

‘Restoring Confidence in the Judiciary’: Kenya’s judicial vetting process, constitutional implementation and the rule of law

Jan van Zyl Smit¹

Introduction

The judicial vetting process currently under way in Kenya is a home-grown and highly innovative attempt to solve a rule of law dilemma. The problem is one which many nascent constitutional democracies have had to confront. What should the new constitutional democracy do if it has inherited a judiciary whose track record is marred by failures to uphold the rule of law? Can the same judges be entrusted with implementing, interpreting and fostering acceptance of the new Constitution, especially if it is a progressive instrument designed to usher in social transformation? In the case of Kenya, the judiciary had long been dogged by allegations of systemic corruption and, at least intermittently, political bias and manipulation. It has always been clear that this was not simply a practical problem that could be solved by a change of personnel (though the disruption of cases and loss of judicial skills entailed by any large turnover of judges would have made that daunting enough). Where the judiciary is concerned, the special status of the institution elevates the practical problem to a dilemma. Standard conceptions of constitutionalism require judges to be accorded security of tenure, and permit their removal from office only by stringent and onerous procedures designed to safeguard their judicial independence. How, then, can a new constitutional democracy justify compromising these guarantees, especially in the crucial implementation phase of the Constitution when the way the judiciary is treated may set an important political precedent for the future?

The Kenyan approach to this dilemma has been to insist that the full guarantees of judicial office should not immediately and automatically be granted to incumbent judges. The Constitution of 2010 requires all judges and magistrates who were appointed under the previous dispensation to undergo individual vetting. The purpose of vetting, as set out in the Constitution, is to determine whether they are suitable to continue to serve in accordance with the rule of law, human rights and other values enshrined in the new Constitution.² The vetting process is being carried out by an independent Judges and Magistrates Vetting Board, consisting of three Kenyan lawyers, three members of Kenyan civil society, and three Commonwealth citizens who hold or have held high judicial office.³ The Board commenced operations in 2012, and by the end of the year it interviewed and assessed most of the 50-odd judges, ie members of the High Court or above, who were liable for vetting. It is due to complete the vetting of the much larger cohort of over 300 magistrates (professional judges who sit in the

¹ Research Fellow, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law. I have served as a consultant to the Kenya Judges and Magistrates Vetting Board and as a researcher to the Committee of Experts on constitutional review. All views expressed in this paper are my own and are not to be attributed to the Board, the Committee or any of their members. Comments gratefully received at j.vanzylsmit@binghamcentre.biicl.org.

² Constitution Schedule 6 s 23(1).

³ The website of the Board is www.jmvb.or.ke, where the vetting decisions of the Board and other publications may be found.

Work in progress – please do not quote or circulate

lower courts), by the end of 2015. The focus of this paper will be on the vetting of judges, although much that is said will also be applicable to magistrates.

The Board describes its mission as ‘Restoring Confidence in the Judiciary’, a phrase I have borrowed as the title for this paper. It is brief but suggestive. If, as the slogan assumes, the Kenyan public had substantially lost confidence in the judiciary as a whole, then judges – whatever their individual guilt or innocence – would face an uphill struggle to obtain public acceptance of their rulings, especially when called upon to adjudicate on intensely political matters in the early years of the new Constitution. Judicial security of tenure would only make it harder to address this unusual situation, which is not one that established constitutional democracies have to contemplate. In these circumstances the rule of law would be better served, so the thinking goes, by a credible vetting process that resulted in a judiciary with fewer bad apples.

The success of the Kenyan vetting process depends on many variables and it is difficult, and almost certainly too early, to evaluate many of these. At best, the vetting process could make a partial contribution to bringing into being a judiciary that garners sufficient public confidence and manages to strengthen and uphold the rule of law. Vetting must be considered alongside other measures also contained in the Constitution including the creation of a new Supreme Court at the apex of the court hierarchy; entrusting judicial appointments to an independent and transparent Judicial Service Commission; and giving greater financial autonomy of the judiciary. This paper can touch on these developments only in passing, since its main focus is on vetting. Analysing the vetting process is tricky enough. It is important not to lose sight of the distinction between public perceptions of judicial independence or lack thereof, and reliable findings of actual judicial wrongdoing. The primary question has to be whether the vetting process that the Board has followed has been fair, and whether the Board’s findings about the conduct of individual judges are justified and withstand scrutiny. In brief, has the Board itself acted in accordance with the rule of law? How successful has it been in removing judges whose continuing presence would have damaged the rule of law? But this is not the only enquiry. Looking at the wider picture of Kenyan society, it also worth asking what the Board has done to demonstrate to the public that it is removing members of the judiciary who lacked independence or integrity, as this bears on the extent to which it is perceived as contributing to making the judiciary more trustworthy than it was before.

As the vetting process is still unfolding, this paper adopts a narrative approach. It sets out to describe the hard choices that Kenyan actors have faced at various junctures and which ultimately led them to forge the unique mechanism and philosophy of vetting that they did. Since the early 2000s, various politicians and members of the legal community had 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. The ‘radical surgery’ and its aftermath seemed only to fuel further mistrust of the judiciary, yet as this paper explains the lessons learned from this experience also informed proposals for judicial reform that were made during Kenya’s constitution-making process. The drive towards a more progressive, people-centred Constitution that characterised constitution-making activity in the early 2000s was interrupted several times, but survived the terrible violence that followed the disputed December 2007 elections, and eventually resulted in

a progressive Constitution adopted by national referendum in 2010. The Constitution ensured that vetting would take place, but left the process itself to be regulated by legislation. This paper accordingly outlines the legal framework that was shaped by Kenyan lawmakers pursuant to this constitutional requirement, and then considers what policies and practices the Board has adopted, for example the publication of reasoned decisions in individual cases (known as ‘Determinations of Suitability’), as well as how the Board has interacted with the public and negotiated its ongoing relationships with Parliament, the judiciary and other institutions and actors. All this forms part of the necessary background for any assessment of the extent to which judicial vetting has contributed, or is contributing, to strengthening the rule of law and constitutional implementation in Kenya.

1 The Kenyan judiciary in the 2000s and the ‘radical surgery’

Writing about the Kenyan judiciary in the Human Rights Quarterly in 2001, the leading human rights scholar Makau Mutua painted a bleak picture of an institution whose members ‘bent over backwards to accommodate the wishes of the executive for financial and political rewards’.⁴ The following year a senior delegation of Commonwealth judges and jurists which had visited the country at the invitation of the Constitution of Kenya Review Commission stated that they were ‘shocked and dismayed by the widespread allegations of corruption in the Kenya Judiciary’.⁵ They concluded that ‘corruption ... is such a serious problem that a strong and immediate response is required’.⁶ Kenyan lawyers have also provided extensive accounts of the corruption they encountered during this period.⁷

The picture that emerges is of a judicial institution which regularly subverted and intimidated by the Executive, particularly under the presidency of Daniel Arap Moi (1978-2002). During the 1980s, President Moi ruled Kenya as a *de iure* one-party state, a reality which many Western donor states ignored in exchange for his support in the Cold War. President Moi even had the Constitution amended to remove judicial security of tenure and its procedural safeguards, only to restore these again when he came under domestic and international pressure from 1990 onwards.⁸ As President he had the power to appoint the Chief Justice and was also able influence other appointments by controlling the membership of the small Judicial Service Commission.⁹ There was a longstanding but constitutionally questionable practice of employing foreign judges on

⁴ ‘Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya’ (2001) 23 HRQ 96 at 113.

⁵ George Kanyeihamba et al, *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (International Commission of Jurists, Kenya branch: Nairobi, 2002), para 4.

⁶ *Ibid*, para 5.XI.

⁷ See Winluck Wahiu, ‘The Independence and Accountability of the Judiciary in Kenya’ in Frederick Jjuuko (ed), *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa* (Kituo Cha Katiba: Kampala, 2005); Paul Mwangi, *The Black Bar: Corruption and Political Intrigue within Kenya’s Legal Fraternity* (Nairobi 2001). The International Commission of Jurists, Kenya branch (‘ICJ-K’), has produced many studies on the judiciary, including *The Judiciary in Review 2000-2002* (Nairobi, 2003); *Strengthening the Fragile Bastion: Blueprint for Judicial Reform in Kenya* (Nairobi, 2006) ICJ-K also collaborated with the International Commission of Jurists, Geneva, to produce a high-level report on the radical surgery: *Kenya: Judicial Independence, Corruption and Reform* (Nairobi and Geneva, 2005).

⁸ Mutua (n4) 101-102. See also Richard Kuloba, *Courts of Justice in Kenya* (OUP, Nairobi 1997) 77-90.

⁹ Mutua (n4) 104-105.

renewable contracts.¹⁰ In Makau Mutua's assessment, some Chief Justices were all too ready to use their powers of case allocation and judicial deployment to make sure 'that executive wishes were executed by both superior and subordinate courts without deviation',¹¹ and they would threaten reluctant judges and magistrates with dismissal or transfer to remote posts.¹²

In these circumstances, the record of judiciary on human rights and the rule of law was poor, especially in political cases, and often fell short of demonstrating actual independence from government. Kenya's 1963 constitution contained a Bill of Rights, the courts for several years declined to enforce it, citing a lack of appropriate court rules, even though it was within the Chief Justice's power to make them.¹³ Although there were some decisions in favour of individual rights,¹⁴ the courts tended to side with the government, for example upholding detention with trial and dismissing election petitions that sought judicial scrutiny of the hotly contested Presidential polls in 1992 and 1997.¹⁵ A strange constitutional rights jurisprudence began to develop in which the human rights of corporations were used to curtail investigations into massive corruption scandals that allegedly implicated senior figures in government.¹⁶ Courts also sometimes used their contempt jurisdiction to impose heavy penalties on journalists and newspapers that claimed to be exposing state corruption. According to one study conducted in 2000, no less than 82% of Kenyans surveyed considered their judiciary to be corrupt.¹⁷

Tackling corruption, including a 'radical surgery' to deal with corruption in the judiciary, was one of the promises made by Mwai Kibaki as he swept victory in the Presidential election of 2002, when President Moi had finally agreed to step down. He also promised to accelerate the national constitution-making process and ensure that it was completed within 100 days. Although the latter promise failed to materialise, there is a sense in which one could regard the 'radical surgery' of the judiciary, which did take place, as an attempt to tackle rule of law problems in preparation for a constitutional transition. The process began when President Kibaki appointed a new Chief Justice, Evans Gicheru, to replace Chief Justice Bernard Chunga, who resigned when disciplinary proceedings were commenced to investigate his record in political cases under the Moi regime. Chief Justice Gicheru formed a subcommittee of the judiciary, headed by Justice Aaron Ringera, to gather evidence of corruption in closed hearings around the country. Within six months, the Ringera committee issued its report, in which it found that there was a 'culture of corruption' in the judiciary, and even gave estimates of the average bribe that was payable to secure judgment in various types of cases.¹⁸ When it came to

¹⁰ Mutua (n4) 107-112, Mwangi (n7) 107-111, ICJ-K, *Strengthening the Fragile Bastion* (n7) 64.

¹¹ Mutua (n4) 118.

¹² Mutua (n4) 111-112, 115. Wahiu (n7) 140-142.

¹³ ICJ-K, *Strengthening the Fragile Bastion* (n7), 39. See also Mwangi (n7) 106.

¹⁴ ICJ-K, *Strengthening the Fragile Bastion* (n7), 39 and Mwangi (n7) 122-126 discuss the celebrated *Githunguri* case. ICJ-K, *The Judiciary in Review 2000-2002* (n7) 8-9 lists a number of instances in which the courts held executive action to be unconstitutional in the period 2000-2002.

¹⁵ Wahiu (n7) 129-131. *Also Abuya.

¹⁶ *Gathi

¹⁷ CJ-K, *The Judiciary in Review 2000-2002* (n7) 20 cites a 2000 survey by the UK Department for International Development in which 81% of respondents (from a small sample of 336) considered the judiciary to be corrupt.

¹⁸ Ringera report * 31-34.

individual judges, the Committee stated that there were credible allegations that five out of nine Court of Appeal judges, 18 out of 36 High Court judges and 82 out of 254 magistrates were ‘implicated in judicial corruption, misbehaviour or want of ethics’.¹⁹ The committee passed their names to Chief Justice Gicheru in confidence, but the Chief Justice then released the ‘list of shame’ to the media and called upon the judges in question to resign. He also formally requested President Kibaki to suspend the judges and appoint disciplinary tribunals to consider the question of their removal, as envisaged by the 1963 constitution.²⁰ The President did so, and for good measure also terminated the salaries and benefits of those who refused to resign, even though this was clearly unconstitutional and payments were later reinstated.²¹ Within a matter of weeks most of the judges named had resigned, and only seven elected to face the tribunals.

The first phase of the radical surgery was widely criticised for the secrecy surrounding the process by which allegedly corrupt judges had been identified, and the pressure that was then brought to bear upon them.²² The second phase, consisting of the tribunal proceedings against the seven judges who did not resign, dragged on from 2003 until 2010. Two judges were finally removed from office after the tribunals, made up of serving and retired judges, had presided over lengthy proceedings that in some cases included weeks of oral testimony and cross-examination.²³ Most of the judges also challenged the proceedings against them by way of judicial review, and some were successful. One Court of Appeal judge won a decision terminating his tribunal proceedings in 2010, as a result of the Chief Justice’s failure to allow the judge to address the allegations against him in private before referring him to the Presidential tribunal.²⁴ This meant that a procedural shortcoming in 2003 led to a judge being suspended for seven years, without the substantive allegations against him ever being tried. Other cases established that the tribunals were confined to considering only those allegations that the Chief Justice had specifically included in his reference.²⁵ Courts in other common law jurisdictions had held that these procedural fairness protections were necessary when the removal of a judge was at stake,²⁶ and since the Kenyan disciplinary provisions were broadly similar to those found in many other Commonwealth jurisdictions, these decisions were probably rightly regarded as persuasive.

The experience with tribunal proceedings in the ‘radical surgery’ also seemed to suggest, however, that while atypical Commonwealth disciplinary model might be appropriate when a small number of judges were suspected of wrongdoing, in the Kenyan context this model could not cope with allegations of much more widespread or even systemic judicial malfeasance. Apart from the procedural missteps that prevented many of the substantive allegations from being aired, there were also formidable

¹⁹ Ringera report* 46-47.

²⁰ Section 62(4)-(6).

²¹ ICJ, *Kenya: Judicial Independence, Corruption and Reform* (n7) 10.

²² ICJ, *Kenya: Judicial Independence, Corruption and Reform* (n7) 14.

²³ Personal interviews with the chair of the tribunal for Court of Appeal judges, Justice Akiwumi (December 2010) and with assisting counsel at the tribunal for High Court judges, Joseph Gitonga M’Limbine (February 2012).

²⁴ *Republic v Chief Justice of Kenya and others, ex p Ole Keiwua* [2010] eKLR (Misc Civil Appl 1298 of 2004).

²⁵ *

²⁶ *Rees

practical problems and issues of public perception. The resignation or suspension of nearly 50% of the higher judiciary, not to mention the involvement of other serving judges in trying them, severely disrupted the conduct of litigation and contributed to a mountainous backlog of cases.²⁷ Worse, the entire process was in the hands of the government and the very same judiciary that had just been found to be systemically corrupt. To some extent, this was what the constitution required.²⁸ However, this did not make it easy to explain to the public why some judges were publicly named and pursued through the tribunals, while others with questionable reputations escaped. The Law Society of Kenya refused to co-operate with the judiciary's investigations after its own testimony seemed to be rejected. Rumours surfaced that the process had been marred by political and ethnic favouritism, and that such considerations also influenced the appointment of new judges to replace those who had been forced out.²⁹ In a public survey conducted in 2004, 68% of respondents stated that the radical surgery would make little or no difference to corruption in the courts.³⁰ It may be that members of the public were swayed by some of the considerations already mentioned, and that a sizeable proportion suspected that the process was controlled by vested interests. This is not to say that the radical surgery did not result in the departure of any judges who were genuinely corrupt, but it does highlight the difficulty of carrying out such an operation without the added credibility that a new constitutional framework and an independent investigating body might provide.

Worse troubles were to come for the judiciary. In late 2007, a few days before general and Presidential elections, the President appointed a clutch of new judges and election commissioners, much to the dismay and suspicion of many. The opposition angrily disputed the results of the Presidential vote as they came in and pointed to what appeared to be large discrepancies during the tallying of votes, but the Chief Justice nonetheless agreed to the hurried swearing in of President Kibaki for a second term of office. Violence broke out and over the ensuing months more than 1,200 people were killed and 600,000 internally displaced. It took international mediation to bring the conflict to an end. The courts had done little to help during this crisis, and in light of the history of judicial delay and obstruction of election petitions, the unwillingness of the opposition to go to court spoke volumes. Opinion surveys later confirmed the damage to public confidence. A series of Gallup polls showed that whereas in 2007, 55% of Kenyans surveyed had confidence in the judicial system, that figure had fallen to 36% by 2008 and 27% in 2009.³¹ The judiciary seemed share in the blame for Kenya's most deadly political crisis since independence.

²⁷ *2009 Ouko report.

²⁸ *Although not entirely. Section 62(5) permitted the President to appoint tribunal members from outside the judiciary, including Kenyan advocates of seven years' standing and serving or retired Commonwealth judges. The Commonwealth panel (* para 5.XI) had also recommended that an advisory committee be established to conduct the initial gathering and assessment of complaints and advise the Chief Justice on which judges had allegations to answer. The panel proposed an inclusive committee including representatives of the practising legal profession, NGOs and law schools. Instead, the Ringera committee consisted of a judge and two magistrates.

²⁹ ICJ, *Kenya: Judicial Independence, Corruption and Reform* (n7), 14. These allegations were later repeated in Parliament in 2011 when the Bill to establish the vetting process was debated.

³⁰ ICJ, *Kenya: Judicial Independence, Corruption and Reform* * 16-17.

³¹ <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>

2 The 2010 Constitution and the adoption of a vetting requirement

In the peace accord that brought an end to the 2007-2008 post-election conflict, President Kibaki's party and the opposition led by Raila Odinga agreed to share power in a grand coalition government for a period of five years. The parties also committed themselves to a programme on a long-term institutional reforms. Two important elements of this were restarting Kenya's constitution-making process, and pursuing reform of the judiciary. In the event, the two strands became intertwined. Although a dedicated Task Force on Judicial Reform was established, its main focus was on technical improvements.³² Questions of how to deal with the existing judiciary, and how to provide the constitutional underpinnings of judicial independence for the future, fell largely to the Committee of Experts on Constitutional Reform, a body of nine Kenyan and international jurists that was tasked with preparing a draft constitution which would be put to the public vote in a referendum.

The Committee of Experts understood its role to be not to draft a constitution from scratch but to attempt to 'harmonise' the proposals that had been made during previous rounds of constitution-making earlier that decade.³³ It nonetheless undertook extensive sector workshops and public consultations, concentrating on issues that had previously proved controversial. Submissions on the judiciary were 'virtually unanimous' in calling for reform, but there was disagreement as how this should be carried out.³⁴ Many, particularly among the legal community, demanded that the entire judiciary should be dismissed and new judges be appointed. The Committee rejected this radical option because it would have been too disruptive, but agreed that there was a need a 'need for an appropriate transition mechanism for Judges'.³⁵ Not doing so 'would have further eroded the public's confidence in the justice system', at a time when the other branches of state would be undergoing very substantial reform to serve the socially transformative aims of the new constitution, and would be democratically accountable to voters for their record in doing so.³⁶

The precise nature of the judicial transition mechanism was a matter of considerable debate. The Committee had before it the proposals of the Constitution of Kenya Review Commission in 2004. The Commission had underscored the need to respect international norms of judicial independence and the danger of setting a political precedent for dismissal of judges.³⁷ The national constitutional conference held under the Commission's auspices proposed that a reconstituted Judicial Service Commission should screen all complaints that had previously been filed with other official bodies about members of the serving judiciary to determine whether they should be referred to a disciplinary tribunal to consider their removal; alongside this, judges would also have to pass financial scrutiny by a national anti-corruption agency.³⁸ Looking further afield, the Committee of Experts also considered vetting mechanisms that had been applied to the judiciary in the former East Germany and the Czech Republic, and in

³² *Ouko Task Force

³³ *CoE report. On the earlier period of constitution-making, see Jill Cottrell and Yash Ghai 'Constitution Making and Democratization in Kenya (2000-2005)' (2007) 14 Democratization 1.

³⁴ Committee of Experts Final Report at p. 74.

³⁵ Ibid at p. 96.

³⁶ Ibid at p. 97.

³⁷ *CKRC 'The People's Choice' 2002 at p. 70.

³⁸ *Bomas draft, sch 7 cl 13.

Work in progress – please do not quote or circulate

Bosnia and Herzegovina while that state was under international peace-keeping supervision.³⁹ The Bosnian process was the most far-reaching of these, as it coincided with the reorganisation of a highly fragmented court system that had developed as the war divided the country into largely ethnically-based enclaves.⁴⁰ Although Bosnian judges retained their positions temporarily during the reorganisation, and were eligible along with new applicants to serve in the new courts, they had to submit their past records for scrutiny by an independent body consisting of international members and members of the judicial oversight bodies in each of the ethnically based regions.

The Committee of Experts favoured a blend of these approaches for Kenya, but encountered strong opposition when it forwarded its proposals to the Parliamentary select committee formed to consider the draft constitution. In the view of the Parliamentary committee, no vetting was necessary. The Committee of Experts was not prepared to abandon the basic principle of vetting, which enjoyed such strong public support, but accepted that a legislature might be better placed to devise the detailed mechanism:

This would allow Parliament to consult widely, consider approaches adopted in other countries, and undertake the responsibility for judicial reform confident that it had addressed all the challenges that such a process inevitably raises.⁴¹

Accordingly, the final draft of the Constitution which went to referendum contained a brief clause which gave Parliament a period of one year to develop and pass 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 [when the Constitution entered into force] to continue to serve in accordance with the values and principles set out in Articles 10 and 159.⁴²

The reference was to the national values and principles of governance in Article 10, and the specific values applicable to the administration of justice in Article 159. These principles are extensive, with the former encompassing ‘the rule of law’, ‘social justice’, ‘human rights’, ‘good governance’ and ‘integrity’, to mention only some, and the latter requiring that justice ‘shall be done to all, irrespective of status’, ‘shall not be delayed’ and ‘shall be administered without undue regard for procedural technicalities’. As a basis for vetting, the provisions open up each judge to correspondingly wide grounds of scrutiny, and were certainly broad enough to support an assessment of their actual record of independence or lack thereof and their ability and disposition to uphold the rule of law.

The clause 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 by way of a defined procedure for removal consisting of an initial investigation, disciplinary tribunal and a right of appeal.⁴³ The clause also sought to insulate the vetting mechanism from interference by the courts. A ‘removal, or a process leading to

³⁹ Ibid at p. 76.

⁴⁰ *M-R; *Pimentel

⁴¹ Ibid at p. 135.

⁴² *sch 6 cl 23(1).

⁴³ Vetting would operate ‘despite Article 160, 167 and 168’ of the draft Constitution.

the removal, of a judge' in the course of vetting was not to be reviewed or questioned in any court.⁴⁴ Although the Committee of Experts did not spell out the reasons for this ouster of jurisdiction it could have been supported on a number of grounds, most obvious of which was the inherent conflict of interest in judges ruling upon a process to which they themselves were subject.⁴⁵ In addition, the clause may have reflected the experience of the massive delays that proceedings before the Kenyan courts had caused to the radical surgery process, or indeed the constitution-making process, which had also been the subject of much litigation, including lawsuits brought by judges themselves.⁴⁶ Interestingly, the Committee's final draft also included a stipulation as to the leadership of the judiciary, as it required the incumbent Chief Justice to step down from this role within six months of the commencement of the Constitution.⁴⁷

The draft constitution also set out significant changes to a permanent arrangements for the judiciary. A new Supreme Court would be established above the existing Court of Appeal, with sole jurisdiction over Presidential election disputes and a power to issue advisory opinions on request in certain constitutional matters.⁴⁸ The appointment of members of the Supreme Court would very likely be the first order of business of a new Judicial Service Commission which was designed to be an independent and inclusive body, unlike its Executive-dominated predecessor.⁴⁹ The Commission would contain members of the legal profession, and judicial members from each level of the court system, chosen by their peers; political decision-makers could only fill a minority of the seats. Finally, the judiciary would have greater budgetary autonomy as it would submit its funding estimates directly to the lower house of Parliament.⁵⁰

The judiciary provisions were just one part of the design of the draft constitution as a whole. It set out commitments to a very extensive set of values – among them national unity, equality, democracy, social justice, human rights and the rule of law – and also reshaped Kenya's national institutions to realise those values. Courts would be charged with enforcing a bill of rights that combined traditional civil and political rights with socioeconomic and environmental rights, and others such as rights to administrative justice and access to information. At the same time, a number of constitutional commissions would be established to help promote and realise these rights, and similarly independent bodies would be charged with combating corruption and given oversight responsibilities ranging from elections to policing. If and when the work of these new bodies became contentious, the judiciary might be called upon to resolve disputes about their functions and powers, and it could certainly expect to play an important part in interpreting the settlement reached between a directly elected Presidency, a now bicameral Parliament with stronger powers to originate its own legislation, and the newly created county assemblies and governments that would be democratically elected and exercise a significant measure of devolved power.

⁴⁴ *sch 6 cl 23(2).

⁴⁵ *case ref ahead

⁴⁶ Case brought to stop the CKRC; under the 2008 peace agreement, a separate interim court was established with sole jurisdiction over the constitution-making process.

⁴⁷ *Sch 6, cl 24.

⁴⁸ *Art 163.

⁴⁹ *Art 171, Sch 6 cl 20-21.

⁵⁰ Historically it had been underfunded, even relative to other levels of government spending, which meant that there were too few judges and magistrates to serve the population.

The draft Constitution secured a two-thirds majority in the August 2010 referendum, helped by the fact that most of politicians in both President Kibaki and Prime Minister Odinga's parties had campaigned for it. It came into force on 27th August 2010, which accordingly became the 'effective date' referred to in the vetting clause. All judges and magistrates appointed before that date would have to be vetted.

3 Legislation and establishment of the Judges and Magistrates Vetting Board

In view of the new rights it introduced and the many institutions it either created or reshaped, the Kenyan constitution set out a long list of topics on which implementing legislation was required and included a deadline by which each statute had to be passed, with the dissolution of Parliament being the ultimate sanction for non-compliance.⁵¹ The deadline for legislation to establish judicial vetting was relatively short, at one year, but it is still remarkable that the Vetting of Judges and Magistrates Act 2011 was the first of the constitutionally required statutes to be enacted. The Act makes up for the brevity of the vetting clause in the Constitution by establishing a Judges and Magistrates Vetting Board, and by specifying the criteria for vetting and the procedures to be followed, through a combination of broad principles and detailed operational provisions.

What is even more remarkable is that the Parliament which passed the Act was the same assembly whose select committee had rejected the judicial vetting proposals of the Committee of Experts, and argued that there was no need for vetting at all. Elections were not due until 2013, so this early phase of the implementation of the Constitution was still in the hands of the politicians who had agreed to share power as part of the 2008 post-conflict settlement. Perhaps they were galvanised by the fact that some vetting legislation was now constitutionally required, and the new Supreme Court might regard an inadequate attempt as non-compliance that merited the early holding of elections.

In fact, it is likely that the real reasons for the emergence of a comprehensive legislative framework on vetting were far more complex than this. There were plenty of ideas to draw upon as a result of Kenya's decade-long engagement with the problem, both in the practical form of the radical surgery and in the proposals developed by the Constitution of Kenya Review Commission and later the Committee of Experts, who had paid attention to the Bosnian court reforms, among other models. Also, it was not up to the government alone to prepare the vetting legislation. The government was obliged to consult with the Commission on the Implementation of the Constitution, which the Committee of Experts had conceived as an expert body that would assist elected politicians with the very substantial burden of preparing the legislation that was constitutionally required. In practice, that has meant that in many cases the Implementation Commission has prepared the first draft of a constitutionally required Bill. In the case of vetting, the consultations were wider as the Implementation Commission worked together with the Kenya Law Reform Commission and representatives of the Kenya Judges and Magistrates Association to craft a framework that took the concerns of serving judges into account as far as possible.

⁵¹ Sch 5.

Many features of the Act suggest that it was shaped by aspects of the preceding national debate that had not been captured in the constitutional vetting clause. One of these was the composition of the Board that would carry out vetting.⁵² This was a far cry from the radical surgery, in which judges hand-picked by the government sat in tribunals to assess their judicial colleagues, and much closer to the proposals that had been aired during constitution-making process. The Board would consist of nine members, none of whom could be a serving Kenyan judge or MP; to further reduce conflicts of interest, members would be barred from appointment to judicial office for five years after leaving the Board.⁵³ Appointments were to be made by the President in consultation with the Prime Minister, ie the two principal partners in the power-sharing agreement, and Parliamentary approval was required, which led to candidates being summoned for a public interview by a committee of MPs.⁵⁴ The decision-makers had to ensure ‘that the Board reflects the regional and ethnic diversity of Kenya and not more than two-thirds of the members are of the same gender’.⁵⁵ Three of the Board members, including the chair and vice-chair, would be Kenyan lawyers; three would be members of Kenyan civil society; and the remaining three would be serving or retired judges from another Commonwealth jurisdiction.⁵⁶ The groups could be expected to contribute, respectively, knowledge of Kenyan legal system, experience of the impact of that system on Kenyan society, and, in the case of the Commonwealth judges, an understanding of the pressures and demands of judging coupled with the perspective of an outsider who would not be beholden to particular interests in Kenya. The Board was permitted to sit in panels of three to expedite its work, but every panel would always have to have one member from each group.⁵⁷

The composition of the Board seems to have been calculated to strengthen public confidence in the vetting process, but the Act alone could not ensure that that would happen. Much depended on the individual Board members who were appointed. In this author’s opinion, the Board succeeded in attracting members of a very high calibre.⁵⁸ The chair of the Board is a distinguished Kenyan advocate and international arbitrator, and his two fellow 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. 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 Chief Justices and a leading anti-apartheid activist. The Board, as a new body without a history of its own, has undoubtedly benefited from the stature and experience of its members.

The Act structured the vetting process in a way that was designed to avoid at least some of the pitfalls of the radical surgery. First, it was not designed to force particular judges out of office, as had seemed to be the case when the Chief Justice had announced his ‘list

⁵² Section 7-8.

⁵³ Section 32.

⁵⁴ Section 9. The Parliamentary interview was used only to fill the six vacancies for Kenyan members and not the three seats for Commonwealth judges. Another relevant difference was that in the case of the Kenyan positions there had to be an open application and nomination process.

⁵⁵ Section 9(12).

⁵⁶ Section 7, 9(13).

⁵⁷ Section 17.

⁵⁸ Profiles of Board members are available on the Board’s website, www.jmvb.or.ke.

of shame’ in 2003. All judges or magistrates who wished to continue in office would have to undergo vetting, but there was no financial compulsion akin to the radical surgery’s withholding of salaries from those who refused to resign, only an encouragement to make the decision whether to stay or go within three months. Those who were found unsuitable by the Board would be discharged with all the benefits they would have received if entitled to early retirement, just as would those who elected to resign within the first three months of the commencement of the Act rather than face vetting.⁵⁹ There is no report of any judge choosing the latter option, but still the incentive structure can only have helped rather than hindered public confidence that the legislation was a genuine attempt to vet the judiciary and retain judges who could still contribute to upholding the rule of law.

Secondly, the vetting process was designed to minimise disruption of cases. Judges would remain in office and continue as normal unless found unsuitable, whereas in the radical surgery all those judges who the Chief Justice thought had a case to answer were suspended, in most cases for years, pending the conclusion of their tribunal hearings. The Act required vetting to occur in phases, with judges of the Court of Appeal, the High Court and the magistrate’s courts being vetted in turn.⁶⁰ The vetting process was to last for one year in total, with a provision for the lower house of Parliament to extend this for up to a year by resolution.⁶¹ The scheme promised to restore confidence in the ordinary appeal routes for litigants as quickly as possible. In any event, the Supreme Court was a new court at the apex of the system whose members would undergo a rigorous appointment process, and it was also given special jurisdiction to re-open decisions given by judges who were removed from office through vetting.⁶²

Thirdly, the procedures for vetting took a more inquisitorial shape than had the radical surgery, which boded well for the Board’s ability to elicit information. This is perhaps the most profound distinction, as it brings to light the differences in nature between vetting and disciplinary processes. As discussed above, during the radical surgery the Kenyan courts had, correctly it is submitted, insisted on various procedural protections in disciplinary process.⁶³ These made it essentially adversarial. A disciplinary tribunal could only try a judge for specific allegations of misconduct that the Chief Justice had included in what was effectively the ‘charge sheet’ of the tribunal, after having first having given the judge an opportunity to answer those allegations privately. By contrast, the Board would have a much wider substantive remit, which was the Constitution’s notion of ‘suitability’ to continue to perform judicial duties independently and in accordance with the rule of law, human rights and other constitutional values. The Act fleshed out the concept of ‘suitability’ and provided procedures to match.

Suitability is essentially a forward-looking notion, although of course in the case of a judge already in office it would partly be judged on his or her judicial record. The Act captured both aspects by requiring the Board to consider whether a judge or magistrate ‘meets the constitutional criteria for appointment’, on the one hand, while also examining their ‘past work record ... including prior judicial pronouncements,

⁵⁹ Section 24.

⁶⁰ Section 20.

⁶¹ Section 23.

⁶² Supreme Court Act*

⁶³ *Cross-ref

competence and diligence'.⁶⁴ Moreover, the Act went on to specify what judicial qualities should be sought when assessing the judge's appointability and track record. By providing a set of factors of suitability, the legislature thus indicated in more concrete terms what it considered would make a judge able and willing to uphold constitutional values. The eight factors were 'professional competence', 'written and oral communication skills', 'integrity', 'fairness', 'temperament', 'good judgment', 'legal and life experience', and 'a demonstrable commitment to public and community service', and a list of elements was provided to illustrate each factor.⁶⁵ In keeping with the apparent legislative aim of making the assessment of suitability as concrete a task as possible, and to ensure that all known issues relating to a judge would be addressed, the Act also enjoined the Board to consider any other proceedings that might be relevant. These included pending or concluded criminal cases or recommendations for prosecution against a judge,⁶⁶ as well as 'pending complaints or other relevant information received from any person or body'.⁶⁷ A non-exhaustive list of such bodies was provided, including the Judicial Service Commission, the police and anti-corruption agencies, and the disciplinary authorities to which the judge would have formerly been subject while in legal practice. This provision also enabled the Board to receive complaints directly from members of the public.

The Board was given extensive evidentiary powers to carry out its broad mandate. It could compel the production of documents and any other information, interview witnesses on oath and hold inquiries; at the same time, the Board would not be constrained by strict rules of evidence.⁶⁸ The judge would be sent a written summary of the complaints against him or her, with 'sufficient notice' to prepare for a personal vetting interview.⁶⁹ The personal interview was the true centrepiece of vetting, and the Act provided that it would be confidential, unless the judge elected to have his or her interview in public.⁷⁰ This was another significant innovation. Compulsory confidentiality would have provided fertile ground for suspicion and would have made it difficult for the Board to persuade a sceptical public that it was acting fairly and independently. Yet by preserving confidentiality as the default, the Act probably performed a valuable service of protecting both the reputation of individual judges and the dignity of courts. It did so by reducing the opportunity for airing of baseless complaints that would nonetheless be damaging to public confidence in those judges, and the judiciary as a whole, if made on an official platform.

Nor was it the case that judges who elected to be interviewed in private would simply have to wait for a decision yea or nay on their suitability, and then be left with no opportunity to criticise or challenge that decision if it went against them. Every judge found to be unsuitable would be entitled to be notified of the Board's determination to that effect within 30 days of their matter being decided, and to be provided with written reasons.⁷¹ At this point, the affected judge could file a request for a review with the

⁶⁴ Section 18(1)(a)-(b).

⁶⁵ Section 18(2).

⁶⁶ Section 18(c)-(d).

⁶⁷ Section 18(1)(e).

⁶⁸ Section 14.

⁶⁹ Section 19.

⁷⁰ Section 19(5).

⁷¹ Section 21.

Board within seven days.⁷² The power of the Board to review its own decisions must be seen in the light of the fact that the Constitution ousted the jurisdiction of the courts in any matter concerning the vetting of a judge. Internal review would thus serve to some extent as an alternative to judicial review, and review would be granted in respect of a ‘mistake or error on the face of the record’ (echoing the traditional formulation of judicial review for lack of jurisdiction),⁷³ or in the case of ‘the discovery of new and important matter’, unless the judge had been at fault in not previously becoming aware of it.⁷⁴

The Board would be required to treat every judge with procedural fairness, or in accordance with ‘natural justice’, in the terminology of the Act.⁷⁵ Overall, the Board would be ‘guided by the principles and standards of judicial independence, natural justice and international best practice’.⁷⁶ The Act empowered the Board to regulate its own procedure, and the Board did so in the form of the Vetting of Judges and Magistrates (Procedure) Regulations, adopted in January 2012.⁷⁷ The Regulations established that judges would be entitled to be assisted by counsel at their personal interview.⁷⁸ The Board could require a complainant whose allegations it considered potentially to have merit to attend the interview,⁷⁹ and in any event the judge could request an opportunity to cross-examine any complainant in a complaint which the Board decided to forward to the judge.⁸⁰ More generally, it would be the duty of the judge to respond to the Board in writing in respect of all forwarded complaints.⁸¹ The Regulations further spelled out what information a judge would be requested to provide in the form of a questionnaire to be returned before the vetting interview. In filling out this form, the judge would be required to explain how he or she satisfied all the statutory criteria and factors bearing upon suitability, and attach a CV, a full wealth declaration in compliance with anti-corruption legislation applicable in the Kenyan public sector, and a sample of five judgments which the judge wished the Board to consider.⁸² The breadth of the matters required to be covered set the tone for the inquisitorial nature of vetting. If a judge’s response was inadequate, the Board could request further written information, or pursue the matter further in the interview, where the judge could expect questions focused not only on the complaints that had been forwarded but also on his or her financial affairs and general aptitude and disposition as a judge. There was thus scope also for judges to be questioned on their attitudes towards constitutionalism, human rights and the rule of law.

The scope of the Board’s vetting enquiries, and the size of the judiciary to be vetted (in excess of 50 judges and 300 magistrates), meant that the Board would need a significant personnel of its own. The Act established a secretariat, which would be entirely under the direction and control of the Board, even in cases where employees were seconded

⁷² Section 22.

⁷³ Section 22(2)(b).

⁷⁴ Section 22(2)(a).

⁷⁵ Section 19(6).

⁷⁶ Section 5.

⁷⁷ *ref

⁷⁸ Regulation 21. Such representation would be at their own expense.

⁷⁹ Regulation 16.

⁸⁰ Regulation 10(5).

⁸¹ Regulation 10(3).

⁸² Form JMVB 5 annexed to the Regulations

from other departments in the public service.⁸³ Specific provision was made for the hiring of assisting counsel who would could advise Board members on the merit of complaints received, correspond with judges as directed, and generally assist Board members in preparing for each interview.⁸⁴ After 18 months of operation, the staff complement of the Board had grown to 111, including assisting counsel, researchers, interview transcription clerks, administrative and security staff among others.⁸⁵

4 The decisions of the Board

The Board commenced the vetting of judges in accordance with seniority as dictated by the Act. There were only nine judges to be vetted who had been members of the Court of Appeal when the Constitution came into force. This meant that rather than forming separate panels, all the members of the Board were able sit together in these matters, which made it easier to develop a common approach. The Board decided that it would make determinations of suitability by majority vote, if necessary, and that dissenting opinions would be permitted. At the same time, rather than making its first few determinations of suitability one by one and potentially allowing differences of view to lead to fragmentation, the Board felt it necessary first to lay down a general approach to vetting, in which it articulated its understanding of the Act against the general background of the history that had led Kenyans to adopt the vetting process. The Board did so in a unanimous First Report, published after the Court of Appeal judges had been interviewed but while the decisions concerning them were still pending.⁸⁶

In this First Report, the Board was at pains to make it clear that it would not be conducting a purge of the judiciary, based on crude attributions of collective guilt. Instead, the vetting process would be ‘founded on the rule of law’, insofar as it would be ‘an assessment of an individual’s responsibility in the light of an overall evaluation of the extent to which the conduct at issue is compatible with the criteria established by the Constitution and the Act’.⁸⁷ Yet the Board did not lose sight of the overall objective, which it saw in institutional terms:

Thus the Board’s objective was not to punish, discipline, exonerate or reward the judge, but to help restore public confidence in the judiciary.⁸⁸

Public confidence in the judiciary became the touchstone. Not only did the effort to restore it define the Board’s work, but the damage done to public confidence by particular types of judicial misconduct informed the Board’s understanding of what made a judge unsuitable to continue in office. The main issue in relation to the Court of Appeal judges whose suitability it was considering, the Board explained, was not merely whether certain high-profile decisions they had given were legally correct, but rather

⁸³ Sections 15-16.

⁸⁴ Section 16.

⁸⁵ *Interim Report (Sept 2013), Annexure F.

⁸⁶ First Report, 30th March 2012. As is the case with all the Board’s publications, this report is available on www.jmvp.or.ke.

⁸⁷ First Report, 30th March 2012, para 46.

⁸⁸ Ibid.

whether the decision had been so extraordinary in itself, and so embedded in a larger pattern of legally-strained decisions, as to point to the existence of a judicial mindset that was so manifestly lacking in fairness and impartiality as to undermine public confidence in the judiciary.⁸⁹

This enabled the Board to explain how it could reconcile its approach to vetting with the idea of judicial independence. Respect for judicial independence meant that there had to be room for differences of ‘judicial philosophy and approach’ and ‘individual judicial conscience’.⁹⁰ Judges could be literalist or purposivist, hard or soft on crime, and even become known for being Executive-minded;⁹¹ although the Board did not say so, it could have added that there was room for honest judicial error. Questions of unsuitability would arise only if the Board found that a judge had gone further than this, for example if the judge had ‘compromised the independence of the judiciary by showing a judicially-unacceptable proclivity to immunize the powerful and the wealthy from independent judicial scrutiny’ or, to put it somewhat more directly, if there had been ‘an undue degree of degree of bending of the law in order to achieve a pre-determined result favouring powerful personalities’.⁹²

The Board soon had the opportunity to apply these principles. By consensus or by large majorities, the Board found four of the nine Court of Appeal judges to be unsuitable. In the case of the most senior judge, this was mainly because of judgments he had given in a challenge to President Moi’s re-election during the 1990s. Not only did he dismiss the petition of vote-rigging on a barely believable technicality, which was that the presidential candidate could not sign the court papers after he had had a stroke while in detention, but he also went out of his way in a separate concurring judgment to mock the aspiration of a disabled man to become President of Kenya. Two more Court of Appeal judges were found unsuitable on similar grounds, mainly because of the way in which they had stretched technical points of procedural law to block the investigation of the largest corruption scandals of the past two decades, Goldenberg and Anglo-Leasing, in some cases issuing permanent stays of prosecution against some of the main government figures who were implicated. The Board also criticized these judges for a lack of objectivity and candour in their approach to the past, and for being defensive and not appreciating the damage which their decisions had cumulatively done to public confidence in the judiciary. A fourth judge was removed for lack of candour in his response to complaints that he had improperly accepted benefits in the form of hotel accommodation from a litigant who was appearing before him.

All four judges were dissatisfied with their determinations and filed applications for internal review with the Board. Their main argument concerned whether their vetting interviews had been procedurally fair. The judges all complained that they had been ambushed when the Board had wanted to question them about certain cases they had decided which had been not cited in the notice of complaints delivered to each judge prior to interview. In essence, the judges were contending that vetting should follow the same adversarial format as a judge’s disciplinary hearing under the former constitution. They also suggested, although with somewhat less emphasis, that their decisions would

⁸⁹ Ibid para 49.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

not have been regarded as misconduct at the time. The Board held that because it was the first and last decision-maker, in view of the constitutional ouster of judicial review, it would adopt a generous approach to the scope of internal review. However, the Board dismissed the review arguments on their merits, arguing that since the cases in question were politically charged and could hardly have been more memorable, it was not unfair for judges to be questioned on them, and moreover that the judges' subsequently offered justifications for their conduct were weak and failed to exonerate them. In practical terms, the Board's insistence on procedural flexibility meant that it avoided the need to repeat these vetting interviews when the outcome would have been a foregone conclusion.

Other review applications have been more successful. The Board has set aside its vetting interview and findings concerning judges several times on grounds of conflicts of interest on the part of Board members that were not timeously disclosed, and once when material evidence of a judge's diligence, which recorded her progress in clearing a backlog of cases, was mislaid. The cases were all been referred for re-vetting, and while two of the decisions are still pending, three have resulted in the Board reversing its earlier finding of unsuitability. It is hard to know how these reversals have affected public perceptions of the Board, but from the point of view of the judiciary they would seem to be a clear signal that the Board will adhere to high procedural standards even at the cost of some embarrassment.

By the end of 2012, the Board had completed its interviews of all those judges who at the time the Constitution commenced had been serving in the higher judiciary (High Court or Court of Appeal). Subject to outstanding review applications, the final picture of this cohort was that 13 of these 53 judges were found to be unsuitable.⁹³ In its September 2013 Interim Report, the Board classified the grounds of removal as follows: three related to failures of impartiality (they were three of the four Court of Appeal cases which have been discussed); five were for lack of integrity; three for shortcomings of temperament and work style and one judge who was found wanting in terms of competence and diligence.⁹⁴

After interviewing judges, the Board proceeded to begin the vetting of magistrates. As far as can be gathered from the Board's most recent public announcement in July 2014, it had vetted approximately 150 magistrates and found approximately 20 be unsuitable to continue to serve.⁹⁵ Space precludes proper discussion of the vetting of magistrates in this paper. Their position differs significantly from that of judges in the higher courts, as magistrates do not exercise judicial review and so are less likely to encounter matters that give rise to classic rule of law issues in the political sense; however, they some wield immense personal power as the sole voice of state judicial authority in remote rural communities, and for the overwhelming majority of Kenyans, urban and rural, they are the first and only opportunity for access to justice.

⁹³ *Interim Report at 40-41.

⁹⁴ Ibid.

⁹⁵ *Eleventh Announcement, 15th July 2014.

5 Relations between the Board, other institutions and the public

Whether the Board is able to strengthen trust in the judiciary will depend, in the end, not only on the number of instances of judicial wrongdoing which it rightly sanctions with removal, but also on how its work is communicated to, and understood by, others. It is not only the Board's direct interaction with the public that matters, but also how it relates to other institutions, both because of their ability to help or hinder the vetting process through their actions and because of their influence in forming opinions about vetting.

The Board has devoted a great deal of energy and effort to engage with the public. The publication of reasons for its determinations has been a crucial way of disseminating information through the news media. This has occurred not only in cases of unsuitability, but also in some other cases where there was dissent or the Board wished to enter caveats regarding a judge's conduct even though they had been found suitable in permitted to continue in office. The Board has typically bundled together its determinations in the form of 'announcements', taking the form of a press conference. There have been 11 of these, and between them they have dealt with the fate of over 200 judges and magistrates. In September 2013, the Board released an Interim Report in two volumes, which included an overview of all the determinations to date, and gave an overview of the logistical and institutional challenges of the vetting process, statistics of complaints received and vetting outcomes, and a discussion of the main obstacles encountered.⁹⁶

The Board has also undertaken a large number of public sensitisation workshops. Over an intensive period before vetting began, and periodically since then, Board members would travel to different parts of the country to explain how the vetting process worked and how people could interact with it, mainly by submitting their complaints about judicial misconduct. Two concerns were commonly raised by workshop participants. The first was the closed nature of vetting interviews, which to many implied conspiracies and subterfuge. Although in law it is the judge's choice whether to be interviewed in public or in private, only two out of 53 judges have exercised this right, which has made the argument seem hollow. A second concern, somewhat in tension with the first, was raised by those who claimed to have experienced judicial malfeasance themselves. Many felt that the vetting process did not sufficiently guarantee the confidentiality of complainants, thus putting their safety at risk and deterring others from coming forward. Once again, there is relatively little that the Board could do about this. It has a practice of redacting the names of witnesses and complainants from the public version of a determination of unsuitability, but more costly schemes such as witness protection are beyond its remit and resources.

A further concern which anecdotally appears to be increasingly common is whether the Board has done enough to identify the most problematic judges. The low rate of corruption findings appears to be a particular source of worry. Here too, the answer is that the Board cannot do everything itself. A stronger working relationship with the police might help. The nature of corruption means that it is generally something that all parties involved have reason to keep it secret, and a significant change of incentives, for example if one party is offered immunity from prosecution, would be required to

⁹⁶ This report is available from www.jmvp.or.ke.

change that. There is no record of any immunity scheme being considered in Kenya. But there may yet be opportunities for other institutions to pursue any well-founded allegations that were not brought to the attention of the Board or could not be adequately verified at the time. Vetting should not be understood as wiping the slate clean as regards past misconduct, and in this respect it differs from other transitional justice mechanisms such as truth commissions, which sometimes offer amnesty in exchange for past disclosure. Kenya has already seen one judge removed from office who was appointed after the commencement of the Constitution and so not liable to be vetted, and there is no reason why the permanent disciplinary procedure cannot be invoked in respect of misconduct by old-order judges which the Board has somehow missed.

The Board's working relationships with the public bodies from which it is supposed to receive complaints about judges have been of varying quality. In some instances, organisations have inadvertently helped the Board as a result of material which they had already placed in the public domain. The Judicial Service Commission, for example, now holds its judicial appointment interviews in public. When senior members of the Court of Appeal applied for positions on the newly created Supreme Court, some of them were confronted about their past track record in political cases, including election petitions and state corruption cases. The Board referred to such questioning in relation to several of the four Court of Appeal judges it found to be unsuitable.

Relations with the legislature and the judiciary have been particularly challenging, in different but interrelated ways. In the case of the judiciary, it was to be expected that despite the consultation process that preceded the Act, there would be some resistance once the actual vetting process got under way. What was difficult to anticipate was the sheer volume of litigation. Most judges who were found unsuitable have either brought or been associated with litigation challenging the findings against them, and there have been several cases of abstract review brought by other parties. On two occasions in 2012, the courts decided to halt the process, although in each case the stay lasted for less than a month. All this litigation has occurred despite the constitutional ouster clause which on the face of it seemed to exclude judicial review of any aspect of the vetting of a judge. The Law Society of Kenya, supported by the Board, has argued that this provision is fatal to all the claims that have been brought since it precludes the courts from exercising jurisdiction. The point has been appealed to the Supreme Court, whose judgment is currently awaited.

Litigation has contributed to significant delays in the vetting process, which is now in its third year. It was probably always unrealistic for the Act to provide that all judges and magistrates were to be vetted within a year, since this would have amounted to a rate of at least one a day. The delays have made it necessary for the Board several times to approach Parliament for an extension of its mandate and of the periods designated for the vetting of particular cohorts. Although Parliament has never refused such a request, it has sometimes taken a long time to accede to it, and the consequent delays have given rise to further litigation about the status of the Board's activities during the interim. From one point of view it may seem less than ideal that Parliament has the ability to amend the Board's legislative framework, since this creates a bargaining relationship between them, but on balance it is probably valuable to have a legislative framework that can be amended, since the courts would have something closer to a definitive say if

the details of vetting were constitutionally entrenched and so subject to judicial interpretations that would be very hard to change. In a worst-case scenario, much of the work the Board has done to identify unsuitable judges and justify their removal from the bench could still be undone through self-interested court decisions that manipulate the content of the Constitution and the Act they are interpreting. The only hope for the Board in such situations is that its reasoned determinations of suitability will be considered on their own terms and found to be persuasive.

Conclusion

Kenya has travelled a long way in the search for a mechanism that would address allegations of systemic corruption and other problems in its judiciary. Much work has been done with a view to strengthening public confidence in that institution and enabling it to play a very important part in upholding the rule of law and fostering constitutionalism under the progressive 2010 Constitution. The Constitution itself provides the starting point by including a novel requirement that all judges should undergo vetting, rather than being left to the disciplinary process which had proved unequal to the challenge during the 2003 radical surgery, which now appears to have been a premature attempt at judicial reform and fatally flawed by the fact that it was controlled by the government of the day and carried out by the existing judiciary.

The Vetting of Judges and Magistrates Act 2011 advanced the project of securing a more independent judiciary and improved on the disciplinary mechanism that was available during the radical surgery in a number of ways. It applies equally to all judges appointed before the Constitution entered into force, minimises the disruption of cases and adopts an approach that is more inquisitorial than adversarial while nonetheless being subject to safeguards designed to ensure procedural fairness while not preventing the large number of judges who have to be vetted. The establishment of the Board as a credible and independent body has been crucial, and the choice of composition, which combines local lawyers and civil society with international judges, appears to be wise. The Board has taken the legislative framework further by articulating an approach to vetting that explains how may be reconciled with judicial independence. Public confidence is the key to this approach, as the Board has decided that it would determine the suitability of judges not on the correctness of their decisions as such, but whether they form part of a pattern of misconduct that had contributed to undermining public confidence in the judiciary.

The Board is at the mercy of other institutions to a considerable extent, whether it be in relation to investigating allegations against judges, or securing appropriate legislative extensions of time and avoiding unwarranted judicial intrusion contrary to the constitutional ouster clause. Perhaps the most striking contribution the Board has made is in providing reasons for its decisions, which speak directly about the role of a judge in a society that is based on constitutionalism and the rule of law.