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JUDICIAL INTEGRITY AND THE VETTING PROCESS IN KENYA

1.0 Introduction

At the height of the post-election violence in Kenya in early 2008, the Orange Democratic Movement which was protesting the result of the presidential election that declared incumbent president Mwai Kibaki re-elected, refused to take its' dispute for judicial determination because it didn't believe that the judiciary was an impartial and independent arbiter to oversee the election petition.

The judiciary is an important component of the rule of law in any country. Its absence or its undermining could lead to insecurity and recourse to private justice. Many of the civil wars that occurred in parts of Africa in the 1990's were as a result of the absence of public confidence that an independent and impartial judiciary that could mediate differences and grievances with the State existed. As a medium for protecting the rights and liberties of the individual, the inability of the judiciary to deal fairly among citizens and to rein in executive excesses contributes to a culture of impunity where might is right and where citizen voices are muscled and denied.

Kenya had signed several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR).[1] The Covenant enjoins State parties to ensure equal treatment of persons before judicial tribunals and to fair and public hearing by competent, independent and impartial tribunals established by law.[2] The United Nations Human Rights Committee has further declared that the right to be tried by an independent and impartial tribunal is an absolute right for which there should be no exception.[3] Kenya is also a signatory to the African Charter on Human and Peoples' Rights which promises individuals the right to be heard. This right includes the presumption of innocence until proven guilty by a competent court or tribunal as well as the right to be tried within a reasonable time by an impartial court or tribunal.[4] In a landmark decision, the African Commission on Human and Peoples' Rights declared that Article 7 of the Charter cannot be deviated from since it provides the minimum protection to the citizens.[5]

The UN Basic Principles on the Independence of the Judiciary;[6] the UN Basic Principles on the Role of Lawyers,[7] and the UN Guidelines on the Role of Prosecutors[8] are major documents that have set out the universal standards on the role of these three institutions. The guarantees provided in these documents were further adopted

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in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which was adopted by the African Commission on Human and Peoples' Rights in 2003.[9]

Despite acceding to these international and regional instruments and protocols, the experience in Kenya was that they were observed more in the breach than in compliance. Between 1960 and 1998 eight different committees and/or commissions were established to examine the state of the judiciary and to make proposals for reform. Most of the reports by these committees/commissions were ignored. Not surprising therefore, the state of the judiciary has been a major point of discourse in Kenya. Decades of one party rule accompanied by the overwhelming power of the president has contributed to a public perception of weakness, ineffectiveness and political manipulation of the institution. Appointment, promotion and discipline of judicial officers have been the preserve of the executive and have not always been on the basis of merit and integrity. Each of the constitution making processes the country has had over the last two decades[10] recommended reform of the judiciary. The recently adopted constitution also directed that all judicial officers in the country must 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), to continue to serve in accordance with the values and principles established under the Constitution.[11]

On the basis of the constitutional provision cited above, the Ministry of Justice, National Cohesion and Constitutional Affairs published "The Vetting of Judges and Magistrates Bill 2010" which had been approved by the Cabinet. This paper reviews this draft legislation, using comparative experience to provide strategic policy choices that should be considered in discussing and approving the legislation in Parliament as well as in its implementation.

2.0: The Problem with the Judiciary in Kenya

The Task Force on Judicial Reforms[12] identified several challenges which affect the ability of the judiciary to be an effective arbiter. These include "complex rules of procedure that frustrate access to justice and the expeditious disposal of cases; backlog and delays in the

disposal of cases that erodes public confidence in the Judiciary; manual and mechanical systems of operations that affect efficiency in service delivery; inadequate financial and human resources that contribute to case backlog; unethical conduct on the part of some judicial officers and staff that impede the fair and impartial dispensation of justice; weak administrative structures that undermine the effective administration of courts, lack of operational autonomy and independence of the Judiciary; poor terms and conditions of service that make it difficult for the Judiciary to attract and retain highly qualified professionals amongst its ranks; less than transparent procedures for the appointment and promotion of judicial officers particularly the judges; and lack of effective complaints and disciplinary mechanisms to deal with misbehaviour amongst judges".[13]

A recent publication argued that public confidence in the judiciary has virtually collapsed. "Partiality and a lack of independence, judicial corruption and unethical behaviour, inefficiency, and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accessing the court system have all served to perpetuate a widely held belief among ordinary Kenyans that formal justice is available only to a wealthy and influential few."[14] A former Minister of Justice had claimed that most judges got their jobs due to "favouritism, cronyism and incompetence".[15]

While some reforms have been carried out in the Judiciary such as the introduction of specialized courts; the institutionalization of law reporting through the establishment of the National Council for Law Reporting and the recent establishment of the Judicial Training Institute, these isolated reforms have by themselves not been sufficient to bring the change that is needed to transform the Judiciary into a strong and independent institution. The Committee of Experts that produced a harmonised draft of the Constitution (which was approved in the August 4 referendum) stated that the overwhelming preponderance of the memoranda it received on the judiciary called for wholesale overhaul of the institution.[16] It adopted a middle course of proposing vetting of the officers so as not to disrupt the workings of the institution, and gave Parliament the responsibility of developing an acceptable vetting mechanism that will enjoy the confidence of the judiciary and of the public.[17]

In reviewing the process for appointment of Judges, the Task Force on Judicial Reforms noted that under the previous Constitution, judges were appointed by the President on the recommendation of the Judicial Service Commission (JSC). The Task Force noted that the process through which candidates for appointment are currently identified and vetted by the JSC is neither transparent, nor based on any publicly known or measureable criteria and is certainly not competitive. The Task Force was convinced that this approach has denied many interested and qualified Kenyans the opportunity to serve in the Judiciary. The Task Force noted with encouragement that since 2002, the appointment of judges has been preceded by some form of vetting and consultation but added that the vetting and consultations have not been institutionalized in any form by the JSC. It concluded that due to the lack of an open and merit-based process, it is likely that persons may be appointed as judges when in fact they may not qualify on account of pending disciplinary cases or criminal investigations. The Task Force further expressed concern with the practice of appointment of judges on acting or contractual basis. It argued that the appointment of acting or contractual judges violates the principles of the independence of the Judiciary, erodes security of tenure and is discouraged by international principles relating to the Judiciary.[18]

On the process of identification of persons to be appointed as judges, the Task Force argued that a compelling case has been made for the opening up of the process to competition. It insisted that transparency in appointment of judges can be achieved through a restructured JSC and the introduction of an open and merit based appointment process for judges.[19]

3.0: The Vetting of Judges and Magistrates Bill, 2010

The Bill provides for an independent Board to be known as the Vetting of Judges and Magistrates Board, consisting of nine members, including a chair and deputy chairperson. The members will include three non-citizen serving or retired judges who have served in a Commonwealth country as a superior court Judge or Chief Justice. The mandate of the Board is to "inquire into and determine the suitability of serving judges and magistrates to continue serving in the judiciary."[20]

Section 9 of the Bill lays out the powers of the Board to include the gathering of information considered relevant by the Board, including the requisition of reports, records, documents or any information from any source (including government sources), and to compel the production of the information when the Board deems that necessary. The Board can interview any person, groups or members of organisations or institutions and it can hold inquiries for the purposes of performing its functions. In addition, the Board is not subject to the direction or control of any person or authority.

The vetting procedures provided for in the Bill allow the Board to divide its members into three panels which could work concurrently. Each panel is to be composed in such a way that it includes at least one judge, one lawyer and one non-lawyer respectively.[21] It is important to set out clearly the relevant considerations that the Board must consider in relation to each Judge or Magistrate.

"13 (a): whether a serving Judge or Magistrate would have met the constitutional suitability thresholds for appointment as a Judge of the Superior Courts or as Magistrate;

(b): any pending or concluded criminal cases before a court of law against the concerned Judge or Magistrate;

(c): any recommendations for prosecution by the Attorney-General or Kenya Anti-Corruption Commission;

(d): the track record of the concerned Judge or Magistrate including prior judicial pronouncements, competence and diligence; or

(e): pending complaints from any person or body including but not limited to Law Society of Kenya, Kenya Anti-Corruption Commission, Disciplinary Committee, Advocates Complaints Commission, the Attorney General, Public Complaints Standing Committee, Kenya National Commission on Human Rights, National Security Intelligence Service, the Police and the Judicial Service Commission."

In terms of procedure, the Board would first consider information it gathers through personal interviews with the affected Judge or Magistrate as well as their records. The information obtained by the Board through the interviews and records shall be confidential. The Judges and Magistrates shall be given sufficient notice and the hearing of the Board may not be conducted in public unless the Judge or Magistrate requests a public hearing. The Board's proceedings shall be guided by the rules of natural justice. In essence, the Board must ensure fair procedures and fair hearing to the affected Judges and Magistrates. A Judge or Magistrate who submits to vetting shall be entitled at their own cost, to legal representation.[22] Where a Judge or Magistrate is dissatisfied with a decision of the panel, it may appeal for review to another panel comprised of the chairperson, the deputy chairperson and three other members who did not sit in the panel whose decision is subject to review.

Sub section (a) is about the qualification for appointment. Sub sections (b) and (c) deal with judicial integrity. Sub section (d) is about the professional competence of the judicial officer in the performance of their duties. It is not clear what sub section (e) is designed to achieve. The pending complaints should be about what? It is certainly open to abuse. A recent newspaper report alleges that lawyers are targeting at least 16 judges for removal from office.[23] According to the report, the General Secretary of the Law Society of Kenya was quoted as saying

that the LSK would ensure that judges about whom complaints have been received would not return to the bench. According to the Secretary "we have laid down several strategies to ensure that they do not make it back to the judiciary".[24]

The Secretary enumerated complaints against judges to include temperament, incompetence, hostility, making disparaging remarks against lawyers, pending bankruptcy, disappointing judicial pronouncements, arrogance, introducing stringent rules and a strict dress code, delays in issuing judgements and rulings, misconduct and open bias against some lawyers. While some of the issues are relevant and require investigation, others give the impression that the Law Society might soon become a lynch mob.

It needs to be restated that the vetting process is not an inquisition. It is a quasi-judicial process where the candidate for vetting is afforded all due process guarantees. If the LSK already has a strategy to ensure that any judicial officer against whom there is a complaint should not return to the bench, this raises the question of bias and whether the LSK should be represented on the Vetting Board or even participate in the nomination of the members of the Vetting Board.

Attitudes like those exhibited by the General Secretary of the Law Society of Kenya contributed to the mixed results that greeted the work of the Integrity and Anti-Corruption Committee of the Judiciary.[25] The general consensus on the work of that committee today is that "judges implicated in corruption and misconduct were unfairly targeted as they were not accorded the chance of fair hearing."[26]

While elements within the judiciary in Kenya have brought collective shame on the institution, the systemic issues need to be addressed in the search for lasting solutions. It has been reported that as at December 2009, there were 910,013 cases pending in the courts in the country. Of these cases, 398,136 related to traffic offences.[27] Historically, traffic offences are the easiest to resolve. From use of mobile courts to imposition of spot fines by traffic marshals, it is scandalous that a litigant would be going to court for several weeks before a case of traffic violation is concluded. As a result of the congestion in the courts, litigants with connections will try to exploit the opportunity by having their cases quickly disposed of. The recent petition by prisoners complaining of delays in finalising prosecutions is a case in point. They cited evidence of how quickly criminal prosecutions of well connected people were concluded in record time. The accused persons were convicted, served time in prison and have since been released. Yet, many of the prisoners are still on awaiting trials, years after prosecution against them was commenced.

4.0: The Vetting Mechanism

There is very limited research and literature globally on vetting. While the normative principles are clear and are rooted in human rights instruments and frameworks, further academic conceptualisation of the principle as well as the exploration of different strategic contexts that enable a decision to vet officials has been limited. This may be because vetting usually takes place in the context of post-conflict. Earliest experiences of vetting can be found in East Germany, Bosnia and Herzegovina, Czech Republic, Hungary, Greece and Liberia among others. Kenya is not a post-conflict country. The adoption of vetting as a mechanism for institutional reform in Kenya demonstrates the increasing appeal of the mechanism to address governance deficits even in the context of development. The success of the mechanism in Kenya will contribute to an explosion of the use as more African countries work towards strengthening their governance systems.

Vetting is the process of assessing individual integrity to determine one's suitability for public employment. Individual integrity refers to the person's compliance with relevant standards of human rights and professional conduct. This also includes the person's financial propriety. The process seeks to exclude from public service persons with dubious integrity so as to strengthen the legitimacy of the institutions in the eyes of the public. At the institutional level, vetting aims to transform institutions that may have been

involved in human rights violations so that they begin to enjoy public trust and confidence, and to increase their capacity to protect human rights.

Vetting is not an end in itself. It needs to be part of a much broader reform of the institution so as to maximise the impact of the process and to make it sustainable. The vetting of judicial officers in Kenya coupled with reform of the judiciary based on the report of the Task Force on Judicial Reforms and exploiting the new safeguards and protections for the judiciary contained in the 2010 Constitution can contribute to strengthening the judiciary and make it an icon of excellence in the foreseeable future. The timing is therefore appropriate.

A recent UNDP publication[28] proposed a number of factors which should be considered during the design of a vetting process. The first is to ensure that certain basic conditions are met. One of these conditions is the existence of government authority and political will. Government authority in Kenya is not in doubt. While there may have been concerns over political will in the early months of the coalition government, the fact that it is already implementing the Report of the Task Force on Judicial Reforms, and it delivered a new constitution with a broad section of the coalition government supporting the adoption of the constitution during the referendum, is evidence that political will exists to go through the vetting process and to embark on substantive reforms of the judiciary. There is also broad public support for wholesale transformation of the judiciary. While vetting processes regulate access to positions of power and are highly political undertakings, and some sections of the political elite have benefitted from control over appointments of judicial officers, there is a clear consensus within the Kenyan political class that vetting of the judiciary does not disadvantage any of the groupings. In any case, many members of Parliament have been sent packing through judicial decisions on election petitions, irrespective of the political affiliations of the MPs.

The second condition relates to institutional clarity on the public service positions needing to be vetted. The Bill on vetting is very clear that Judges and Magistrates are those to be vetted. These include the Judges of the Appeal Court and the Registrars of the High Court and the Magistracy. The vetting does not extend to the entire personnel of the Judiciary. It is understandable that the government does not want to make the vetting a protracted one and thereby cause institutional delays in the dispensation of justice or to disrupt the operations of the judiciary. It needs to be borne in mind that criticism of the judiciary does not extend to judicial officers only. There are complaints of missing court records, of corruption and other forms of abuse by other levels of personnel in the judiciary. The vetting of judicial officers needs to be accompanied by reform targeted at other levels of personnel in the judiciary so that the change is systemic and a new ethos of service can be generated and sustained.

The third condition, identification of the individuals to be vetted is straightforward. The number of judicial officers in Kenya is a non-contentious issue. There are 11 judges of the Court of Appeal, 44 Judges of the High Court and less than 150 Magistrates. What is required as the process unfolds is to develop a realistic and viable vetting and personnel reform process so that the operations of the judiciary are not disrupted while the vetting takes place and that the outcome of the process leads to systemic change. Critics of the proposed vetting draw attention to early 2003 when the government embarked upon what was called a “radical surgery of the judiciary” which led to the suspension and/or removal of more than 100 judicial officers. The outcome of that effort did not lead to increased public confidence and trust in the judiciary. While individuals with dubious integrity may be targeted for removal from the judiciary, one of the lessons of that “surgery” is that without systemic change, individual conversions in behaviour is not sufficient to ground institutional transformation.

The fourth condition relates to the legal mandate for the vetting. A vetting process may be contested and there could also be political resistance to the process. The Parliamentary Select Committee on the Constitutional Review had removed the

recommendation for vetting in the proposed constitution submitted by the Committee of Experts. In re-inserting the provision, the COE argued that there was virtual unanimity in the recommendations it received for the reform of the judiciary.[29] There is firm legal basis for the vetting. The transitional provisions in the Constitution make it imperative that the vetting must take place.[30] The Constitution further provides that the removal (including the process leading to the removal) of a judge from office by virtue of a legislation providing for vetting shall not be subjected to question in, or review by, any court.

The fifth condition is about the availability of resources for the vetting. A vetting process needs a clear evaluation of the operational needs as well as adequate time and resources. The various reform initiatives are competing for the scarce resources available. The UNDP publication argues that the requirements of vetting processes are generally under-estimated, and that vetting processes are time-consuming and resource intensive.[31] The vetting of judicial officers/reform of the judiciary is one of the three most important reform initiatives the State needs to address within the first year of the operation of the new constitution. The others are police reform and reform of the electoral system. The reform of the electoral system has been supported through generous contributions by donors and now seems to be on auto-pilot as a result of the impressive work the Interim Independent Electoral Commission has done in the last one year. Because of the importance of the judiciary to strengthening the rule of law in the country and to more effectively manage any potential fallout from the next political transition in August 2012, there is likelihood of donor support for this process. The new Constitution provides a permissive environment to return to the question of judicial reform. Early in the life of the NARC government in 2003, donors had committed resources to a governance, law and order programme with a huge component of the resources devoted to the judiciary. The reforms never really took off due to factors internal to the judiciary.

The last condition is about the timing of the process. While there are competing agenda and timetables, there cannot be a better moment than now for the vetting. In any case, the Constitution provides a timeframe within which the vetting must be concluded. It will be difficult to depart from this timetable. Judicial reform is tied to other elements of the implementation of the Constitution. The Chief Justice is the Chairperson of the Judicial Service Commission which has responsibility over judicial appointments and discipline. The current chief justice must vacate office within six months of the promulgation of the new constitution. A new chief justice must be vetted before he or she assumes office in February 2011. If there are disputations over new legislation enacted under the constitution, there must be a judiciary to arbitrate the disputations. The other transitional justice mechanism is the Truth, Justice and Reconciliation Commission. While the TJRC may still inquire into the conditions that led to violations and abuse of human rights, it is recommended that it focus its attention on unearthing the trends and patterns that led to this state of affairs rather than to individual accountability. The vetting process would have addressed the individual accountability question long before the TJRC submits its report. The TJRC report can focus on the broader political and environmental factors that led the judiciary to its sorry state. While the Report of the Task Force on Judicial Reforms is useful, it focuses more on the systemic issues internal to the judiciary that led to the rot.. The vetting of judicial officers is therefore not competing with any other transitional justice mechanism in Kenya.

The UNDP report cautions against a number of undesirable consequences.[32] The most important of these considerations for our purpose is the possibility of political misuse of the process. There is a possibility that any vetting of the judiciary can undermine its independence. In addition, removals may be based on group or party affiliation rather than on individual conduct, target political opponents and degenerate into political purges. There is an open question how the several judicial officers who are fingered in bar room discussions as agents of respective political parties may be treated. These are unproven allegations but have contributed to public

perceptions of the officers and the lenses with which members of the public view their judicial decisions.

Section 13 of the proposed Bill enumerates the relevant considerations for vetting: these include meeting the suitability thresholds for appointment; if there are pending or concluded criminal cases against the judicial officer; any previous recommendations for prosecution by the Attorney General or the Kenya Anti-Corruption Commission; the track record of the individual including prior judicial pronouncements, competence and diligence; and pending complaints from a list of institutions contained in the Bill. In addition, the composition of the vetting board includes three foreign judges: a mechanism obviously designed to give confidence to the process and to respond to perceptions of deliberate targeting of judicial officers.

5.0: The Vetting Process

The UNDP publication[33] discusses the five key steps in the design of a vetting process. We shall now examine those steps in detail.

t. The publication argues that to re-establish civic trust and re-legitimise public institutions, the public needs to be aware of and trust the reform process. Transparency about the vetting process and consultation about its objectives will help in building confidence in the process reducing uncertainty that may be experienced by the personnel subject to the vetting and in ensuring that the vetting responds to the needs of the victim and the society in general. Public awareness can help in pre-empting later efforts to cast doubts on the validity of the process. The publication therefore recommends that the vetting process include a public information mechanism and that the design of the process itself should be informed by broad consultations with civil society and other reform-minded institutions.

Public consultation should occur at two levels. The first is in the design of the process and the second is while the process is ongoing. It is important to note that in the design of the process, the Ministry of Justice, National Cohesion and Constitutional Affairs has consulted the “usual suspects”: the Law Society of Kenya, the International Commission of Jurists and the Federation of International Women Lawyers. None of the institutions listed in the draft legislation to nominate members for consideration for appointment to the Vetting Board was consulted in the development of the legislation.[34] It should be expected that for such an important body for which these institutions are expected to play a pivotal role, they should have been consulted in the development of the legislation. It will not be sufficient to argue that they could provide input when the Bill is presented in Parliament. In countries with strong executive presidencies, it is usually difficult for executive bills to under radical alteration when they are presented in Parliament. On the positive side, the Constitution now provides a mandatory injunction on the Parliament to “facilitate public participation and involvement in the legislative and other business of Parliament and its committees.”[35] It is to be hoped that Parliament will allow members of the public the opportunity to make inputs on the Bill. Further, the Bill is fairly robust and comprehensive and responds to all the major issues that are involved in a vetting process.

The second aspect of public involvement in a vetting process relates to when the process is ongoing. This is necessary to avoid a situation where the public or a section of it begins to perceive that the personnel being vetted are being stigmatised and to avoid the development of a “martyr syndrome”. The Vetting Board should develop a robust communication and public information strategy that will ensure the full involvement of the public at all stages in the implementation of the process.

Establish vetting priorities and vetting type. Apart from the judiciary, the Constitution does not mandate the vetting of any other institution of governance. The delivery of justice is not the preserve of the judiciary alone. The police are another important institution in the delivery of criminal justice. While the Report of the Task Force on Police Reforms is impressive, Kenyan civil society is not convinced that the current officer cadre of the police service (including the Administration Police) can deliver effective public service unless the leadership is subjected to an

integrity process like vetting. The service is alleged to be still involved in extra-judicial killings and other types of felonies.

The issue of vetting type has already been addressed. There are four main types of vetting. The first is the vetting of all or certain categories of personnel. In such a case, the vetting process can target all positions or only certain positions of a public institution or a certain category of positions across institutions. The second type is a review process. In this type of process, a special mechanism is established to screen serving public employees with the aim of removing those who are unfit to hold office. Due process standards apply in this process, the burden of proof falls on the reviewing body, and the standard of proof is the balance of probabilities. In the third type, rather than vetting serving public employees, the vetting process is limited to new appointments, including transfers and promotions. Candidates are screened for positions that are or become vacant. The last type is a special or regular mechanism. Here, a special or ad hoc commission is established to implement a vetting process. It may also be possible to use regular procedures to remove public employees with serious integrity deficits. Unlike a special process, regular procedures do not infringe on the certainty of the law and are less costly and disruptive. Kenya has settled for a special mechanism through the creation of the Vetting Board to be established by law.

Define vetting criteria and outcomes. The integrity of a public employee refers to the persons' adherence to international standards of human rights and professional conduct, including the person's financial propriety. In general, the precise kind and scope of integrity required for public employment depends on the particular circumstances in each country and the circumstance of the position. For judicial officers, the integrity requirements ought to be high given the public trust that they hold. The criteria should correspondingly respond to this requirement.

The requirements established under the Bill are three. First, the Vetting Board may gather information it considers relevant (including requisitioning all kinds of documents and records, and compelling their production). Second, it can conduct interviews of individuals, groups or members of organisations or institutions and finally, it can hold inquiries for the purposes of performing its functions. The first requirement may seem to impose the duty of gathering relevant information on the Board. If this is the intention of the Act, it may constrain the work of the Board.

The duty to provide relevant documentation about their qualifications, competence and integrity rests on the personnel to be vetted. This should be in the form of a standard template provided by the Vetting Board. The information requested should include evidence of individual integrity (human rights record, professional conduct and financial propriety), individual capacity (citizenship, minimum age, educational standards, professional qualifications, competence and experience), physical and mental aptitude and of representation (gender, ethnicity, religion and geographic origin). The relevant considerations for the vetting should have included looking into the financial and banking records of the judicial officers. Any financial resources that cannot be accounted for, raises questions of the integrity of the officer. While the Board may gather information it considers relevant, the officer is not under any obligation to provide information not requested by the Board. In addition, the draft legislation does not give the Vetting Board powers of investigation. It is not clear how the Board can corroborate the statements submitted by the officers to be vetted unless it is able to investigate those statements. Ideally, it should have independent investigative capacity and not rely on the security institutions to conduct investigations on its behalf.

The Constitution establishes the suitability criteria for appointment as a Judge.[36] The person must possess a law degree from a recognised university, or is an advocate of the High Court of Kenya, or possesses an equivalent qualification in a common-law jurisdiction and possesses the experience required (in the case of a high court judge, ten years), and have a high moral character, integrity and impartiality (emphasis mine).

Section 75 of the Constitution lays down the minimum conduct expected of State officers. "A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest, or demeaning the office the officer holds".[37] Determining the moral character and integrity of the individual or whether the individual's conduct leads to a conflict of interest or demeans the office they occupy is impossible in the absence of investigative capacity.

Develop the mechanism. Generally the special ad hoc commission should be independent to ensure an impartial and legitimate implementation of the process. Members of the commission should be distinguished and broadly respected individuals. Section 9 (2)(d) of the Bill assures that the Vetting Board shall not be subject to the direction and control of any person or authority. Its independence will be assured if the members conduct themselves in a manner that reflects the protection afforded by the legislation. The Bill also spells out the qualifications for chairperson/deputy chairperson and member of the Vetting Board. "A person shall not be qualified for appointment as the chairperson or deputy chairperson unless they have at least twenty (20) years or an aggregate of twenty (20) years experience as a superior court judge, distinguished academic, judicial officer or other relevant legal practice in the public, private, or any other sector in Kenya".[38] For member of the Board, the Bill provides that a person qualified for appointment must have a degree from a recognised university, have at least 15 years post-qualification experience in their field of study and is of high moral character and proven integrity.[39] The qualification criteria established by the Bill meets the international threshold for membership of such boards.

The Vetting Board will need a well-staffed secretariat to prepare the necessary information and support the decision making process. The staff of the secretariat should be multi-disciplinary and include information system managers, lawyers and technical experts among others. The Board and its staff should be given adequate financial and material resources. The Board is likely to make unpopular decisions that could lead to security risks for its members. Arrangements need to be in place to provide security for the members.

Respect international procedural standards. A vetting process that fails to respect international standards may undermine, rather than reinforce human rights and the rule of law and is unlikely to build civic trust. International standards require, in particular, that vetting processes are based on assessments of individual conduct, rather than on membership of a group or institution. Any exclusion on the sole basis of group affiliation not only violates international standards but also tends to cast the net too wide and may exclude persons of integrity who bear no individual responsibility for past abuses. At the same time, group exclusions may also be too narrow and overlook individuals who committed abuses but were not members of the group.

The specific rights that apply in a vetting process depend on the type of process used. In a review process, minimum due process standards required in administrative proceedings should be respected: initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for the parties to prepare a defence, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before the vetting body; the opportunity of being represented by counsel; notification of the parties of the decision and the reasons for the decision; and the right to appeal to a court or other independent body. An exception to this is that employees who were unlawfully appointed, in violation of procedural or qualification requirements can be removed without any need to establish other reasons for their removal.

Section 5 of the Bill establishes the guiding principles for the execution of the mandate of the Vetting Board. It enjoins to Board to be guided by the principles

and standards of judicial independence and international best practice. Section 14 established the vetting procedure. The Board is expected to have personal interviews with the affected Judges and Magistrates and to review their records as well. The information obtained during the personal interview and records shall be confidential. The Judge or Magistrate to be vetted shall be given sufficient notice. The rules of natural justice shall apply to the Board's proceedings. This implies that the judicial officer shall be notified of the complaints against them, and be afforded time to respond to them, including cross examining those giving testimony against them. The judicial officer is also entitled to legal representation, though at their own cost. The hearing by the Board shall be in private unless the judicial officer requests a public hearing. This is a strange provision given that ordinary judicial proceedings are conducted in public. The desire of the drafters of the Bill may be to protect the name of the judicial officer since the person is presumed innocent until proven guilty. There is a risk that the process may lock out complainants and victims of the judicial officer since the Bill does not provide for their participation in the process.

6.0: Conclusion

The Bill on the vetting of judicial officers provides a sufficient basis to begin discussions about how to make the institution responsive to the needs of the public, and to assure public trust and confidence in the judiciary. However, it should be noted that a comprehensive approach to institutional reform is critical to ensure its effectiveness and sustainability. More often than not, the shortcomings of a public institution are multifaceted and represent complex and interrelated causes of malfunction and abuse. Vetting is an important but insufficient reform measure and needs to be accompanied by broader institutional reforms to safeguard the results of the vetting process and to ensure the quality of judicial personnel in the future.

Endnotes

1 Signed on 1 May 1972.
2 Article 14(1) of the ICCPR.
3 Communication No 263/1987, M Gonzalez del Rio v Peru (Views adopted on 28.10.1992), UN Doc CCPR/C/46/D/263/1987 at para 5.2
4 Article 7(1) of the Charter
5 African Commission on Human and Peoples' Rights, Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria
6 Adopted by consensus by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy,
from 26 August to 6 September 1985 later endorsed by the UN General Assembly in resolution 40/32 (29.11.1985) and welcomed by the UN
General Assembly in resolution 40/146 (13.12.1985).
7 Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 and welcomed by the UN General Assembly in resolution 45/121 (12.12.1990) and resolution 45/166(18.12.1990).
8 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27August to 7 September 1990.
9 Adopted as part of the African Commission on Human and Peoples' Rights' activity report at the 2nd Summit and meeting of heads of state of the African Union, 2003.
10 The CKRC and the BOMAS drafts of the constitution recommended the institutional overhaul of the judiciary through a vetting process.
11 See the Sixth Schedule of the Constitution of Kenya 2010, Section 23.
12 Appointed by President Kibaki as part of the Agenda 4 reforms following the post-election violence. The Task Force submitted its repot in August 2009.
13 See Report of the Task Force on Judicial Reforms in Kenya, Government Printer, Nairobi, August 2009: 10-11.
14 International Bar Association and International Legal Assistance Consortium, "Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya" February 2010: 8
15 Martha Karua, cited in the Sunday Nation Newspaper of September 26, 2010.
16 Committee of Experts on Constitutional Review, "Report of the Committee of Experts on Constitutional Review issued on the Submission of the Proposed Constitution of Kenya", 23 February 2010: 40

17 Ibid
18 Report of the Task Force on Judicial Reform, August 2009.
19 Report of the Task Force on Judicial Reforms, August 2009, pp.27-29
20 See Section 8 of the Bill
21 See Section 12 of the Bill
22 Section 14
23 Sam Kiplagat "Why lawyers have singled out 16 judges for dismissal from bench" Sunday Nation Newspaper, 26 September 2010: 4-5
24 ibid
25 The famous "radical surgery" of the judiciary that resulted in the suspension of about 23 judges and more than 70 magistrates.
26 Sunday Nation ibid.
27 Ibid
28 United Nations Development Programme, Vetting Public Employees in Post-conflict Settings: Operational Guidelines. New York, Bureau for Crisis Prevention and Recovery, 2006:11-14
29 Committee of Experts, "Final Report to the Parliamentary Select Committee", August 2010:40
30 Article 23 of the Sixth Schedule of the Constitution
31 Vetting Public Employees in Post-conflict Settings: ibid.
32 Ibid
33 The section that follows borrows heavily from the publication Vetting Public Employees in Post-conflict Settings: Operational Guidelines, 2006.
34 These institutions include the Kenya Private Sector Alliance; the Supreme Council of Kenya Muslims; the Kenya Episcopal Conference; the National Council of Churches of Kenya and the Evangelical Fellowship of Kenya.
35 Section 118(1)(b) of the Constitution
36 See Section 166 of the Constitution for the qualification criteria of judicial officers.
37 Sub section (1) (a), (b), and (c).
38 Section 7 (5) of the Bill.
39 Section 7 (7) of the Bill.

About The Author

Dr. Ozonnia Ojielo is the Senior Peace and Development Advisor to the UN Resident and Humanitarian Coordinator and Chief of the Peace Building and Conflict Prevention Programme of UNDP Kenya. He is a former Senior Governance Advisor at UNDP Ghana. His previous career positions include Chief of Information Management and subsequently Officer-in-Charge of the Sierra Leone Truth and Reconciliation Commission, Human Rights lawyer and private legal practitioner in Nigeria, University teacher in Law and Conflict Resolution at the Enugu State University of Science and Technology, Enugu and the ESUT Business School, Lagos, Nigeria, President of a research and advocacy NGO, Centre for Peace in Africa, in Lagos, Nigeria, and professional mediator, conciliator and arbitrator in Nigeria. He holds first and advanced degrees in History, Law, Strategic and Project Management, and Peace and Conflict Studies.

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