilke, 2007; David, 2011). Reforms can also contribute to trust building between individuals who are members of the same political community (de Greiff, 2007; Horne, 2005).

Trust has been theorised and empirically shown to be an important factor contributing to the development of effective and capable democratic governance (Hardin, 1998). Trust in national government, trust in public institutions, trust in social institutions, and interpersonal trust or social trust are all theorised to contribute to democratisation (Sztompka, 1999; Putnam, 2000). One way in which countries have tried to build trust is through institutional reforms. Politically, economically, and socially, institutional reforms are envisioned as explicit and implicit agents of trust building. Policymakers and academics stress how transitional justice measures instil trust in the new system and hence democratic stability (Grodsky, 2010).

According to Horne (2012), in post-repressive societies, victims of the previous regime might be unwilling to trust public institutions that continue to employ former perpetrators of regime atrocities. This is the case with public institutions in which citizens have direct contact, such as the police and the judiciary. If citizens do not see

a change in personnel in public institutions or enforced new standards for institutions, they are unlikely to engage in the risk-taking required for trusting behaviours. A failure to use public institutions would stymie political and economic exchanges, and thwart democratization (Horne, 2012).

Many governments have explicitly linked institutional reform measures with a desire to build trust in government. Content analysis of the reform debate in the Czechoslovak Federal Assembly demonstrated that trust-building was one of the top goals of their vetting (Boed, 2002). Several international institutions have supported this public institution trust-building interpretation of employment vetting. In 1996, the Parliamentary Assembly of the Council of Europe passed Resolution 1096 which supported the right of states to enact vetting laws as forms of institutional reforms (Boed, 2002). The Council of Europe explicitly stressed the use of vetting as a way to reassure citizens that they could trust their political officials and public institutions. International organizations have also highlighted the importance of vetting to support trust-building in post-conflict societies. For instance, the United Nations High Commission on Human Rights in its vetting handbook for post-conflict states stressed that the primary goal of vetting was the re-establishment of civic trust and the promotion of legitimate public institutions. According to the UNHCR (2006), well executed vetting programs are viewed as a means to promote trust and institutional legitimacy.

Apart from trust building, institutional reforms are assumed to promote democratisation in the long run (Arenhovel, 2008; Huntington, 1991; McAdams, 2001; Stan, 2009). There are many ways this is assumed to happen, depending on the type of reform measure examined. Generally, reforms create a new foundation for

state and society's rebuilding (Kritz, 1994; Horne, 2005). Using reform mechanisms to demonstrate tangibly a break with the past and to refocus citizens on the future allegedly creates a solid foundation for promoting democratization (Kritz, 1994).

Other scholars emphasize a more indirect method by which reforms politically contributes to the process of democratization (Horne, 2005; Bertschi, 1995; Huyse, 1995). It is argued that reform measures reduce corruption and prevent abuse of power by removing from positions of power those whose integrity is compromised by their past actions (Boed, 2002). This in the long run contributes to good governance and democratization (Boed, 2002; Letki, 2002; Bertschi, 1995; Mayer-Rieckh, 2006). Reform measures contribute to a perception of government accountability and adherence to legal principals, both foundational principles of democracy. Others focus on how reforms can be designed to enhance security through security sector reforms (Duthie, 2007; Elster, 2004) and prevent future conflicts (Bassiouni, 1997; Huntington, 1991), thereby promoting democratization. According to Duthie (2007), although justifications for reforms can be narrow, broad, long term, short term, numerous, contested, and changing over time, they focus on one broad reason, consolidation of democracy.

David's (2003) qualitative comparison of Poland and the former Czechoslovakia finds that post-Cold War institutional reforms contributed to human rights conditions and democratization. In Poland and the Czech Republic, members of old state socialist networks have not committed serious violations since vetting laws were enacted, but abuses did re-occur in Slovakia when its vetting policy ended. In addition, comparison of the initial round of unregulated vetting in Poland and Czechoslovakia with later and more regulated vetting suggests that the latter contributed to democratization by

preventing old guard networks from undermining the new political system. Vetting also reduced political tensions in the Czech Republic, contributing to stability during its transition (David, 2003).

Barahona de Brito et al (2001) examined the determinants of reforms policy choices in 19 transitional societies in Europe, Latin America, and South Africa. They then analyse their impacts on democratization while taking other factors into account, including transitional conditions and institutional reform. The study considers impacts on the rule of law insofar as they contribute to democratization. The analysis finds no clear link between backward-looking reform efforts and the functioning of democracy. In Spain, Hungary and Uruguay, for example, democracy developed well without reforms, while in other cases, such as Portugal, El Salvador, and Guatemala, reforms made little or no contribution. In still other instances, including Argentina and the Czech Republic, reforms seem to have contributed to democracy (Barahona de Brito, González-Enríquez, & Aguilar, 2001).

There are many single case studies or comparative studies in which trust-building is asserted as part of the narrative showing the relationship between institutional reform mechanisms and the success or failure of democratization. In these cases, trust is treated as an intervening variable, with institutional reform measures being the independent variable and democracy being the dependent variable. There are fewer studies treating trust as a dependent variable, or explaining how different types of institutional reforms affect a change in trust levels. Since trust-building in government, public institutions, and civil society are considered components of democratization, the lack of attention paid to trust or trust-building as empirically and

theoretically separate from democratization is a gap in the literature that this study aims to contribute to.

1.8.3 Vetting as an Institutional Reform Mechanism

Vetting is a concept that is extensively used in transitional society institutional reform literature. According to Mayer-Rieckh (2006), vetting refers to processes for assessing an individual's integrity in order to determine their suitability for public employment. In this definition, integrity refers to a person's adherence to relevant standards of human rights, professional conduct, her or his financial propriety, education standards, professional qualifications, competence and experience (Mayer-Rieckh, 2006), which is more than just being a part of a former oppressive administration.

Vetting is an administrative activity that leads to purges in the public administration (Elster, 2004); it is the removal of categories of people from public office or benefits for the purpose of getting leaders fit for public service (Minow, 1998); the systematic lustration of public officials for links to the communist era security services (Williams, Fowler, & Szczerbiak, 2005). For Meierhenrich vetting refers to the purification of state institutions from within or without (Meierhenrich, 2006). Vetting is either the mechanism or process used in determining a person's integrity and suitability for public employment (Duthie, 2007).

Vetting can either be done emphasizing its administrative-preventive character, or targeting those responsible for serious abuses (Velasquez, 1988). It can target personnel or institutions but must be devoid of politics (Czarnota, 2007). Czarnota goes on to argue that, the vetting process losses teeth the moment politics is introduced to it. However, for whichever mechanism used, the process must be systematized (Williams, Fowler, & Szczerbiak, 2005). However, these authors argue

that successful vetting must be accompanied by institutional reforms. They point out that the absence of comprehensive vetting and accompanying institutional reforms are a recipe for failure in the vetting process. This is supported by Mayer-Rieckh (2007) who states that other reforms are important because they improve the performance of the vetted institution.

Appel (2005) defines vetting as a process of screening that determines the extent and nature of former functionaries' collaboration with the former regime (Appel, 2005). This definition, however, is limited as it only delineates vetting's administrative nature and neglects its role as a means of institutional purification. Scholars contend that vetting is a process of purifying state organizations from their misdeeds under repressive regimes and transforming these organizations' political culture (Boed, 1999; Meierhenrich, 2006; Stan, 2013). On the other hand, new research demonstrates that vetting has a dual nature: administrative as well as societal ritual cleansing (David, 2011). Administrative vetting has clear organizational and security objectives in terms of screening and vetting former regime functionaries to ensure institutional reform.

David's (2011) summarizes vetting's dual nature and explains why different countries employ divergent vetting methodologies. David argues that the public's perception of the former regime and tainted officials determines timing and type of vetting (David, 2011). David's comparative research on the Czech Republic, Poland and Hungary reveals that at least three types of vetting can be identified; exclusive, inclusive and reconciliatory. Exclusive vetting establishes discontinuity with the former regime through dismissals whereas inclusive and reconciliatory systems demonstrate

continuity with previous regimes through the mediums of exposure and confession, respectively.

The realist approach examines why political elites pursue vetting and how transition regimes deal with dilemmas emanating from the vetting exercise (Welsh, 1996; Huntington, 1991; Moran, 1994). This theory argues that vetting is an outcome of political bargaining processes before or during a transition. The realist theory also constructs strategies of vetting through the duality of truth versus justice. Huntington (1991) coined the term "torturer problem" to highlight paradoxes of seeking punishment and prosecution while attempting to establish the rule of law and a fair democracy. That is, whether to "prosecute and punish" or to "forgive and forget" the officials of the authoritarian regime who blatantly violated human rights was predicted by the type of transition a society underwent in its efforts to move closer to democracy. For Huntington (1991), countries could be divided into three groups (*transformer, replacements* and *transplacements*) with respect to the role former leaders played in facilitating or hampering exit from the past regime. The transformers took the lead and changed that regime into a democracy' replacements lost strength and collapsed or were overthrown by revolutionary forces while *transplacements* brought democracy about in negotiations between weak political regimes and weak oppositional forces, because in those countries neither the regime nor the opposition was powerful enough to enforce its vision alone (Huntington, 1991).

According to Moran (1994), the extent to which a regime tolerated emigration ("exit") and dissent ("voice") predicted the appetite for vengeance. He found that the tendency to forgive and forget can be found in those countries where either exit and/or voice

were allowed under the former regime. In countries where neither exit nor voice was allowed calls for punishment predominated (Kritz, 1994; Horne & Levi, 2004; Moran, 1994).

A more recent theoretical framework for explaining vetting has been advanced by Nalepa in 2005. In her doctoral dissertation she tried to explain the puzzling behaviour of Polish and Hungarian vetting exercises. In her study, Nalepa determined that when former elites in a transitioning country anticipate losing power to reform forces, they try to appease a pivotal median political party in order to prevent harsher legislation favoured by hard-line reformers. Thus, she concluded, the former elites behaved rationally by initiating less punitive versions of transitional reforms than their rivals would. For the former elites, support for vetting is not the result of support for an honest re-examination of the oppressive past, but a pre-emptive strategy designed to protect their political careers from more radical policies. Nalepa's analysis is well suited for countries where vetting has been promoted and adopted by, or at least with the help of, the former members in the regime the country is trying to move from (Nalepa, 2005).

1.8.4 Vetting and Trust Building

Vetting has been done to attain different objectives. While in former Soviet Republics vetting was done to rid the new transitioning state of communists, in transitional democracies in Africa it is done principally to transform abusive institutions in order to prevent the recurrence of abuses and to enhance the legitimacy and integrity of the new institutions and structures (Mayer-Rieckh, 2007). However, for whatever reasons vetting is done in different societies, the overall objective focuses on building trust through the process of holding individuals accountable for their past behaviours,

positions, or affiliations, as well as revealing the truth about previous regime complicity (Fithen, 2009).

Vetting fosters trust in both direct and indirect ways. First, the creation of institutional trust and trust in government is assumed to have an indirect impact on civil society and interpersonal trust. Mayer-Rieckh (2007) captures this dynamic when he explains that vetting processes helps to re-establish civic trust and to re-legitimize public institutions by excluding from them persons who have committed serious abuses in the past and have breached the trust of the citizens they were meant to serve. Second, increasing transparency about the past is thought to normalize regular activities and build trust.

The implementation of vetting has institutional and symbolic change elements (Kaminski & Nalepa, 2006; Killingsworth, 2010). Institutionally vetting encourages bureaucratic turnover (Sólyom, 2003). Symbolically, vetting is designed to purify society of its previous complicity with an authoritarian system, and to promote regime rebuilding (de Brito & Aguilar, 2001). It is a form of ritual purification to restore the social order and change the moral culture of citizens (Cepl, 1997). From this perspective, vetting is a catalyst for bureaucratic, ideational, and moral societal change.

Citizen distrust of the state and fellow countrymen remain legacies of post-totalitarian system of control in which people must live within a lie (Killingsworth, 2010). Mishler and Rose's (2001) analysis of public institutions in China and Taiwan shows all of the institutions examined suffer substantial levels of public distrust; none enjoy extensive trust. Informal understandings and unwritten agreements between current political elites and former elites in positions of power fuelled perceptions that the

transitions were unfair, and that the state remains untrustworthy (Wołek, 2004). Continued high levels of corruption and economic inequality also contribute to low institutional trust (Uslaner, 2008).

Vetting might undermine strict rule of law procedures, thereby undermining the trustworthiness of government and by extension institutional trust. Vetting exercises that are manipulated by political parties for personal advantage or used as acts of revenge politics, as documented in Hungary, Albania, and Poland, could decrease citizen trust in political parties and government institutions (Kiss, 2006; Horne, 2009). Problems with the design or the implementation of vetting programs could also create distrust at many levels. Even well designed and well implemented programs could undermine trust because the nature of the revelations might catalyse renewed fear, re-traumatisation, and distrust.

Mayer-Rieckh's (2007) qualitative study of vetting in Bosnia found mixed results and unclear impacts on the performance of the police and judiciary. Local law enforcement personnel were screened amid strong resistance and local legal challenges. Although the vetting does appear to have helped in some areas, overall improvements in police performance remain unclear. According to surveys, public confidence in the Bosnian police rose slightly during the vetting period but has since plummeted. Judicial vetting was blocked until 2002-04, when judges and prosecutors were finally vetted. However, public confidence in the judiciary still remains low. Overall, the Bosnian vetting processes were contentious, with local nationalist parties aggressively intervening to influence outcomes.

As has been discussed above, primarily, vetting seeks to establish or restore trust between state institutions and citizens. However, many African states are deliberately

'in-formalized' therefore entrenchment of the rule of law may not often correspond with the logic of politics (Chabal & Daloz, 1999). Hence, efforts towards reforming state institutions and establishing conditions where citizens can be sufficiently committed to the norms and values that motivate their ruling institutions can run counter to the practices of a state in which the rulers benefit from an informal equilibrium (de Greiff, 2006). In states with weak institutions, one of the unintended consequences of vetting is that it can provide a veneer of legitimacy for governments that actually shun democratization and the rule of law, enabling leaders to pay lip service without substantive change in the business of politics (Snyder & Vinjamui, 2004).

With this as characteristic of the African state, it is possible to see why vetting has not been a reform choice in many African countries. Implementing vetting policies in the African state could lead to uncertain outcomes and even fall drastically short of expectations. In conditions with few legitimate rules and institutions, vetting programs can clash with the patronage logic of the informal state, along which much of politics is ordered, so was the case in the Liberia's vetting program (Chabal & Daloz, 1999). And therefore, most African states have adopted less confrontation local approaches that integrate the local culture and the desire for justice, for example, the Gacaca Courts in Rwanda.

Vetting programs are framed as intentional trust building measures, designed to restore trust in public institutions, interpersonal trust, and trust in government, and thereby positively contribute to the process of democratisation. Despite the many assertions about the relationship between vetting and trust, the evidence is scant. The relationship is more often assumed than demonstrated. Given the shortage of impact

assessments and the high stakes implications of assumptions of vetting's effects, this study attempts to shed light on the relationship between vetting and trust building in public institutions using the case of judicial vetting in Kenya.

1.9 Theoretical Framework

There are several theories that are relevant to this study: "mode of exit" (Huntington, 1991); John Moran's 'Exit-Voice' and Ramon David's (2011) theory of 'Lustration Systems'. Samuel Huntington's 'Mode of Exit' states that the weaker an authoritarian regime was at the time of the transfer of power to democratic forces, the more likely officials/collaborators would be held accountable for their acts of oppression (Huntington, 1991). According to Huntington, the elite bargains are the ones deciding whether the old regimes will be held accountable for past transgressions or it will be an issue of forgive and forget.

Huntington established a classification of countries according to their exit from authoritarian rule. These are, transformations where former authoritarian leaders took the lead and changed the regime into a democracy, replacements, where the oppressive regime lost strength until it collapsed or was overthrown and, transplacements, brought about in negotiations between weak political regimes and weak oppositional forces, because in such countries neither the regime nor the opposition is powerful enough to enforce its vision alone. In cases of transformation or transplacement, reform measures like vetting should not be attempted. To Huntington, in such scenarios, the political costs of such an effort will outweigh any moral gains (Huntington, 1991). Hence, according to this theory it's only if the former elites are removed from their positions against their wish would there be a desire for retribution.

In Kenya, Huntington's theory is not very applicable because transformation did not occur because neither President Moi's nor President Kibaki was removed from office by force. In Kenya, there was transplacements that resulted in negotiations hence there was no need to hold past offenders into account.

Moran's 'Exit-Voice' theory focuses on the 'tough' or 'soft' nature of repression during the authoritarian regimes. If the citizens were not allowed to talk or to express their disagreement, then there would be more pressure for finding the guilty ones. Moran's hypothesis is that where the former oppressive regime did not allow either 'exit' or 'voice', the citizens will be more likely to demand vengeance after the transition. However, the case does not seem to apply in Kenya. One notes the systematic denial of both "exit" and "voice" to ordinary citizens under Moi's dictatorial regime. Moi tightened his grip on the country, limited freedom of expression, quashed dissent and opposition, and extended the ruling party's control over every aspect of life. The Judiciary was instrumental in denying citizens both the right of "exit" and the right of "voice." Even a task like a Kenyan citizen getting a passport was marred with bureaucracies making it almost impossible. According to Moran, the lack of both "exit" and "voice" should have fuelled desires for revenge and facilitated the adoption of vetting as soon as Moi was out of power. However, this did not happen in Kenya. Even after Moi was out of power, it took totally different circumstances in the form of the PEV for Kenyan to institute vetting programs. Hence, Moran's analysis cannot explain the Kenyan case.

It is on these shortcomings in the aforementioned theories that the study adopts Ramon David's (2011) theory of 'Lustration Systems' to explain vetting in Kenya (David, 2011). Lustration System differentiates strategies of dealing with inherited

personnel into three core categories of dismissal, exposure, and confession. This theory draws insights from David's (2006) 'Lustration Laws' and from cultural sociology especially the symbolic-expressive aspect of social behaviour (Wuthnow, 1987). Lustration Systems are demonstrations or public rituals that convey messages about the legitimacy of the new government and the malleability of tainted officials. Dismissal represents a ritual of sacrifice, which can purify the government of its "tainted officials" but further demeans their social standing. Exposure aims to increase the transparency of government but inadvertently creates a shaming ritual that stigmatizes tainted officials in the eyes of the public. Confession is a self-sacrificing ritual that signifies the moral rebirth of the tainted official under new conditions.

Consequently, each lustration system is seen as a "trust base" (Simmel, 1950) having a different tendency to influence citizens' trust toward the new government and its officials and institutions. "Lustration systems" also refer to transitional public laws that stipulate particular conditions for holding public office in the new democracy by persons associated with former regimes (David, 2003). These are designed to deal with abuses of power by previous regimes and as a means of rebuilding society after transition. This theory acknowledges that vetting varies in scope, opportunity and implementation in different countries. However, institutional innovation of vetting does not rest in these technical and operational differences, but in their respective methods of dealing with tainted personnel (David, 2006).

Kenya's Judiciary vetting law was approved in 2011. The main feature of the law was the verification of questionnaires submitted by judges and magistrates to the vetting board. The questionnaires represented a form of confession and dismissal: they

required the judges and magistrates to answer questions about their past. In addition, background checks are done on the judges and magistrates to determine their suitability. If they answer the questions truthfully and the background checks do not reveal past misdeed, the persons concerned were allowed to hold a public office. The law therefore sanctioned the present dishonesty and of past involvement of the judges and magistrates.

People associated with the former regime are often viewed by the public as corrupt, inefficient, and loyal to the previous regime (Teitel, 2000). By changing state personnel, a lustration system based on dismissals and confessions draws a clear line between past and present and unequivocally distances the new government from the old system and its practices (David, 2003). It sends messages to citizens that the new state is not an instrument of oppression but a trustworthy administration that would serve the interests of society.

The judiciary in Kenya has a history of one of the least trusted public institutions. Hence the overall objective of the current vetting exercise is to increase public trust in the judiciary. To achieve this, the country has adopted demonstrations or public rituals that convey messages about the legitimacy of the new institution. First, the adoption of the Vetting of Judges and Magistrates Act, second, all officials are required to fill a questionnaire answering truthfully their past official conduct, which is later verified. This is a form of confession. Third, tainted officials have been dismissed from their positions and their 'sins' exposed in the form of the frequent determinations the vetting board announces. In these determinations, the 'sins' that led to the dismissal of the positively vetted are aired. All these 'actions' act as 'trust base' that communicate

a message of discontinuity with the past, it is because of these that 'Lustration Systems' is the most suitable theory to explain the vetting process in the judiciary.

1.10 Methodology

This section provides the research methodology that was used in the study. It discusses the research design, data collection and data analysis procedures used in the study.

1.10.1 Research Design

This project drew from a holistic case study of the vetting process in the Judiciary. The research used a combination of quantitative (Afrobarometer survey data) and qualitative (key informant interviews) research methods. The qualitative part allowed for the quantification of descriptive statistics. The quantitative part used frequency, percentage distribution tables and time series statistics to express the data. The qualitative part complemented the quantitative method and was summarized in thematic sections. The objectives of the study were layered. So first the study established whether public trust in the judiciary has increased since the vetting exercise began in 2012. This was accomplished by the use of Afrobarometer Survey Data. The second objective was to understand the factors that have facilitated the judiciary in achieving or not achieving this objective. This was done by conducting key informant interviews with experts.

1.10.2 Data Gathering Methods

The study utilized two data collection methods in order to study the vetting process: Survey and Interviews. These data collection methods were chosen for their utility. Surveys helped establish whether public trust in the judiciary has increased since the

vetting process started. Interviews helped capture experts' points of view on why they think pubic trust in the judiciary has not increased despite the ongoing vetting exercise.

1.10.3 Surveys

The researcher used Afrobarometer Surveys Data to answer the first research question: To what extent has vetting in the Judiciary influenced public trust in the institution? Afrobarometer is an independent, non-partisan research project that measures the social, political, and economic atmosphere in Africa. Afrobarometer national surveys are conducted in more than 30 African countries and are repeated on a regular cycle. Each Afrobarometer survey collects data about individual attitudes and behaviour, including innovative indicators especially relevant to developing societies. Because the instrument asks a standard set of questions, countries can be systematically compared and trends in public attitudes are tracked over time. This data is available in its raw form by request. One particular question in the Afrobarometer instrument was of interest to the study:

> *How much do you trust each of the following, or haven't you heard enough about them to say: Courts of law?*
>
> *Not at all*
> *Just a little*
> *Somewhat*
> *A lot*

Because of the regular nature of the Afrobarometer surveys, the researcher utilized its 2008 data to establish the baseline on public trust before the vetting started. The study then utilized the 2012 and 2014 data to establish public trust in the judiciary after the vetting process has been completed.

1.10.4 Interviews

Key informant interviews were geared towards collecting data for the second research question: What factors are responsible for the increase or decrease of public trust in the judiciary? To answer this question, the researcher spoke to 26 key informants drawn from the judiciary, civil society organizations, and government official, academia and experts in the field who were actively involved in the decision-making, planning and implementation of the vetting program in the Judiciary. In addition to the elite interviews, the researcher spoke to judges and magistrates who have undergone or are yet to undergo the vetting exercise to get their perspectives on the process. These interviews were very useful in learning the structure of vetting, perspectives regarding vetting and the realities of vetting implementation.

1.10.5 Sample Selection

An institutional approach was taken to arrive at the interviewees. The key informants/expert respondents were drawn from the following institutions: NGOs, government, university experts, LSK members, members of the Judiciary. In addition, the following key informants were interviewed: CJ and President of the Supreme Court; 1 High Court Judge; 2 Judiciary expert; 2 lawyers form LSK; 2 Transparency International officials; 2 ICJ officials; 1 ICTJ official; 2 officials from KHRC; 2 Agenda 4 monitoring officials; 2 government officials from CIC; 2 officials from JMVB; 2 academician from University of Nairobi; 1 government official in security sector reform.

All interviews were semi-structured. The researcher followed the interview guides prepared for each group of interviewees, but while conducting the interviews the researcher had to ask different questions or adjust some of the guide questions

depending on the context of interview or experiences of interviewees (for the interview guide, please see Annex 2). The study used open-ended questions to learn more about vetting in the Judiciary. A digital-recorder was also used in order to pay close attention to what was communicated, to facilitate the use of a conversational style, and to minimize any information loss. All the interviews were transcribed verbatim.

1.10.6 Data Analysis and Presentation

Quantitative data was analysed and presented through cross tabulation and time series. Qualitative data was analysed simultaneously with data collection. Interviews and field notes were transcribed and synthesized. While reading the transcripts, and documents, the researcher traced critical expressions or themes. Qualitative data was presented in thematic narratives.

Validity was fulfilled through data triangulation and respondent validation. The researcher read each transcript at least twice in order to detect statements that would seem to be incorrect and inconsistent. In this process, field notes were utilized to crosscheck. Finally, quantitative data was expressed in tables and graphs while qualitative data was presented in form of thematic narratives each responding to the research objectives.

CHAPTER TWO: A HISTORY OF JUDICIAL REFORMS IN KENYA

2.1 Introduction

To better understand the judiciary reform process in Kenya, it is imperative that we begin with a history of judicial reforms in Kenya. Therefore, this chapter provides a background to judicial reforms in Kenya, which it divides into two—early judicial reforms (dating from independence to 2007) and the current reforms brought about by the 2007/8 post-election violence and the national accord that ended the violence. The chapter discusses the various problems and challenges that have faced the judiciary in these two periods and the various attempts to address them. The chapter argues that the pre-2007 reforms in the judiciary were generally a failure (and provides reasons for this), however, these failures have provided a good anchoring for the current wave of reforms. The second part of the chapter discusses these current and ongoing reforms within the judiciary, with emphasis on our case, judicial vetting, the set-up, legal framework and the work done so far by the Judges and Magistrates Vetting Board.

2.2 Judicial Reforms in Kenya: An Overview

The judiciary in Kenya has been rammed with a number of problems ranging from corruption, rule of law, judicial independence, appointments, backlog of cases, internal financial organization and general governance issues (Oseko, 2011). A few issues are selected for discussion, the basis of the selection is that these issues bedevilling the Judiciary have had the greatest impact on the trust citizens have in the institution.

Kenya was a British colony until it gained independence in 1963. Like all other British colonies, Kenya had its constitution largely determined by the British. However, it was a fairly progressive liberal democratic constitution (Kibala, 2003). It included some important provisions such as checks on executive power, the protection of fundamental rights and freedoms of the individual (Sanger & Nottingham, 1964). Even though the Independence Constitution contained clauses that otherwise represented some elements of judicial independence, this did not hold for long. Like many other African leaders who assumed power after independence, Kenyatta used state machinery and institutions for political patronage rendering them ineffective (Miller & Yeager, 1984).

From 1978, Moi followed in Kenyatta's footsteps, further weakening the Judiciary in what could be seen as a race to the bottom. Most amendments during these periods had a purely governmental-cum ruling party origin and sought in the first place to consolidate the authority of the executive almost at the expense of other organs of government. For example, parliament on Moi's order reinstated the detention laws which had been suspended in 1978. Colonial era laws, like the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act, the Public Order Act, and the Penal Codes, gave the president the right to suspend individual rights guaranteed by the constitution undermining the rule of law. In 1986 parliament enacted Act No. 14 followed in 1988 by Act No.4, imposing limitations on the independence of the judiciary, with far reaching human rights violations. Sections 61(1) and (2) of the Constitution empower the president to appoint the chief justice and puisne judges respectively upon the recommendations of the Judicial Services Commission (JSC) which was also appointed by the president. The 1986 and 1988

constitutional amendments provided for the removal of the security and tenure of the Attorney General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal further weakening the judiciary.

Two major actions can symbolise the lack of independence of the judiciary during this period. In 1986, in his ruling in a case in which an American marine had murdered a Kenyan woman in Mombasa, a judge found the accused guilty but fined the marine only Ksh500 and bonded him for one year probation (Maina, 1996). The issue was raised in parliament thereafter because of the light sentence imposed by the judge. The then Attorney General, James Karugu, as the chief legal advisor to the government, responded by criticizing the decision of the judge. He did not last long in his position. After that, the Controller and Auditor General questioned why a state owned corporation engaged the services of a private lawyer in this particular case (Maina, 1996). His office became the object of executive branch criticism. Moi interpreted both of these actions as direct threats to his leadership and thus pressured parliament to enact amendments to give him more authority over the judiciary and the audit department

The judicial system could not protect human rights either. The British judges who have continued to serve Kenya as part of the British overseas development aid were even more susceptible to the manipulation than their Kenyan counterparts because they are seconded on contracts. Under the terms of the agreement between Kenya and the United Kingdom, the renewal of contracts was at the discretion of the Kenya government. A former British expatriate judge in Kenya, Eugene Cotran, openly stated that in cases in which the president has direct interest, the government applied pressure on the expatriate judges to make rulings in favour of the state (Africa Watch,

1991). It was as a result of similar circumstances, that two expatriate judges, Justices Derek Schofield and Patrick O'Connor, resigned because of what they called a judicial system blatantly contravened by those who are supposed to be its supreme guardians (Rakiya, 1988).

The ease with which judicial independence was compromised is traceable to inadequate constitutional safeguards. The available safeguards were susceptible to misuse, thereby exposing the judiciary to the control of the executive. This resulted in perceptions of lack of independence, and its incapacity to check the excesses of the other arms of the government, especially the executive. Specific aspects of judicial independence that were in question included: separation of powers; appointments; tenure and removal; and, budgetary autonomy.

On separation of powers, Kenya's Independence Constitution has been cited as one of the few in Anglophone Africa that did not clearly establish the judiciary as a separate branch (Widner, 2002), which gave the president incentives to want to make it an appendage of the executive. This silence, it was argued, immediately created a perception of a weak foundation of judicial authority and an imbalance of power between the judiciary on one hand and the other two arms of government on the other. This created a lacuna in the framework of a clear separation of powers, as without separation of powers, there could not be a truly independent judiciary (Amolo, 2005).

On appointments, judicial appointments in Kenya were done by the president. This by itself is not an issue as in most countries judicial appointments are done by politicians. However, Kenya has a history of executive domination of other branches of government. Therefore, the country lacked the kind of democratic culture developed

by other countries like Britain where judicial appointments, even though made by the executive, this didn't compromised judicial integrity. Under the Independence Constitution, the CJ was solely appointed by the President. In an ICJ survey carried out in 2005, 74% of the respondents believed that the system of appointing the CJ had affected the administrative structure of the judiciary, making it a political office whose appointment was dependent on the interest of the incumbent Head of State;68% of the respondents believed that the then CJ was not independent (ICJ, 2005). Hence, public trust in the office of the CJ was very low as he was perceived to be a crony to the President.

Merit, seniority or other objective criteria or qualifications were not considered. It would not be farfetched to perceive that a rather big 'favour' had been extended by the appointee to the appointing authority (executive). Such judges, even if independent and impartial, would not command confidence of the public and would be perceived as not independent of the executive. Decisions made by a judge so appointed, especially those that arise from disputes wherein the executive is a party, would lead the other party or parties to the suit, or the general public to believe that the outcome of such a case can only be in favour of the executive. The perception of lack of personal independence on the part of such appointee would not be easy to dispel and was an issue in Kenya's judiciary before the current reform measures (TI, 2009).

On security of tenure and removal, the Independent Constitution set retirement age at 74 years. In addition, Judges of the High Court and the Court of Appeal enjoyed security of tenure. They could be removed from office only for inability to perform the functions of their office or for misbehaviour and in accordance with procedures

laid down in the Constitution. However, the 1986 and 1988 amendments removed all such guarantees. Judges could be easily and arbitrarily removed, making them more vulnerable to manipulation by the executive. On budgetary allocation, allocations to the judiciary remained meagre and inadequate, fully reliant on the executive (ICJ, 2007). This resulted in an institution that was preserved to be weak and operated at the behest of the executive.

2.3 Early Proposals for Reform

The seeds of the present-day judicial reform program in Kenya were planted prior to, and in the years following, independence when numerous committees were appointed to study various aspects of the civil service which, until the early 1990s, included the judiciary. In total, there are no less than thirteen reports that have been done that abound recommendations on what should be done in the Judiciary. They include; the Flemming Commission Report, 1960; Pratt Commission Report, 1963; Ndegwa Commission Report, 1971; Waruhiu Committee Report, 1979/80, Ramtu Committee Report, 1985; Mbithi Committee Report, 1990/91; The United Nations Basic Principles on the Independence of the Judiciary, 1985, The Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary (The Kotut Report), The Commonwealth (Latimer House) Principles, 1998; The Report of the Committee on the Administration of Justice (Kwach Report), 1998; The Universal Charter of the Judge, 1999; Report of the Advisory Panel of Eminent Commonwealth Judicial Experts for the Constitution Review, 2002; The Report of the Integrity and Anticorruption Committee of the Judiciary (The Ringera Report); The Draft Constitution of Kenya 2004 (Bomas Draft 2004), Final Report of the Constitution of Kenya Review Commission, 2005; The Proposed New Constitution (Wako Draft),

2005; The Report of the Subcommittee on the Ethics and Governance of the Judiciary (The Onyango Otieno Report), 2006; The Report of the Task Force on Terms and Conditions of Service for Judicial Staff (The Bosire Report), 2007; The Consultancy Report on the Synchronized Survey of Pending Cases in Kenyan Courts, 2007; The Report of the Committee on Ethics and Governance of the Judiciary (The Kihara Kariuki Report), 2008; The Kenya National Dialogue and Reconciliation: Agenda Item IV, 2008; The Kenya Vision 2030; The Medium Term Plan of Vision 2030; The Judiciary's Strategic Plan, 2009-2012.

Out of these many reports, this section will highlight the Waruhiu Report, Mbithi Committee, Kotut Committee, Akiwumi Committee; the Kwach Committee; Ringera Committe; Onyango Otieno Report and the GJLOS. The basis for the selection is that, these committees reports stand out for their relevance and impact contribution of their recommendations to judicial reforms in Kenya.

The Waruhiu Committee report on the Civil Service Review Committee to the judiciary recorded three key recommendations. On the independence of the judiciary, the Committee proposed that the independence of the judiciary ought to be maintained and that the judiciary ought not to be treated as an appendix of the office of the Attorney-General. The Government accepted this recommendation in Sessional Paper No 10 of 1980 and this need is now partly captured in the current Constitution. On the terms of service of judicial officers, the Committee recommended that judges and magistrates ought to be on permanent and pensionable terms of service as a step towards enhancing their security of tenure. This was accepted by the government and was implemented.

On the localization of the judiciary, the Committee proposed the intensification of the training and recruitment of local lawyers to take over from the expatriate magistrates and judges. The Committee also proposed a training program for clerical staff, executive officers and court interpreters. The Mbithi Committee of 1991 recommended the decentralization of the judicial service to provincial level and district level to aid administration of justice; the computerization of record-keeping in the courts; and the strengthening of the Kenya School of Law to enable it to offer specified and enhanced professional training to paralegal staff.

The Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992, commonly referred to as 'the Kotut Committee', was appointed to inquire into ways and means of establishing a structure of salaries, conditions of service and related benefits for the judiciary separate from those of the civil service. The Committee made several recommendations on the structure of the judiciary, recruitment and development of judicial personnel including paralegal staff, and the structure and other terms and conditions of service of judicial officers. The implementation of these recommendations was charged to the Akiwumi Committee. The Akiwumi Committee was responsible for the formulation of the Judicial Service Staff Regulations, and the publication of Gazette Notice No 3801 of 8 May 1995, signed by the President, by which the judiciary ceased to be a part of the civil service with respect to the terms and conditions of service of its staff.

Towards the late 90's, the Kenya Judiciary had come to be known for, lengthy case delays and backlog; limited access by the public; lack of adequate facilities; allegations of corrupt practices; cumbersome laws and procedures; questionable recruitment and promotional procedures; general lack of training; weak or non-

existence of sanctions for unethical behaviour and inequitable budget. Cumulatively, these problems resulted into loss of public confidence in the institution. This necessitated the then Chief Justice Justice Chesoni to introduce a more structured approach to reform of the justice sector. This he did in 1998 when he appointed a committee chaired by a Judge of the Court of Appeal, Justice Kwach, to review and report on the administration of justice in Kenya. The Kwach Committee was appointed to review the administration of justice in Kenya. In its report presented later that year, the Committee cited 'corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering' as common problems in the judiciary (Kwach Report, 1998). The Committee examined and made several far-reaching recommendations on strategies for the improvement of the administration of justice.

Amongst its recommendations, included proposals to amend the constitution to allow for the removal of incompetent judges; increase judicial personnel, and improve employment terms and conditions; develop and implement a code of conduct for judicial personnel backed by an inspectorate unit; improve facilities within the judiciary; overhaul the Judicial Service Commission; reorganize case handling and management systems; simplify court procedures and introduce alternative dispute resolution (ADR) mechanisms; and split the High Court into four divisions, namely the Family, Commercial, Civil and Criminal Divisions. Upon receipt of the Kwach report in late 1998, the Chief Justice appointed another committee to investigate modalities of implementing its recommendations for improving the judiciary (US Department of State, 2000). Unfortunately, the Chief Justice passed away shortly

thereafter and the next Chief Justice, Honourable Chunga, did not fully implement the findings of this report before resigning when the new government came to power.

At the new year of 2002/2003 a significant political change took place in Kenya when Mwai Kibaki defeated President Moi by a landslide in a general election powerfully propelled by a coalition of political parties within the National Rainbow Coalition (NARC) as the ruling party. The Kibaki Government had been elected on a platform of fighting corruption and mismanagement of the long KANU era, therefore, Kibaki and his new team in office were keen to show their intentions to fight official corruption and cleaning up the Judiciary. Following the political transition, the new government prioritized the problem of judicial corruption through the implementation of a process often referred to as 'the radical surgery', which sought to identify and remove corrupt judges (ICJ, 2007). In 2003, the new Chief Justice, the Honourable Gicheru, appointed a committee chaired by Judge Ringera, to investigate the nature, level and impact of corruption in the judiciary and to recommend strategies for its detection and prevention. The Committee was also required to investigate and identify corrupt members of the judiciary and to recommend disciplinary measures against them.

The Integrity and Anti-Corruption Committee (IACC), also referred to as 'the Ringera Committee', was appointed in March 2003 and presented its report in September 2003. The report noted that judicial corruption was rampant. It cited credible evidence of corruption on the part of five out of nine Court of Appeal judges (56%), 18 out of 36 High Court judges (50%) and 82 out of 254 magistrates (32%) (IACC, 2003).Prior to informing the accused of the allegations against them, however, a 'list of shame' was published in the media, naming the judges and magistrates implicated in the

report. The Acting Chief Justice publicly advised those named on the List to resign quietly within two weeks or be suspended without pay or privileges and face tribunals. Fifteen judges resigned but two Court of Appeal judges and six High Court judges decided to face tribunals. Most notably, Justice Waki, a Judge of the Court of Appeal, challenged the allegations against him and secured his reinstatement in late 2004. Of the 82 magistrates implicated, 70 were 'retired' by the JSC in the public interest. The process of publicly naming individual judges and magistrates as corrupt without giving them prior notice of charges against them was widely criticized, as was the pressure placed on them to resign from office. These actions were seen to compromise judicial independence, including security of tenure, and undermine the right to due process (ICJ, 2005).

In 2003, the Government launched the Governance, Justice, Law and Order Sector-wide Reform Program (GJLOS). GJLOS sought a sector-wide approach to dealing with problems affecting the justice, law and order sector institutions. The program covered four key ministries and up to 32 department and agencies. GJLOS was supported by nine countries and eight international organizations. The program was coordinated by the Ministry of Justice and Constitutional Affairs, while funds were managed by a financial management agent chosen by the government and the basket-fund donors. When the program was conceptualized, the donor community anticipated that GJLOS would lead to far reaching reforms in all the legal and justice sector institutions. However, in practice, although the program has developed several judicial reform initiatives, implementation has been limited. In 2009, the donors decided to cease engagement with GJLOS, citing the overly-ambitious nature of the

project goals and the absence of intended results as the major reasons for their withdrawal of funding.

Perhaps the boldest effort at judicial reform to date was contained in the 2004 draft Constitution of Kenya (the Wako draft). Chapter 13 of the draft Constitution advanced various principles and guidance on the exercise of judicial functions and placed obligations on judicial officers and the state in the conduct and facilitation of judicial work. The draft also emphasized the independence of the judiciary and made this subject only to the Constitution. The judiciary's financial independence was secured by charging all its expenses to the Consolidated Fund. Regarding the structure of the court system, the draft contemplated the establishment of a Supreme Court as the superior court of record. The draft constitution also contained elaborate provisions on the appointment of the Chief Justice and judges, including minimum criteria for such appointments. Although many of the provisions of Chapter 13 were non-contentious, the draft constitution as a whole was rejected following a public referendum held in 2005.

The Sub-Committee on the Ethics and Governance of the Judiciary, popularly known as 'the Onyango Otieno Committee', was established on 18 March 2005 to continue to investigate issues related to integrity in the judiciary and the due administration of justice. The Sub-Committee presented its report in November 2005 and it was made public in January 2006. Unlike the earlier Ringera Report on judicial corruption, the Onyango Otieno Committee Report refrained from naming individual judges as corrupt. The Sub-Committee made recommendations towards enhancing the integrity in the judiciary through, inter alia, substantive changes in the disciplinary procedures of the judiciary in order to make them more transparent and fair to the affected

parties. The Sub-Committee also proposed measures to enhance the integrity of the litigation process for the efficient and effective delivery of justice. The Onyango Otieno Report was followed by the Report of the Committee on Ethics and Governance of the Judiciary in October 2008 (Kihara Kariuki Report). It too did not publish open accusations against judges or magistrates.

The post-election crisis in late 2007 and early 2008 and the subsequent establishment of the Kenya National Dialogue and Reconciliation process marked a potential turning point for judicial reform in Kenya. Public confidence in the judiciary was greatly undermined following the outright rejection of the judiciary as an impartial and independent arbiter to resolve the dispute arising from the presidential election results (Oseko, 2011; Onyango & Maina, 2015). To address this situation, the grand coalition government resolved under Agenda Item IV of the National Dialogue and Reconciliation Agreement to undertake comprehensive reforms of the judiciary. The Kenya National Dialogue and Reconciliation (KNDR) process prioritized a number of steps to reform the judiciary. They include the following: Constitutional review to anchor judicial reforms, including financial independence, transparent and merit-based appointment, discipline and removal of judges, strong commitment to human rights and reconstitution of the Judicial Service Commission; Enactment of the Judicial Service Commission Act, with provisions for peer review mechanisms and performance contracting; and, streamlining of the functioning of legal and judicial institutions through the adoption of a sector-wide approach to increase recruitment, training, planning, management and implementation of programs and activities in the justice sector (KNDR, 2009).

At the same time, several policy initiatives on the reform of the judiciary were included in the Medium Term Plan (2008-2012) of Vision 2030 (GOK, 2009). The judiciary also devised its own blueprint for judicial reform. Launched in 2009, the Strategic Plan for the Judiciary 2009-2012 stipulated strategic objectives and activities for the reform of various aspects of the judiciary. In particular, the plan identified the enactment of the Judicial Service Bill, improving human resource capacity within the judiciary and establishing a communication department as important objectives.

2.4 Challenges Faced in the Implementation of Early Judicial Reforms

One of the challenges to the implementation of judicial reforms was lack of sufficient political goodwill for judicial reforms (Judiciary, 2009). This point is repeated in almost all the reform initiative reports, either explicitly or implicitly. Studies on judicial reform elsewhere reiterate this contention and observe that adequate implementation of reforms depends on committed political and judicial will and a broad base of society support, hence transparency and systematic monitoring is essential (Sousa, 2007). Political will is therefore very important for reform of the judiciary to succeed since it is the executive which has the responsibility for developing policies and implementing them.

One area that has been used to illustrate lack of political will is in financial independence. To achieve financial autonomy, legislation was required to be enacted to enable the judiciary to access funds directly from the Consolidated Fund. As at 2005 and also 2009, the draft Judicial Services Bill still appeared as pending in the Judiciary Strategic Plans, meaning that the executive never acted on it. The Bill was tabled before Parliament by the Minister for Justice and Constitutional Affairs, only after the enactment of the new Constitution. It was subsequently debated and passed

into law shortly thereafter. The absence of a justifiable explanation for this delay can reasonably be construed as evidence of lack of political will with the intention of denying financial autonomy to the judiciary.

Another challenge identified that contributed to failure of earlier judicial reforms is lack of implementation strategies. This hindered the realization of the various judicial reform attempts in Kenya (Oseko, 2011). On implementation of salaries and terms and conditions of service, and related issues, the Waruhiu Report (1980) in its review of reform initiatives since independence, observed that many of the recommendations that were accepted by the government were straightforward and could have been implemented almost immediately. However many of them took as long as eight years to be implemented and many others have never been looked into. Whatever half-hearted implementation that was done, it was piecemeal, uncoordinated and without a clear sense of direction. The result has been that the impact of whatever recommendations that were implemented has been largely dissipated.

The Kotut Report (1992), expressed concern that the Waruhiu Report (1980), which had recommended that judges be employed on permanent terms, had not been implemented. Implementation regarding salaries increments was made, not only for the judiciary, but across the whole civil service. The Kanyeihamba Report (2002) lamented that, many of the fundamental recommendations of the Kwach Committee (1998) had not been implemented. The Ouko Report (2009) still expresses similar concerns that due to lack of resources, and clear framework for implementation, the implementation of judicial reforms has been painfully slow and majority of them have yet to be put to their full effect. The failure to implement these reports pointed to the failure by the executive to put in place adequate policies geared towards

enhancing judicial independence. This would be due to the fact that the executive had developed a culture of using the judiciary to its benefit hence had no motivation to change the status quo. Thus, although some reforms have been carried out, these isolated reforms have themselves not been sufficient to bring change that is needed to transform the judiciary into a strong independent institution.

It is true that attempts to reform the judiciary were half-hearted and infrequent; implementation was haphazard and not designed to attend to the root causes of the clearly identified challenges. In fact, most of them completely missed the intended target of entrenching judicial accountability for the purposes of strengthening judicial independence. Instead, some attempts, like the 'radical surgery', had the opposite effect of compromising judicial independence. This could be largely attributed to the fact that the, despite the executive trying to control it, the judiciary over the years appeared not to make serious effort to protect its own independence even within the minimal protection actually offered by the Old Constitution. There seemed to lack any serious attempts by the judiciary to conduct any self-help measures to stave off executive onslaught to its independence. The reform initiatives, especially those that were judiciary driven as the Kwach Report, the Onyango Otieno Report and the Ringera Reports, were mostly of the view that amendments to the Constitution would be the most preferred solution to lack of independence. The assumption appeared to be that once this was done, it would automatically deter the executive from encroaching into the affairs of the judiciary. Apart from feeble one off protests from the CJ no serious engagement with the executive was forthcoming. The judiciary simply sat back and played victim

2.5 2007 Judicial Reforms

Calls for reform of the judiciary reached fever pitch especially after the aftermath of the post-election violence in 2007. Judicial reforms became even more urgent and the recommendations for the creation of a new judiciary, more radical and far reaching. This was informed by the fact that the judiciary was one of the institutions whose rejection led to the post-election violence. Former UN Secretary General, Kofi Annan and a team of Eminent Persons were identified by the African Union to intervene and find a solution to the raging violence. They finally brokered a political deal to avert further violence. The deal created a power sharing agreement that formed the basis for the creation of the Grand Coalition government, with the office of the Prime Minister sharing executive powers with the President.

2.6 The National Accord and Agenda 4

The National Accord and Reconciliation Agreement (NARA, 2008), (the power sharing agreement)—was signed between the two rival candidates. They agreed to implement a number of reforms to address the immediate and long term issues that triggered the violence. The main agenda was to address the crisis, reconcile communities and mitigate against future conflicts. The specific objectives categorized in terms of agenda items one to four included: First, to stop violence and restore fundamental rights and liberties; second, to address the humanitarian crisis that involved resettlement of Internally Displaced Persons (IDPs); third, to resolve the political crisis; and fourth, to examine and address constitutional, legal and institutional reforms, poverty and inequality, youth unemployment and land reforms (KNDR, 2009).

Under institutional reforms, judicial reforms were considered very important for the country. This was because contributing to the conflict was the fact that opposition parties denounced the courts due to their limited capacity to offer impartial judgment over the disputed presidential election petition. The power-sharing agreement underlined the need to strengthen the independence of the judiciary by reviewing the constitution to ensure financial independence, transparency in the appointment, discipline and removal of judicial officers, reconstitution of the Judicial Service Commission to include other stakeholders and enhance the independence. Streamlining the functioning of legal and judicial institutions by adopting a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes and activities in the justice sector were also considered necessary (South Consulting, 2012; KNDR, 2009).

The NARA also set the stage for commencement of another round of constitution review. The Committee of Experts (CoE) in its report identified the politicization of the process, lack of political will, deep seated suspicion together with lack of confidence in government institutions and consistent failure to complete the previous reform processes as some of the reasons why Kenyans were sceptical of the renewed process. However they finally prepared the Final draft of the proposed Constitution which was placed before the public for a referendum on the 4th of August 2010. The result was a vote overwhelmingly in favour of the proposed Constitution.

The Constitution of Kenya (2010), unlike the previous one entrenches the independence of the Judiciary. It proclaims that in the exercise of judicial authority, the Judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. The New Constitution

recognizes the judiciary as a separate arm of government and bestows upon it the function of exercising judicial authority. Amendments to the provisions relating to judicial independence have been made more difficult than it was under the Old Constitution. A 2/3rd majority parliamentary vote and also a referendum is now required in order to secure an amendment.

The New Constitution established the Judiciary Fund, which is administered by the Chief Registrar of the judiciary (Oseko, 2011). The Fund is used for administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of its functions. The Chief Registrar is required to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval. Upon approval by the National Assembly, the expenditure of the Judiciary becomes a direct charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund. The bureaucratic executive laden budgeting procedures which exposed the judiciary to manipulation by the executive, whether perceived or actual, appear to have been removed with this shortened process.

In general, the Constitution of Kenya (CoK) (2010) endeavoured to reduce the executive's control of the judiciary, opening a possibility for reforms (Onyango & Maina, 2015). Other steps undertaken to reform the Judiciary include: the transparent recruitment of senior judicial officers including the appointment of new Chief Justice of the Supreme Court, Willy Mutunga, a reform activist (Onyango & Maina, 2015). This has been assumed to prioritize the implementation of the rule of law and human rights over the political will of the elites; training of officers and outreach state institutions to complement the work of the judiciary, building capacity of the Judiciary for example the Judicature Amendment Bill, 2011 increased the Court of

Appeal judges from 12 to 30 and those of the High Court from 70 to 150 (South Consulting, 2012) as well as the boldest reform measure so far— vetting of all judges and magistrates (South Consulting, 2012).

2.7 The Setting up of the Judges and Magistrates Vetting Board

Kenya presents a complex set of 'pasts' relevant to transitional reform vetting. For this study Kenya's troubled past that has necessitated transitional vetting in its institutions is grouped into two periods, Moi's authoritarian rule (1978-2002), and Post-election violence (2007-2008). Issues under these two periods include. During the transition to multi-party politics in the 1990s, violence between government and opposition supporters resulted in killings, forced displacement, looting and dispossession of property (Republic of Kenya, 1999). These were characterized by 'ethnic', 'land' and 'political' clashes. Human rights violations including massacres, assassinations, detention without trial, torture and extra-judicial execution of rivals and land grabbing took place under the government of Moi (1978-2002) (Human Rights Watch, 1993; Kinyatti, 1997), economic crimes, including land-grabbing, looting of the national coffers, official corruption, and transfer of public funds into private bank accounts (GOK, 2005; GOK, 2000). Widespread violence following the disputed December 2007 presidential elections in which Mwai Kibaki was declared re-elected for a second term. The post-election violence stands out not only because of its nature and unprecedented scope, but also, significantly, for prompting international action to both mediate the conflict and institute transitional reforms measures (NPI-Africa & GPPAC, 2014).

Several options were floated for transitional reform in the judiciary. These included: a proposal to reappoint the entire judiciary, that is, treating all judges as having lost

their jobs but permitted to reapply and there was also a proposal of a more gentle nature that, judicial officers remain in office but are required to take a new oath and to undergo a 'vetting' process (Kegoro, 2012). Besides the aforementioned proposals, there was also another proposal to maintain the status quo even under a new constitutional order. The Committee of Experts (CoE) weighed all those options floated by the members of the public to determine their feasibility.

The committee did away with the call for a 'total renewal' of the judiciary and asserted that, if adopted, the approach would lead to large-scale instability in the country as those who already had cases in court would suffer injustice (CoE, 2010). Maintaining the status quo was also not an option among as Kenyans already wanted change in the judiciary. The only viable option left was the option of taking the vetting approach. This approach entails that the judicial officers remain in office but are required to take a new oath and to undergo a 'vetting' process. It thought that vetting would achieve the same goal as renewal and that it would be less disruptive than a process of filling anew all judicial positions.

Article 23 (1) of the Sixth Schedule of the 2010 Kenyan Constitution provided that Parliament would enact legislation to establish a Board for the vetting of judges and magistrates. In March 2011 the Kenyan parliament enacted the Vetting of Judges and Magistrates Act (the Vetting Act) which established an independent board called the Judges and Magistrates Vetting Board (JMV Board). According to its official website the Board's main objective is to vet the suitability of all the Judges and Magistrates who were in office on the effective date of the new constitution of Kenya to continue to serve in accordance with the values and principles set out in Articles 10 and 159 of

the constitution. It was to operate for one year from the date of operationalization (JMVB, 2013).

The aim of the Board was not to carry out a "purge", but to restore the public's confidence in the judiciary and the courts (JMVB, 2013). In order to prevent affecting the Rule of Law, like in the events that happened in the 'radical surgery', and to not go against the principles of due process, the Board was to discharge its mandate according to the values of teamwork, integrity, respect, accountability and transparency, efficiency and effectiveness, and professionalism (JMVB, 2013). If the processes followed by the Board were arbitrary and its decisions were not solidly based on material before it, the main goal of restoring public confidence in the judiciary would not be achieved (JMVB, 2013).

Section 18 of the Vetting Act details the relevant considerations that the Board would consider when determining the suitability of the candidate to continue being a judicial officer or magistrate under the new 2010 Constitution. These criteria are: constitutional criteria for appointment; past work record, including prior judicial pronouncements; criminal cases or prosecutions against the judge or magistrate concerned; and complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Kenya Anti-Corruption Commission, the Attorney General, the Judicial Service Commission and other identified bodies (van Zyl-Smit, 2012; GoK, 2011).

The Board should ideally use these criteria to arrive at a fair and appropriate determination, once considered in conjunction with the answers and impression made by the vetting candidate at their interview. Section 19 (2) of the Vetting Act provides that all information gathered throughout the interview and the consideration process

remains confidential. Section 19 (3) follows that all candidates who undergo vetting shall be given sufficient notice of when the procedure will begin, as well as receiving a summary of any complaints lodged against them. The vetting procedure and interviews would also be conducted in private, unless the candidate to be vetted requests a public hearing. Section 19 (6) also affirms that all proceedings would happen according to principles of natural justice (GOK, 2011).

Section 21 (1) of the Vetting Act provides that if the Board decides a candidate is unsuitable to continue as a judge or magistrate they must inform that candidate within thirty days of the determination and specify reasons. Once the candidate has been informed of this decision, they are deemed to have been removed from office. Section 22 says that the vetted candidate would be allowed to request a review from the same panel that made the decision, within seven days of being informed of the final decision. The decision would be made public.

Sections (2) and (3) of the Vetting Act assert that if a Judge elects to leave office voluntarily instead of submitting to vetting procedures or is found unsuitable by the vetting board, they will be deemed as qualified for early retirement. Therefore, such a judge would be entitled to the terminal benefits of early retirement. An important innovation is that all judges and magistrates that would be subject to the vetting procedure would remain in office, unless and until they were found unsuitable in terms of the Vetting Act (van Zyl-Smit, 2012). The judges and magistrates were to be vetted in stages: first the Court of Appeal judges, then the High Court judges, then the vetting of the Registrar of the High Court, the Chief Court Administrator, Chief Magistrates, and then other magistrates.

2.8 Vetting Outcomes

In April 2012 the Board released its first outcome. It declared four Court of Appeal judges unsuitable to continue in office. Justices Emmanuel Okubasu, Samuel Bosire, Riaga Omollo and Joseph Nyamu failed to pass the integrity test (Kadida, 2012). The reasons given for this outcome were that some of the judges lacked independence, showed bias towards the high and mighty in society, favoured impunity and limited democratic expression among others (Kadida, 2012). The Board cleared justices Philip Tunoi; Philip Waki; OnyangoOtieno; Erastus Githinji and; Alnashir Vishram as being fit to continue in serving.

On the 2nd of July 2012 the 2nd determination issued by the Board found that Justice Mohammed Ibrahim was unsuitable to continue in office. Justice Roselyn Nambuye was also found to be unsuitable. Justice Jackton Ojwang, Justice Paul Kihara Kariuki; Justice Hannah Magondu Okwengu were cleared to continue serving. The four Court of Appeal judges who had been declared unsuitable in the first determination had sought a review of this decision, but in this determination the Board confirmed its previous ruling. In the third determination, the Board was reviewing judges holding office in the High Courts.

In the announcement made on the 3rd of August 2012, only one judge, Justice Jean Gacheche, was declared unfit to continue in office (Mayabi, 2012). Justice Wanjiru Karanja; Justice Jessie Wanjiku Less it; Justice Amraphael Msagha; were declared fit to remain in office. In the fourth determination announced on the 21st of September 2012, Justice Khaminwa was found unsuitable to remain in office due to ill health. Both Judges Ibrahim and Nambuye were granted review applications of their rulings of unsuitability and were to be subjected to fresh vetting.

In the 5th determination announced in December 2012, five High Court Judges, Justices Ang'awa, Njagi, Sergon, Ombija and Mugo, were determined as unsuitable to continue in office. In the 6th determination made on the 15thof January 2013, the Board cleared both Justice Ibrahim and Justice Nambuye (both of whom the Board had declared unsuitable in the second determination and they had requested a review) as suitable after they both underwent a fresh vetting. However, Judges Apondi and Aroni were still declared as unfit.

By the 14th determination (13th May, 2015), the Board had vetted 9 Court of Appeal Judges out of which 4 were found to be unsuitable; 44 High Court Judges out of which 13 were found unsuitable in the first instance and on review 5 were successful and 8 were still found unsuitable, 2 of the 5 successful reviews were scheduled for re-hearing. The Board had also vetted 220 magistrates, 28 were found unsuitable in the first instance, and on review 13 were reversed. In total the Board had vetted 273 judicial officers by May 2015 and about 15% of them being found unsuitable to continue serving (JMVB, 2015)2.

2.9 Conclusion

The main objective of this chapter was to give a background of reforms in the judiciary, and to shed light on the judicial reforms landscape in Kenya since independence. This is intended to establish the basis for the current reform measure—vetting, which is the study's area of focus. To achieve this, the chapter has made a historical analysis of judicial reforms in Kenya. As the chapter has demonstrated, the independence constitution made attempts to provide for judicial independence. However, subsequent governments made amendments that created a judiciary that

[2]For a comprehensive analysis of the 14 determinations to-date please refer to http://www.jmvb.or.ke/determinations/

was weak, dysfunctional and never gained popular support. By 2010, there were hundreds of thousands of cases that had not been determined or finalized some of them dating as far back as the 1970s, highlighting the rot in the institution. The judiciary was perceived as a tool of the executive branch of government which compromised its independence and public trust. The aftermath of the PEV and the perception that the Judiciary's perceived weaknesses and dysfunctions were partly to blame for the violence ushered in another era in judicial reforms. So far the vetting process has been on for over three years and has been able to remove from the judiciary a number of officials who were deemed to be unsuitable to continue serving. However, has the exercise been able to achieve its objective of reforming the judiciary and increasing public trust in the institution? These are the questions addressed in the subsequent chapters.

CHAPTER THREE: LEVELS OF PUBLIC TRUST IN THE JUDICIARY

3.1 Introduction

As indicated in chapter one, the purpose of vetting the Judiciary aimed at having a judicial system that people had trust in. For a long time the Kenya Judiciary had been grappling with three major problems; inefficiency, incompetence and corruption, which had resulted in case delays and backlog, limited access by the public, lack of adequate facilities, allegations of corrupt practices, cumbersome laws and procedures, questionable recruitment and promotional procedures; and, weak or non-existence of sanctions for unethical behaviour (ICJ, 2007). This had resulted in loss of public trust in the institution. By 2015, over 90% of the vetting had been completed. Since the objective was to increase public trust in the judiciary, the study sought to establish the extent to which public trust in the institution had increased.

The chapter is divided into 3 sections: Section one discusses changes in levels of trust in the courts of law. Section 2 presents data on trust in the judiciary based on ethnicity and rural urban respondents. Section three presents data on how perceptions of corruption towards judges and magistrates have affected trust in the courts of law.

3.2 Trust in the courts of law

The study relied on Afrobarometer data for Kenya conducted by the Institute for Development Studies, University of Nairobi, for 2008, 2011 and 20143 to answer the first research question: To what extent has vetting in the Judiciary increased public trust in the institution? Afrobarometer is an independent, non-partisan research project

[3]The survey interviewed adult Kenyans throughout the country and its sample size yields results with a margin of error of +/- 2% at a 95% confidence level. All of these surveys sampled members of the Kenyan population 18 years old and older.

that measures the social, political, and economic atmosphere in Africa. Afrobarometer national surveys are conducted in more than 30 African countries and are repeated on a regular cycle. Each Afrobarometer survey collects data about individual attitudes and behaviour, including innovative indicators especially relevant to developing societies. Because the instrument asks a standard set of questions, countries can be systematically compared and trends in public attitudes are tracked over time. This data is available in its raw form by request and any researcher can access and analyse variable of interest.

Although Afrobarometer surveys are conducted using a standard instrument throughout Africa, national research teams are allowed to include four to five country specific questions on important national issues. Owing to the high levels of corruption and the institutional reforms that the country has been undertaking in the last almost two decades, questions on levels of corruption in the country, trust and the performance of key institutions have been included in Kenya's Afrobarometer study in the subsequent Rounds. Since the promulgation of Kenya's new Constitution in 2010, which demanded the vetting of Judges and Magistrates, aimed at improving the functionality of the Judiciary and increasing peoples' trust, the relevance of the question: How much do you trust (the courts of law), or haven't you heard enough about them has been reaffirmed. To examine whether there has been any positive changes in the level of trust in the Judiciary since the vetting was initiated, the responses of Kenyans in 2008 (here taken as the baseline year) were compared to those of 2011 and 2014.

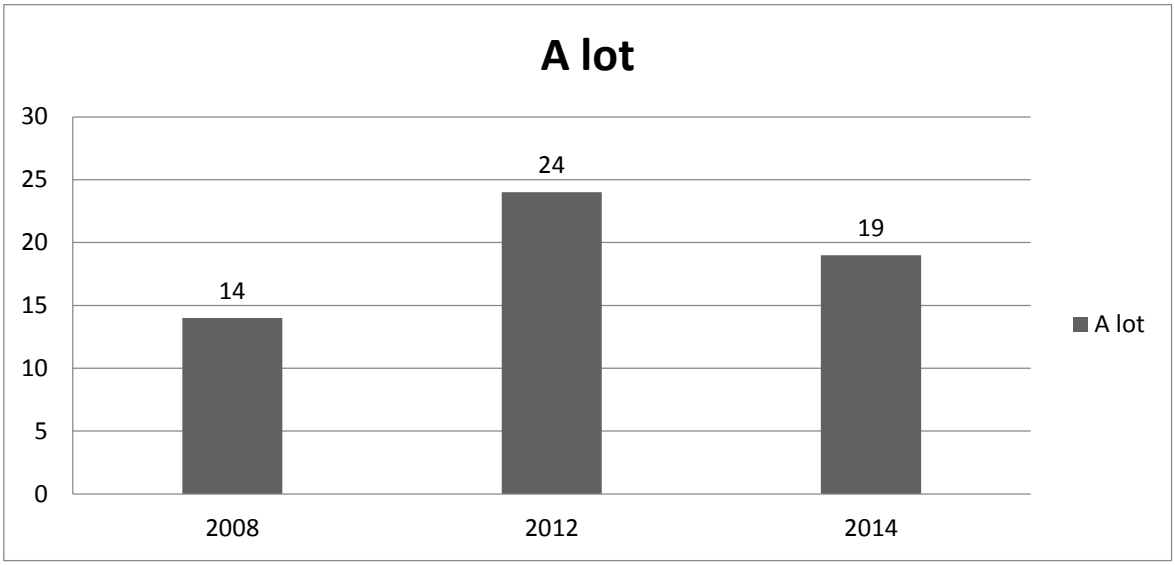
This section examines the changes in levels of trust in courts of law, and the judiciary in general. The section shows that before the vetting began, public trust was quite

low, but increased significantly when the process began in 2011 only to decrease slightly in 2014. The 2008 data is taken as the base year, and the process of vetting is assumed to have begun in 2011 when the government begun putting in place—the legal framework and other institutional mechanisms and the interviewing of Board members.

As Figure 1 shows, in 2008, trust in the courts of law was very low. Only 14% of Kenyans trusted the courts a lot. As the Figure indicates, in 2012, there was considerable increase in the people who had trust in the courts of law. The people who trusted the courts a lot increased from 14% to 24%. This shows a 10% increase in those who trusted the courts a lot. This however, reduced slightly in 2014 to 19%.

Generally, the 10% increment in the level of trust for those who responded a lot between 2008 and 2012 can be accounted for by a number of factors, mainly the optimism brought about by the promulgation of a new constitution in 2010. Kenyans were very optimistic that the Constitution of Kenya (2010) would bring positive changes to the country. In addition, there were a number of institutional reform measures that were being undertaken that the people had confidence in. This optimism seems to have reduced after the 2013 general elections, whose disputed results were resolved by the Supreme Court. The results of the 2013 elections were disputed and the dispute ended in the newly created Supreme Court. The outcome of the case—a declaration by the Court that the Jubilee Coalition had won fairly, displeased many especially supporters of the CORD coalition. This is illustrated below.

Figure 1: Levels of Trust in the Judiciary (2008-2014)



(*Source: Afrobarometer, Author's analysis)*

3.3 Trust in Courts by Ethnicity

Ethnicity has been known to influence peoples' perceptions towards institutions. Elischer's 2013, for example, showed that ethnicity heavily influenced people's perceptions towards political parties. Similarly, a study by Bratton and Kimenyi in 2008 showed that electoral outcomes were a major factor in peoples' orientations towards public institutions. To them, ethnic identity is the dominant mobilizing agent and therefore those that end up on the winning side perceive public institutions positively while those on the losing end perceive them negatively. There seems to be a significant variation in the levels of trust among the different ethnic groups, with those either forming or in government trusting more than those in the opposition. The responses of Kenya's six major ethnic groups—Kikuyu, Luo, Kalenjin, Luhya, Kisii and Kamba—illustrate this.

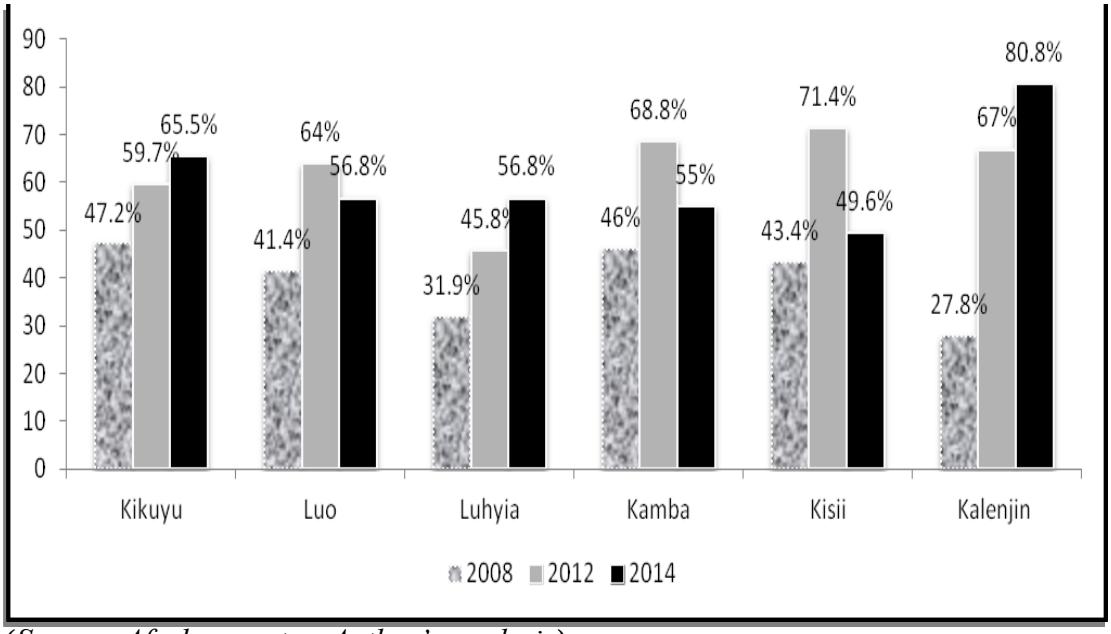
In 2008, the Kikuyu had the highest level of trust in the courts of law (47%). This was followed by the Kamba at 46%, the Kisii at 43.4%, the Luo at 41.4%, the Luhya at 31.9% and least trust in the judiciary was by the Kalenjin at 27.8%. By 2012, the level

of trust had increased quite significantly. The Kikuyu experienced the least change of 12% from 47% to 59%. Most change in perception of the courts of law was witnessed among the Kalenjin with a change of 40% from 27% to 67%. The Luo, Luhya, Kamba and Kisii communities had a 23%, 14%, 22% and 28% respectively.

A number of factors could explain this change of perceptions among different ethnic communities towards the courts of law. First, this was in the wake of the 2010 referendum which led to the promulgation of the Constitution of Kenya (2010). The new constitution promised to usher in an era of far reaching reforms including in the judiciary. This may have considerably led to a more favourable viewing of the institution by the citizenry. Second, during the campaigns leading to the referendum in 2010, there was a high level of unity among key politicians that had not been witnessed since the 2002 elections. Between 2008 and 2012 the then president, Mwai Kibaki, a Kikuyu, and the then Prime Minister, Raila Odinga, a Luo, were in a coalition government and both campaigned for the passing of the constitution.

By the end of 2012, signs of the collapse of the grand coalition were on the wall. By the end of 2012 and in preparation for the March 2013, the grand coalition dissolved, leading to the formation of two major coalitions—the Jubilee (mainly Kikuyu and Kalenjin) and CORD (Luo, Kamba, Luhya and Kisii). The Jubilee coalition was declared winner of the the general elections, which CORD disputed and took the petition to the Supreme Court challenging the results. The case was ruled in the disfavour of CORD, probably explaining why the communities forming the CORD coalition had the least favourable trust in the courts of law in the 2014 Round.

Figure 2: Trust in the Judiciary by Ethnicity/ somewhat/A lot



(*Source: Afrobarometer, Author's analysis)*

The Figure 2 above shows the responses of the major ethnic groups when asked: How much do you trust the courts of law, or haven't you heard enough about them to say? As the Figure above shows, the Kikuyus and Kalenjin (the major communities in the Jubilee coalition) had the only increase in trust levels in 2014 compared to 2012. All the CORD coalition communities, Luo, Kamba and Kisii, witnessed reduced levels of trust in 2014 from 2012. The level of trust for the Kikuyu and Kalenjin increased from 59% and 67%, to 65%, ad 80% respectively. Among the Luo, Kamba and Kisii, who were mainly in the losing coalition, and who were disfavoured by the Supreme Court ruling, the levels of trust in the courts of law decreased by 8%, 13% and 22% to 56%, 55% and 49% respectively. The Luhya, a community that wasn't strongly aligned to either of the two main contenders, did not witness a significant change in their trust levels, which remained at 46%. This finding seems to confirm Bratton and Kimenyi

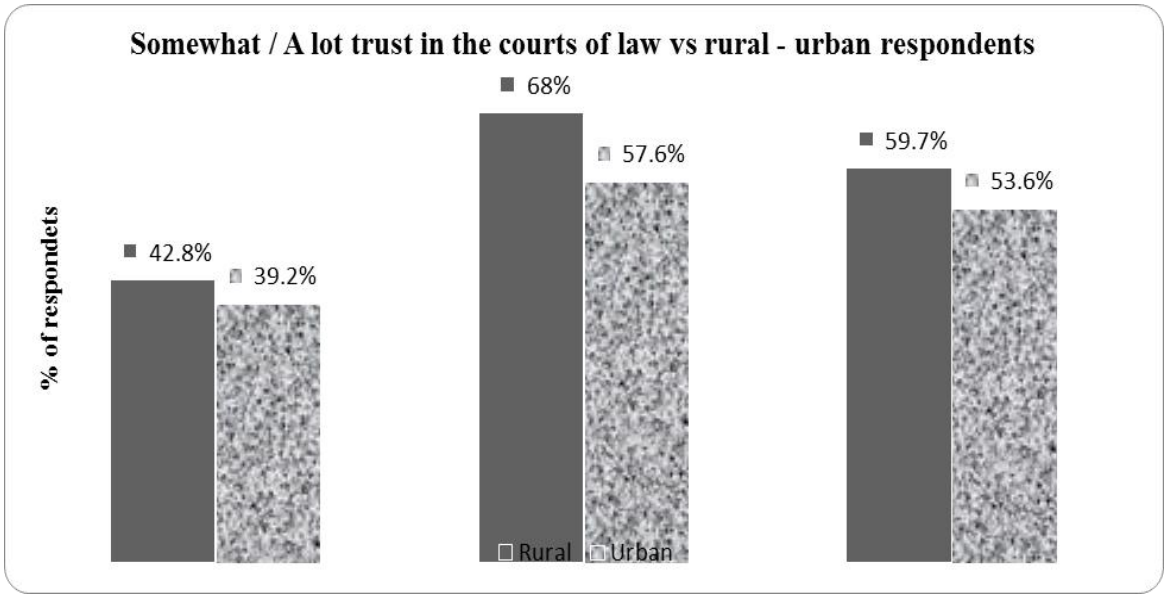
(2008) who argue that electoral outcomes have an effect on the trust people have towards public institutions.

3.4 Trust in the Judiciary Vs. Rural-Urban Respondents

People living in rural areas have been known to have more trust towards public institutions as compared to their urban counterparts. This could be because, unlike their urban counterparts, rural dwellers have has less interactions with the courts of law. Therefore, respondents living in rural areas are predisposed to provide slightly more positive answers regarding the courts of law, compared to those living in the urban areas.

Contrary to the above, Kenya's experience in trust in the judiciary seems to be different. As Figure 3 shows, there is only a slight difference in the perceptions of respondents regarding their trust towards the courts of law between urban and rural populations. In 2008, 42% of those who responded they trusted the courts of law 'somewhat or a lot' were living in the rural areas, compared to 39% of those living in urban areas. In 2012, a significant increase in trust was registered among the rural residents, with 61% of them having either 'somewhat or a lot' of trust in the courts of law. Urban dwellers also registered a slight increase in level of trust to 57%. In 2014, there was almost a uniform decrease in level of trust in the courts of law in urban and rural respondents. Among rural respondents, trust levels decreased from 61% to 59% while in the urban dwellers it decreased from 57% to 53%. Figure 3 below is a presentation of these statistics.

Figure 3: Trust in the judiciary (rural-urban respondents)



(Source: Afrobarometer, Author's analysis)

There is therefore not a very evident rural urban gap on levels of trust in the courts of law. Low trust is anchored in the urban areas while whatever amounts of trust in the courts of law is anchored in the rural areas. The pattern is repeated in all the three rounds—2008, 2012 and 2014. The general picture portrayed is that of slightly low trust in the courts of law by the urban dwellers, contrary to their rural folk whose trust in the courts of law is relatively high. However, there have been significant changes in the perception of both rural and urban residents over time. For example between 2008 and 2012, the trust level of rural dwellers had an almost 20% (from 42% to 61%) increase which reduced marginally (by 2%) in 2014 (from 61% to 59%). Similarly, the level of trust of urban dwellers had an 18% increase from 39% to 57% between 2008 and 2012, and reduced marginally from 57% to 53% in 2014. The rural urban perceptions seem to be consistent with the perceptions of the rest of Kenya where the increase from 2008 to 2012 seem to be related to the optimism created by the enactment of the new constitution while the slight decrease in 2014, are the result of

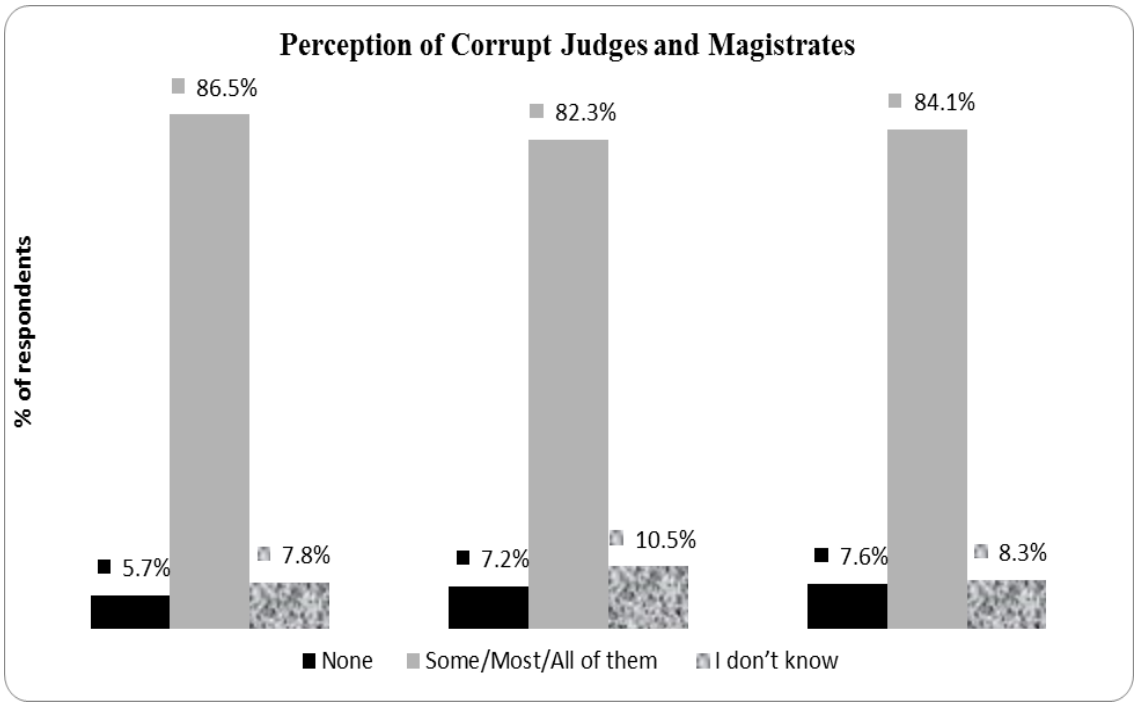
the frustration of the 2013 elections which did not produce an outright winner, both of which affected rural and urban dwellers equally.

3.5 Trust in the Judiciary Vs. Perceptions of Corrupt Judges and Magistrates

Perceptions of corruption in public institutions have also been known to affect the level of trust citizens have in such institutions. An increasing number of empirical studies show the perception of corruption affected trust in political institutions. Della Porta (2000) finds that perception of corruption greatly reduces trust in governments in Italy, France and Germany. Anderson and Tverdova (2003) conclude that citizens who view their countries as most corrupt exhibit less trust in their political systems. A number of studies of the situation in Latin America (Seligson, 2002), East Asia (Chang and Chu, 2006) and Africa (Cho and Kirwin, 2007) also come to the same conclusion. Indeed, it is likely that the more corrupt a country and its public institutions are perceived to be, the less trusting citizens will be of those institutions. Higher levels of perceived corruption do undermine perceptions of the trustworthiness of public institutions.

This seems to be the case for Kenya, where the levels of corruption seem to influence trust in the judiciary as Figure 4 below shows. In 2008, 86% of Kenyans perceived at least some judges and magistrates to be corrupt. In fact only 5% perceived ‘none’ to be corrupt. This number (of those who said at least some were corrupt) reduced slightly to 82% in 2012. Similarly in 2012, a higher percentage of Kenyan perceived no judge or magistrate to be corrupt at 7%. However, in 2014, more Kenyans perceived judges and magistrates to be corrupt as the number increased slightly to 84% in 2014. Figure 4 below is a presentation of this.

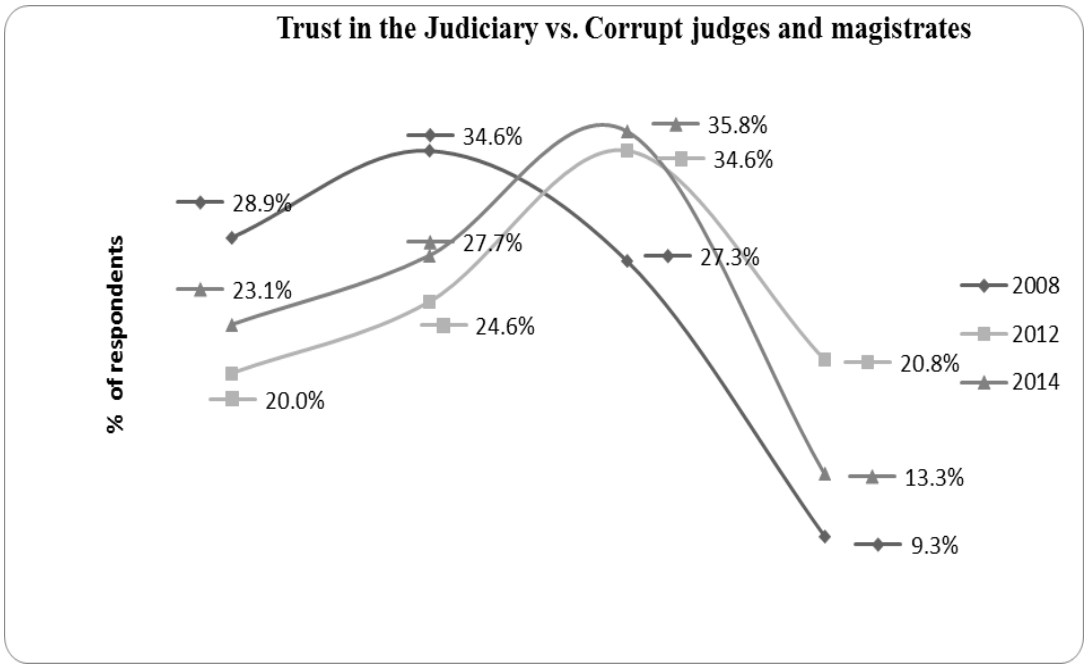
Figure 4: Perception of corruption towards Judges and Magistrates



(*Source: Afrobarometer, Author's analysis)*

Data for those who said that at least some judges and magistrates are corrupt was then cross-tabbed with their responses on trust in the courts of law. As Figure 4 shows, in 2008, of the 86% who thought some, most or all judges and magistrates were corrupt. 34% of Kenyans who had negative perceptions of the judges and magistrates trusted the courts of law 'just a little'. In 2012, of the 82% who thought some, most or all judges and magistrates were corrupt, only 20% said that they trusted the judiciary a lot. A larger number, (36%) 'somewhat' trusted the courts of law. In 2014, of the 84% who thought some, most or all judges and magistrates were corrupt, only 13% said that they trusted the judiciary a lot. 35% of them 'somewhat' trusted the courts of law.

Figure 5: Trust in the Judiciary vs. Corrupt judges and magistrates



(*Source: Afrobarometer, Author's analysis)*

This analysis confirms the common held hypothesis in literature that the more corrupt a country and its public institutions are perceived to be, the less trusting citizens will be of those institutions.

3.6 Conclusion

The main objective of this chapter was to establish the changes in levels of public trust since the vetting process began. This was accomplished by the use of one main question of the Afrobarometer survey data, how much do you trust each of the following (Courts of law), or haven't you heard enough about them to say? Increase in the percentages of respondents saying the 'somewhat' or trust the courts of law 'a lot' was taken as increase in public trust in the judiciary. As demonstrated in Figure 1, trust in the judiciary was very low in 2008 (only 14% trusted the judiciary a lot), which considerably improved, in 2012 (24%). This was an indication that a significant number of Kenyan thought that the judiciary and judicial reforms headed in the right

direction. This trust was, however, short-lived. As the analysis shows, in 2014, public trust in the courts of law marginally decreased. It is a trend showing that the vetting process has not been able to achieve its overall objective of increasing public trust in the judiciary. What factors account for the decreasing trust in the judiciary despite vetting process being almost complete? This question is what the next chapter addresses.

CHAPTER FOUR: FACTORS ACCOUNTING FOR THE DECREASE OF PUBLIC TRUST IN THE JUDICIARY

4.1 Introduction

The previous chapter established that vetting in the judiciary has so far not been successful in increasing public trust in the judiciary. The data shows trust in the judiciary slightly increased in 2012 but by 2014, started deceasing again. The main objective of the vetting exercise was to increase trust in the institution. From this, this chapter answers the second research question: what factors account for the decreasing public trust in the judiciary? The chapter argues that while initially judicial vetting seemed to have been on track to success, with a good vetting law, a competent Vetting Board, a charged but supportive political environment and an adequate institutional set up, in the recent past, the vetting exercise seems to be facing serious challenges that are likely to derail it or even reverse the gains experienced so far.

4.2 Kenya's Vetting Framework

In this section, the factors that account for the initial success of the vetting exercise are examined. These are: conclusive constitutional anchoring; a good legal framework; an effective institutional structure; adequate, competent and trusted vetting personnel that key stakeholders had confidence in. The fact that members of the Board also represented regional and ethnic balance, gained them more public trust. These were enhanced by an environment conducive for vetting and an unusual political will brought about by the existence of the coalition government and a desire to avoid a repeat of the 2007 post-election violence. The intervention of the international community in Kenya's 2007 PEV led by Kofi Annan and the Panel of

eminent African personalities4 ended the chaos. As indicated in chapter two, the National Accord that was signed between Mwai Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM) demanded that the two share power, and that, jointly with their political supporters, form a grand coalition government to pursue an aggressive and far reaching reform agenda that would both resolve the then political impasse as well as resolving the many historical injustices that had led to the conflict, commonly referred to as Agenda Four. The spirit of the grand coalition government was one of cooperation in which, members of the coalition government were to work together to push through parliament the necessary legislation to ensure a quick and comprehensive constitutional and institutional reform agenda. The National Accord provided an environment conducive for the enactment of an adequate and progressive vetting legislation. With the legislation 'proper' institutions were put in place. This, coupled with the fear of the recurrence of 2007 type post-election violence, united Kenya's political class into setting the stage for an environment conducive for vetting as well as providing the impetus for pushing it forth.

4.3 Constitutional Anchoring

The constitutional foundation of the vetting process is Section 23 (1) of the Sixth Schedule, of the Constitution of Kenya that contains the transition clauses. The Section states that: Within one year after the effective date, Parliament shall enact legislation establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and

[4] These personalities had been sent by the African Union to mediate on the Kenyan conflict.

principle. The Article set in motion the vetting process of all judicial officers who were in office at the time without exception, including the Chief Justice.

Existing laws such as Chapter 6 of the Constitution of Kenya govern the vetting frameworks including the one for vetting judges and magistrates. Chapter Six states that any person appointed to a state office should be a person of integrity and competence. He or she should practice honesty in the execution of public duties and should not compromise the interest of the public for his own interest.

Article 35 provides for the right to access information and such information can be used to deal with vetting of public officials. Article 260 provides the definition of those who are subjected to the standards contained in Chapter Six and they include all state officers, public officers and those who hold constitutional offices as well as governors and others. Chapter Six of the constitution stresses the principles of leadership and integrity. The chapter further talks about the expectations of the conduct of state officers and restriction on activities of state officers. Judges and magistrates are included in the definition of a state office and indeed this is the chapter that was applied in the case of the former deputy Chief Justice of Kenya, Justice Nancy Baraza. Justice Baraza was alleged to have assaulted a guard and when a tribunal was constituted to investigate the allegations, while recommending to the President that the Deputy Chief Justice be removed from office concluded “she has shown an inability to control her behaviour, demonstrating the strong likelihood that she will continue to commit misconduct or misbehaviour in future.

From the information gathered, it can be concluded that constitutional anchoring of the process shielded it from political manipulation. This is more so due to the fact that during the constitutional reform exercise, there were debates whether the exercise was

necessary at all. It being a constitutional requirement therefore went a long way in giving the exercise a firm foundation.

4.4 The Judges and Magistrates Vetting Act

One of the factors attributed to the initial success of the vetting in the judiciary was a good legislation—the Judges and Magistrates Vetting Act. The fact that the legislation was good has been attributed to a number of reasons. The Act had provisions that create a strong vetting institution with a clear mandate; it gave the procedure to be followed while even providing for the timelines for the exercise. The drafting of the Bill was a process that involved a wide range of stakeholders especially professions and the civil society. During the drafting of the Judges and Magistrates Vetting Board Bill, stakeholders participated in contributing views to ensure that the vetting board remained 'strong and not under the influence of any entity'. The Act was enacted after a considerable degree of consultation. The consultations were more engaging especially between the Kenya Magistrates and Judges Association (KMJA) and a number of civil society representatives. According to a Key Informant

> "…coming from the premise of creating transitional justice to reform the judiciary, we (ICJ) drafted a model legislation that could be used in the vetting of the judiciary. This was based on the criteria of competency, ethics, history in the profession, whether judges are true to their oath. Majority of what we suggested in the model legislation was adopted when the bill was presented in Parliament…."[5]

During the formulation of the Act, there was a lot of resistance from different circles on what should be contained. The main contention was over the powers, mandate and scope of the board. Most officers within the Judiciary aimed at the maintenance of the

[5]Interview with an ICJ official conducted on the 11/8/2015 at the ICJ main offices starting 11am

status quo and therefore were resistant to the radical reforms that were being suggested. According to a Key Informant,

> "…we had fireworks when it came to the approving of the Act…..the old guard within the Judiciary were determined not to let loose their hold of the judiciary…the perks…the monopoly…it wasn't something they were willing to let go of…but then for us young people who did not have to pay homage to anyone, we stood our ground and insisted they (judicial officers) go through the process and even if it meant chasing them down the corridors of justice we were ready to. I am happy that eventually, the more pragmatic position carried the day…6

The Act that was finally adopted contained progressive provisions that would have contributed to ensuring the success of the vetting exercise. It was 'comprehensive' and covered key elements of vetting. It also provided the vetting board with adequate powers. As a key informant pointed out, the Act provided the board with adequate 'ammunitions' to remove 'undesirable' officers from the judiciary. It was a 'tight' Act with no much 'loopholes' to ensure that no 'undesirable people' would get past.

Further, the Act insulated the vetting mechanism from interference by the courts. This prevented a conflict of interest where judges and magistrates would rule in a process in which they were subject. Because the Board derives its mandate from the constitution, any challenge to it would be like challenging the validity of the Constitution. Indeed, Article 2(3) of the Constitution provides for the supremacy of the Constitution. Second, as it stated by on Key Informant 'because of the inefficiencies of Kenyan courts' the Act prevented a situation in which courts would hinder and delay a process that was to be done within a year. The Judges and Magistrates Vetting Board therefore had the exclusive powers to vet judges and magistrates. It is important to note that despite this constitutional guarantee, the

[6]Interview with a senior personnel in TI- Kenya conducted on 21/6/2015 at the TI main offices starting at 3pm

exercise faced a numbers of challenges in the courts, as constitution clarification was sought on the Article 2(3) of the constitution. However, subsequent amendments to the Act eliminated any doubts of the absolute mandate of the Vetting Board.

The Act also identified the vetting Board as the exclusive body to carry out the vetting exercise. Its role was so excusive that even the Judicial Service Commission (JSC) was not incorporated lest they interfered with the Board's independence. This is why previous amendments to the Act that had provided that the function is shared with the JSC were dropped. The fear was that since not every JSC member had undergone rigorous vetting under similar circumstances (some were presidential appointees), the Commission's impartiality was at question. According to a key informant

> …there is no way the JSC would be trusted at the time…we still had elements in the Commission who were determined to see the process (vetting) does not even reach its infancy. We were not going to let elements with questionable character be part of a process that was meant to weed out the very elements…7.

By creating the Board as the exclusive body conducting the vetting, the Act insulated the process from conflict of interest, duplicity of roles and unnecessary delays, which is an important element in the process of implementing transitional reforms. According to one key informant

> "….the Act is very clear on whose mandate it is to conduct vetting in the judiciary….it isn't the courts…nor is it the JSC…there is no question of mandate…but look at the police vetting…there is the NPS…there is the NPSC…which apparently is supposed to be in charge of the process…there is IPOA…whom I am yet to understand their role. You see the confusion and the infighting and you can see the outcome of that…a process in shambles that completely lacks credibility…"8

[7] Interview with an ICJ official at the ICJ offices on 11/8/2015 starting at 11am
[8] Interview with a judge of the High Court conducted on 16/6/2015 at Milimani Law Courts staring at 12pm

Finally, the Act was strict and rigid ensuring that judges could be removed quickly and decisively without regard to their previous security of tenure status. It made it clear that vetting was to operate outside the framework of provisions that would in other circumstances guarantee the security of tenure of judges. Removal of judges and magistrates was simply by investigation, disciplinary tribunal and appeal.

4.5 The Judges and Magistrates Vetting Board

The initial gains made in the vetting of the judiciary have also been attributed to the vetting Board. Restoring public confidence in the Judiciary required a Board that would function in a manner that was simultaneously firm, fair and expeditious. The Board was required to conduct itself without fear, favour or prejudice. One of the most important aspects of the Board was its composition. The integrity of its members was beyond reproach. None of the discredited sitting judges or magistrates was to sit in the Board. The chair of the Board is a distinguished Kenyan advocate and international arbitrator, and the Kenyan lawyers had both held leading positions in the Law Society of Kenya. The three Kenyan civil society members are experts in mediation, accountancy and management studies and have among them experience of long periods of detention and exile during one-party rule. According to a key informant,

> "…..if you look at the Board that started off the exercise, there was no doubt about their integrity…or their allegiance. It was very clear these were people who meant business and would go to lengths to achieve that. Remember the likes of Judge Sachs of South Africa. He was one guy who could pass the integrity test at any time….a guy with a career that spans decades and completely steelier….yes the board did really attract accomplished people…"9

[9]Interview with an Agenda Four Monitoring team member conducted on 29/6/2015 at the Arziki Restaurant-UON starting at 1pm

Even the appointment process for the Chair and Board members was open, comprehensive and above board. Both were appointed by the President in consultation with the Prime Minister. This was after a competitive interview process where the Public Service Commission selected 3 candidates from whom to select the Chair and 18 candidates qualified for appointment as 5 board members. The names were then forwarded to the President, who in consultation with the Prime Minister nominated the Chairman and five other members and forwarded their names to parliament for approval. The Board was specifically designed to reflect the regional and ethnic diversity of Kenya. In addition, gender balance was observed in the Board as per the stipulations of the Act.

Even the foreign members of the Board were equally competent. A key provision was that the Board must have at all times the services of at least three foreign judges from any country of the Commonwealth. The presence of Judges from other Commonwealth countries on the Board was assumed to ensure objectivity. After the constituting of the Board, 3 panels were constituted to speed up the vetting process. Importantly, the constituting of internal vetting panels required that it consists of one judge form the Commonwealth always so as to maintain objectivity. So far, six Commonwealth judges have served on the Board, bringing experience of the highest courts of Ghana, South Africa, Sri Lanka, Tanzania, Uganda and Zambia. Among them have been three former Chief Justices and a leading anti-apartheid activist. According to one key informant:

> "…you know our political culture…Kenya is a very pessimistic country…I am likely to trust I guy with a name I can't pronounce than a guy with an Otieno or Kariuki. I think that is why it was advisable to have foreign judges on the

board…remember this is an exercise meant to have an impact on the public…"10

The tenure of the Board members also played a key role enhancing their incorruptibility. The tenure of the Board members was to end with the dissolution of the Board. The Board members would not be fired either by the JSC or by the Executive. This reduced the probability of members being unduly influence by either the Executive or the JSC. A Board member could only leave by resigning.

4.6 Role of Public participation

Another factor that has been credited for the early success of judicial vetting was the extent of public participation. Public participation in the process served to bring to fore two very important aspects—the promotion of credibility in the process and integrity in the judiciary. Public participation in the judiciary vetting exercise was achieved in three ways. First, before the hearing began there were educational outreaches, consultation and information gathering. During this time the vetting board sought out to inform the public of its mandate, what it was aiming to do, how they would go about the vetting process and ways in which the general public would participate in the exercise. This they sought out to accomplish through public forums in different towns in Kenya. The most rigorous public sensitization programs were held in January and February of 2012.

In the forums, the Board made presentations highlighting the reason for the enactment of legislation forming the board and the procedure of the vetting process. While the public sensitization process was going on, the Board distributed the JMVB information/complaint form. This form was used to gather information and

[10]Interview with a CIC program officer conducted on 11/7/2015 at the CIC main offices, Westlands staring at 2pm

complaints from the public before the vetting exercise began. The public was also informed on how to access the complaint forms, how to fill them and where to send them. In addition, the board distributed to the public copies of the JMV Act and regulations. The table below summarizes the public forums and number of participants

Table 1: Public Forums held by the JMVB

Town	Number of Participants
Thika	149
Kericho	37
Machakos	33
Kisii	82
Kisumu	80
Malindi	159
Nyeri	70
Mombasa	298
Embu	47
Kwale	147
Nakuru	75
Meru	75
Voi	41
Nanyuki	10
Bungoma	65
Eldoret	70
Kwale	131
Mwingi	49
Kapsabet	101
Iten	61
Kilifi	183
Garissa	50
Nyando	67
Kitale	162
Narok	80
Busia	58
Isiolo	150
Thika	79
Molo	100
Nyamira	72
Kitui	70
Chuka	61
Eldama Ravine	101
Kakamega	69

(Source: Documents provided by the JMVB during interviews)

Apart from the public forums, the JMVB also had meetings with representatives from the legal profession, inmates from different prisons, media briefings (not including the announcements) and interviews with the media. It is from these forums that the public in various parts of the country were able to learn of why the exercise was important and various ways that they could participate in it. This helped the processes gain currency in many parts of the country.

Second, during the vetting process, public participation took the form of direct or indirect participation. The vetting board frequently heard testimonies from complainants and witnesses as part of the process of assessing the judicial officer concerned. In total, 115 members appeared as either complainants or witnesses in the vetting of Court of Appeal and High Court Judges. For example, In the case of Judge Emmanuel O'Kubasu, 7 witnesses appeared before the panel while for Judge Muga Apondi, 12 witnesses appeared before the panel. Although the exercise was often time consuming, taking sometimes days on one judicial officer, adequate opportunity was provided for the participants. According to one key informant;

> "Sometimes we sat for hours….even sometimes days….going ensuring we look at the complaints that had been provided by the public…we took time cross examining these kind of people….the officer under review was also given the chance to cross examine the witness…so it was tiring process….but we had to make it as transparent as we could….."11

In some cases some members of the public were allowed to be an audience to the vetting exercise hence indirectly participating in the process. Yet still, indirect public participation was achieved through live televising of the some vetting exercises, especially for the Chief Justice. This created a sense of an open exercise and hence able to influence public trust in the institution.

Finally, after the conclusion of the hearings, public participation in the vetting of the judges and magistrates included the public having access to the written decisions of the JMVB. Public announcements of the determinations were conducted in Nairobi where all media houses were invited to the announcements. Thereafter, copies of the determinations were supplied to the Chief Justice, Chief Registrar of the Judiciary,

[11]Interview with a commissioner of the JMVB conducted on 13/7/2015 starting at 10 am at KICC cafeteria ground floor

LSK and the media houses. In addition, the determinations were uploaded to the JMVB's website for access to the wider public. According to one key informant

> "….if you ask anybody be it the officers who have undergone the vetting or the public at large…one thing clear is the fact that the process has been very transparent….at the end of it…if an officer is found to be unsuitable, the reasons are recorded in the determination…"12

Another aspect of public participation that heavily influenced earlier success of the vetting process was the involvement of the civil society. Civil society was involved in a number of ways from. First, some civil society groups were consulted in the technicalities of drafting the Vetting Act. Second, while the Board was still conducting public outreach programs, some civil society groups aided the Board in such activities. Third, civil society organizations were allowed to provide information or complaints on specific judicial officer and lastly, some civil society organisation provided technical knowhow to the Vetting Board while it was just on its infancy and hadn't contracted its own staff. According to a key informant;

> "…we were given an opportunity to engage in the drafting of that bill, and we made provisions that were to ensure that the vetting board remains strong and not under the influence of any other person….in addition, we went out in the first year in 2012 and build the public capacity on how they can engage with the Board, that even if the Board doesn't come closer to you, you could submit your complaints to TI Kenya and we would deliver it…"13

Another key informant stated;

> "….actually the vetting questionnaire is mostly the work of ICJ. We prepared a policy of an ideal vetting basing the criteria on the values in the Constitution and the international standard of judicial officers. This informed the vetting toolkit that we developed and shared with the vetting board as a way for them to adapt and take it to their context. And they did, if you look at the form they

[12]Interview with an official of the KHRC conducted on 6/7/2015 at the KHRC main offices starting at 3pm

[13]Interview conducted with a TI program officer on 23/8/2015 at the Transparency International main offices in Upper Hill Nairobi starting at 2pm

send to judicial officers to sign before vetting. That was based on the ICJ work….14"

Earlier involvement of such groups also helped monitor the vetting process and deter any forces that sought to undermine the exercise. It also advanced impartiality by exposing the process to legitimate pressure and perspectives. This was done necessitated by the fact that even with the best intentions on the part of its leaders; a judiciary often cannot be a wholly self-reforming body.

Despite the earlier gains made in the vetting of the judiciary, an emerging trend is that these gains are systematically being reversed. As demonstrated in chapter 3, by 2014, level in public trust in the judiciary had slightly decreased. This was a trend that was supported by information gathered from key informants. One mentioned the 'old guard' clawing back. Another mentioned the 'faces of impunity re-emerging'. All this goes to demonstrate that despite earlier achievements, the process was facing serious hurdles which if left unchecked, there is a likelihood of the process being a complete failure.

4.7 What went wrong?

A number of factors has contributed to the reducing levels of public trust in the judiciary, these include: resistance of key institutions that were to facilitate the vetting, state capture and failure of attendant reforms to support the vetting process. The following section discusses these challenges in detail.

4.7.1 Resistance by Key Institutions

Before the vetting exercise began and while it was going on the Board requested information and/or complaints touching on the Judges from members of the public

[14]Interview with an ICJ official conducted on the 11/8/2015 at the ICJ main offices starting 11am

and complaints or information furnished by the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Judicial Service Commission and the International Commission of Jurists. Unfortunately, and despite written requests from the Board, no complaints or information were received from the Advocates Disciplinary Committee, the Advocates Complaints Commission, the Office of the Attorney General, Public Complaints Standing Committee, Kenya National Human Rights and Equality Commission. Even the police who had been involved with investigating a number of cases within the judiciary released no information.

One such office is the Commission for Administrative Justice (Ombudsman). The office is tasked with enforcing administrative justice and promoting constitutional values by addressing maladministration through effective complaints handling (ICTJ, 2015). By virtue of this, the CAJ, having been formed before the vetting process began, would have been 'a one stop shop' for complaints or comments about the judges and magistrates.

According to a key informant;

> ".....one really wonders how many institutions really owned the process. There were key institutions that were a repository of information...the sought of information that the Board needed to perform its functions effectively. Take an example of KNHRC. But they were not yielding. Is it they didn't have the information or they just didn't want to give it? I stand with the latter..."15

Another key informant commented…

> "....I personally oversaw the launching of a complaint against a certain judge of the High Court. It was a serious case because he had colluded with a defendant to swindle acres of land…all proof was there…but what happened…he apparently passed the vetting process because my complaint was not forwarded to the Board…and I was away of official on official

[15]Interview with a TI legl conducted on 23/8/2015 at the Transparency International main offices in Upper Hill Nairobi starting at 2pm

> duty…now you understand….these institutions were not in any way cooperating…"16

Resistance to the vetting process was also experienced from the Police. The vetting Board did not have powers to subpoena files from the police on judicial officers under review. All they could do was request the police to forward the files to the Board. Such requests were made severally but according to a key informant, they were requests that were not honoured, not even one. As seen in the words of this key informant:

> "…we wrote…and wrote….requested…I can show you all the letters requesting for information…on officers we knew as insiders that was available within the police files…but what happened…none was sent…not even an apology saying the information wasn't available…just mumbness…and you are left wondering…"17

As noted by the Vetting Board, 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

However, the most resistance, with far-reaching consequences, has been from the Judiciary itself. From the beginning there was resistance from within the judiciary. The old order was too terrified not just of the radical nature of the Constitution but also the assertive independence of the Judiciary. Many people, particularly the political and economic elite, having been socialized in and benefited from a retrogressive culture had neither desire nor appreciation of the new environment. According to a key informant

> "….vetting in the Judiciary in attempts to transform it a complex process….It is not easy to change an institution and people who have internalized certain

[16]Interview conducted on 6/7/2015 at the ICTJ-Kenya head office
[17]Interview conducted on 13/7/2015 staring at 10 am at KICC cafeteria ground floor

> ways of doing things over decades overnight and actually do not know or do not want to do things in any different way…18"

Most judicial officers are of the opinion that the vetting board was established as a quasi-judicial body with a mandate that runs for only a specific period. According to the Judges and Magistrates Vetting Act, the decision of the Board is not subject to a review by anybody including a court of law. This leads to the question as to whether a quasi-judicial body can oust the jurisdiction of a court of law. The guidelines as framed seem to take away the jurisdiction of the court and therefore breaching the rights of the affected officers to access a court of law hence resistance from many officers.

Power tussles between the JSC and the Board have been a derailment in the vetting process. JSC is mandated under the constitution to promote and facilitate the independence and accountability of the judiciary. It is also mandated to hire and discipline the judicial officers. According to information provided by several key informants the mandate seems to be being taken away by the Board when it declares unsuitable judicial officers without consultation with the employer of the said officers. This has caused friction and resistance from within the judiciary. For example, the JSC conducted interviews for the office of judge of the High Court and appointed some judges who had been magistrates. When the appointed judges went through the vetting process, the Vetting Board declared some of the said judicial officers as unsuitable to continue holding the office of a Judge.

Resistance from the judiciary has also been experienced because judges and magistrates feel targeted. The claim is that the judicial process has many players beginning from the time of arrest to the point of conviction and serving of the

[18]Interview conducted on 10/6/2015 starting 12 pm at the Institute for Development Studies Boardroom

sentence. These players include the police, the Director of Public Prosecutions, the advocates, the judicial staff, the community service officers, the probation officers and the prison officers. All these players are actively involved in the justice process and may be involved in some practices that may imply that the judicial officers are influenced in the conduct of the judicial affairs. The constitution has not provided for the vetting of these other players. This has created a 'victim mentality' within the judiciary where resistance is commonplace.

4.7.2 State Capture of Accountability Institutions

The Executive arm has been in an all-out war to recapture the third arm of the government. This could be because, historically, the executive in Kenya has had the tendency of controlling other branches of the government to exert undue influence. Once the Board completes the vetting of the judicial officers, the JSC will take over all matters related to discipline in the judiciary. However, it seems that the executive has started playing 'a long con' in preparation for the winding up of the Board. In 2013, six JSC commissioners were suspended among them people who were deemed by the public as free thinkers who could keep the judicial rot out. The president appointed a tribunal to investigate the conduct of the suspended commissioners. The integrity of the tribunal was put in question because of its chair Retired Justice Aaron Ringera infamous for the failed 'radical surgery'. However, the High Court reversed the suspension of the six judicial service commissioners by the President and stopped the probe by tribunal appointed to investigate them. The Judge presiding over the case categorically stated that the action by the President of appointing the tribunal was undertaken in breach of the orders of the court and therefore it was to be considered null and void and of no effect.

It seems like the vetting process has been taken over by the anti-reform judges with connivance from the executive. The JSC and elements within the executive have conspired to frustrate the reform process. Indeed, some key informants were of the opinion that the JSC has already been captured by and is in cohort with the state to frustrate the vetting exercise. It is said that the old order within the judiciary and the political class were not keen on seeing successful reforms and hence when the process looked like it was likely to lead to reformed institutions, the state, especially elements within the executive put brakes on the process to vetting to slow it down.

According to a key informant

> "…the judiciary as it is now is going back to the era where it was unduly influenced by the state or private interests using non-transparent means. What we are seeing re-emerging is the institutionalization of political corruption. Power is getting allocated disproportionately with the judiciary being on the losing end. Accountability and transparency are increasingly limited….judiciary (re)capture by the state is complete…."19

4.7.3 Failure of other Attendant Reforms

Another factor accounting for the reducing levels of public trust in the judiciary has been the lack of coordination with broader programs of institutional reform in the judiciary. This was a view held by many of the key informants. Vetting as a stand-alone measure has been insufficient in reforming the judiciary. According to the Judiciary Transformative Framework, by 2016, the Judiciary is expected to put in place strategies to ensure awareness of and understanding of the law and procedures; simplification of court documents and procedures; easy availability of information pertinent to cases; physical accessibility of courts within reasonable distance of

[19]Interview with an official of TI conducted on 23/8/2015 at the Transparency International main offices in Upper Hill Nairobi starting at 2pm

where people live; affordability of the judicial process; cultural appropriateness of court procedures and processes; promotion and enforcement of dispute resolution systems which are in line with the Constitution; friendly and non-intimidating courts; and timeliness in the processing of claims and enforcement of judicial decisions (JMVB, 2015). However, by 2015, much of this had not been achieved, or even started. To achieve this, the judiciary was to develop and deploy an electronic Case Management System; embrace ICT and apply appropriate technology to enhance court efficiency and effectiveness; and ensure appropriate staffing levels to deal with caseloads. According to a key informant

> "…..look at me as Judge of the High Court I cannot access my emails in the office. Why? We don't have internet, and we haven't had it in three months. I still spend hours writing my judgement in the analogue way. While vetting was happening one of the issues was removing slow judges….but sometimes slowness is not upon me…it is the system in place…and currently the system is a very slow one…."20

The importance of other institutional reforms have been shown in other jurisdictions where vetting was successfully conducted. For example, in Germany, as much as vetting did focus on a person's past wrongdoing, it still was only the first step in a large-scale process of restructuring and personnel reduction (Wilke, 2007).

The judiciary was to develop and implement a structured approach to the achievement of successful public information, education and communication strategies as well as those for re-branding of the Judiciary for example open days, to close judicial-public distance. An internet-based and SMS code complaints was to be developed in addition to a public feedback mechanism to harness public opinion and views on the Judiciary's performance. According to one key informant

[20]Interview with a judge of the High Court conducted on 16/6/2015 at Milimani Law Courts staring at 12pm

> "...we are good at making plans...look at the Judicial Transformation Framework....it is a good strategy, but how much of it was realistic....even the least time for implementation of any strategy is five years...it was four years....nothing much has been achieved....we need another 10 years and a complete overhaul of the existing leaders to actually achieve anything in the judiciary....so no...the vetting wouldn't achieve much if the other reforms aren't implemented...."[21]

4.8 Conclusions

This Chapter had set out to find out the factors that account for the falling levels of public trust in the judiciary. From a series of key informant interviews, the study found out that there are three main factors that account for this. First, resistant from key institutions to the vetting process, second, capture by the executive and third, lack of broader attendant institutional reforms to accompany the vetting process and cushion the results. The chapter concludes that despite initial success of the vetting process, largely owing to a good legal and institutional set up, the process is facing challenges that are systematically reversing the gains made earlier on.

[21]Interview with a judge of the High Court conducted on 16/6/2015 at Milimani Law Courts staring at 12pm

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the summary and conclusions of the study. It further gives policy recommendations and areas for future research.

5.2 Summary

This research set out to investigate whether vetting in the judiciary has increased public trust in the judiciary and what factors account for this so as to be lessons to learn for future reform attempts in the country. To do so, various aspects of the Kenya judiciary were discussed. These included a historical analysis of previous reform attempts in the judiciary, laying ground for the current reform attempt, the vetting process as provided for in the Constitution and the governing statutes in chapter 2. In chapter 3, the study analysed whether levels of public trust has increased since the reform processes began. This was done by use of Afrobarometer surveys data from the year 2008, 2012 and 2014. The chapter concluded that despite earlier increases in public trust in the judiciary, by 2014, the levels decreased. In chapter 4, data from key informants was used to establish why public trust in the judiciary seemed to be decreasing. The chapter concluded that three factors are responsible; resistant from key institutions to the vetting process, capture by the executive and lack of broader institutional reforms to accompany the vetting process. These problems were systematically negating the process and if left unchecked, the process may be headed for failure.

The study discounts David's 'Lustration Systems'. According to the theory, the presence of a vetting law serves as a 'trust base' with a tendency to influence citizens'

trust toward the new and reformed institutions. As the study shows, despites the presence of a vetting law and demonstrations or public rituals that were to convey messages about the legitimacy of the new institution and the malleability of the tainted public trust in the institution hasn't increased—the study thus disproves the "Lustration Systems' theory

5.3 Conclusions

To conclusively answer the research questions, the study used a mixed method approach—triangulation between qualitative and quantitative research methods. Afrobarometer survey data for Round 4, 5 and 6 was used for the first research question: To what extent has vetting in the Judiciary influenced the levels of public trust in the institution? The study found out that level of trust in the judiciary increased in 2012. However, the optimism was short lived and the trust levels reduced in 2014 despite the vetting exercise still ongoing.

To answer the second research question—what factors are responsible for the decrease of public trust in the judiciary—the study relied on information gathered through conducting of interviews with 26 key informants. The study found that three main factors account for the decrease in public trust in the judiciary. First, resistance by key institutions like the judiciary itself was a key factor accounting for the failure of the vetting exercise to increase trust in the judiciary. Second, capture by the executive was also negatively affecting the reform process in the judiciary. Capture by the state was mainly driven by succession politics as top judges fought to take over once the current CJ retired. Third, other attendant reforms that were meant to complement and reinforce the vetting process in the judiciary have not been done. So it was a case of reforming the bureaucrat but not reforming the bureau. In summary,

the study found that, with what had been completed by August 2015, vetting in the judiciary had not been able achieved its objectives of either reforming the institution or increasing public trust in the judiciary.

Available literature on vetting has long debated whether vetting reforms have any impact on trust in public institutions. This study provides some preliminary but compelling and robust answers to that debate. The findings presented here should help to move past this initial question regarding whether vetting has any impact on trust in public institutions toward more nuanced assessments of how different types of vetting programs might affect levels of institutional trust and how gains made in the processes can be sustained over a long period of time.

5.4 Recommendations

While trying to assess the judicial vetting process, the study discovered that the process, in the course it is now, is experiencing a number of challenges that, if left unchecked, are likely to reverse gains made earlier on in the process. Based on interviews conducted, the study makes the following recommendations.

First, there is a sense in the judiciary that the Board and the Judiciary are performing different unrelated functions. In addition, the functions of the Board overlap with those of the JSC and the Board has usurped the JSC's mandate. The study recommends that since the Board is a transitional unit with a set mandate and timeframe with specific objectives of carrying out a constitutional mandate, it should be allowed to complete the said mandate. However, to avoid power tussles and smooth transition upon completion, then the JSC should be strengthened, reconstituted and given a wider mandate so that in future it will have the powers and mandate to conduct the vetting.

Resistance by the judiciary is also because judges and magistrates feel as if they are sacrificial lambs in a process where they aren't the only players. The study recommends that the new restructured body formed out of the above recommendation should be given a broader mandate to vet not only judges and magistrates but also prosecutors and all other law enforcement officers. According to those interviewed, targeting only the judges and magistrates leaves a perception that only judges and magistrates were involved in past injustices committed within the judiciary.

Second, the study notes that a transitional process is as good as the sources of information available. When a person commonly known to have engaged in past injustices is cleared for lack of information, the process is likely to lose credibility. The study recommends that the Board needs to have capacity and resources to conduct independent investigations. As it is now, the Vetting Board still relies on the products of the old system. There are no investigators who have been vetted and employed by the Vetting Board to investigate the officers who are undergoing vetting. This opens up the Board to partisan investigations and political interference. In countries where vetting has been conducted successfully, the body responsible for vetting has a special investigative arm whose role is to investigate judicial misconduct. The current vetting body does not have such a luxury and this compromises its capacity to be effective and efficient.

Third, in any process that may lead to a change in the status quo with the political class, chances of political interference are high. Such is the case witnessed in the hiring of the two new commonwealth judges to the Board. In addition, many of the officers doing the investigations are products of the old system that was not transparent, lacked integrity and were products of political patronage. They have not

been vetted and there is a possibility that they can be used for political reasons. Some steps to reduce this risk could include the effective and transparent public information and consultations with civil society organisations in order to foster public trust and the sustainability of the efforts.

Fourth, the vetting of judges and magistrates should become a periodical exercise. The researcher is of the opinion that vetting of judges and magistrates is actually a big step forward in restoring public confidence in the judiciary. Vetting should in future be conducted by a more strengthened JSC and it should be a periodical exercise. This would ensure that the justice system retains its integrity.

Fifth, more often than not, the shortcomings of a public institution in a post-conflict situation are multifaceted and represent complex and interrelated causes of malfunctioning. The study recommends that the vetting process needs to be accompanied by broader institutional reforms to safeguard the results of the vetting process and to ensure the quality of public personnel in the future. These include, initiating institutional culture change, including appropriate modifications in training methodology and content; establish effective civilian oversight and ensure the separation of powers, build in particular the independence of the judiciary and the operational independence of other public institutions (e.g. the police and the prosecutor's offices).

Finally, this study relied on Afrobarometer data to answer the first research question. However, this methodology had one major short coming as it does not measure changes in perceptions of trust in the courts of law directly related to vetting in the institution. In further research, it is recommended that future studies should introduce

direct questions relating to changes in perceptions related to the vetting. Although this may be costly and time consuming, it is a highly recommended approach.

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ANNEXES

Annex I: Introductory Letter

Hello. My name is Gloria, a post graduate student at the Department of Political Science and Public Administration at the University of Nairobi. I am in the final stage of my MA—writing my dissertation. My research is an Assessment of Vetting as a Mechanism for Institutional Reform in Kenya: a Case of the Judiciary and you have been selected as a Key Informant. Your views of this are highly valuable and will be useful in the completion of this study. I would appreciate if you spare about 40 minutes to answer some questions. Your identity will remain confidential as well as everything you tell me. The data collected will be used to inform my Master of Arts project and no other purpose. Your cooperation is highly appreciated.

Gloria Mmoji

Annex II: Interview Guide

In your opinion, has the judicial vetting been able to increase public trust in the institution?

What factors account for the above mentioned trend?

Probe for:

Strength and nature of the Vetting Act (key and important elements of the Act that made it good),

Mandate, nature, formulation and composition of the Judges and Magistrates Vetting Board (JMVB) and the effect on this on the vetting outcome

Role of public /CBO participation in the exercise and how it affected outcome

Role funds (availability or not) has played in the exercise

Role 'politics' has played in the vetting process

Other reform measures that reinforced and supported the vetting process

What challenges have been experienced in the vetting of Kenya's judiciary?

Probe for:

Unrealistic timelines

Vetting done in private and not in public

Sustainability of gains made so far