

A NEW CONSTITUTION AND THE AGENDA FOR JUDICIAL REFORM

Farnoosh Hashemian, JD, MPH
Farnoosh.hashemian@aya.yale.edu
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In the context of an unsatisfactory order and political turmoil that followed Kenya 2007 disputed presidential election, and after a struggle that lasted more than two decades, a very ambitious and progressive Constitution was born and promulgated on 27th August 2010. The new Constitution broke ground for reorganizing the normative and institutional frameworks to meet the aspirations of Kenyan people, as stated in its Preamble:

a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

By ending the presidential supremacy and devolving authority the Constitution sought to better separation of powers, enhance fairness in sharing authority and national resources, and curtail practices of political patronage and nepotism. In addition to embracing traditional political and civil rights the Bill of Rights expanded justiciable protections to social, economic, and cultural rights. By acknowledging that the state had often discriminated against segments of society, the new Constitution guaranteed the right to be free from public and private unjust discrimination to women, minorities, and marginalized communities. And it provided for affirmative actions to create substantive equality.¹

¹ Article 56 of the Constitution of Kenya – 2010 provides: “The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) develop their cultural values, languages and practices; and

The new constitutional dispensation envisioned a more fair and participatory society through its provisions that called for land and electoral system reform as well as openness and transparency. In order to boost public faith in the country's institutions and promote accountability for all organs including the judiciary the Constitution introduced principles of Leadership and Integrity, noting that the authority assigned to a state officer is a "public trust" that must be exercised in manner that is consistence with the Constitution and promotes public confident in the integrity of the office.²In short the Constitution strives to restore public confidence in the country's institutions and bring social transformation to Kenya according to her national values and principles.

As expressed in Article 10 of the Constitution, the national principles of participation, equality, rule of law, social justice, human rights, good governance, and accountability, among others, bind all. Each organ of the government has a duty to advance the letter and spirit of the Constitution in a manner that promotes national values and principles. Yet the Constitution entrusts the judiciary to exercise final control and authoritatively test all law or conduct of all arms of the government and private persons against the guiding values and principles, and protections given in the Constitution.

In order for courts to have the tools and capacity to be the guardian of the Constitution³ and to be the catalyst for societal change, the Constitution required urgent judicial

(e) have reasonable access to water, health services and infrastructure."

² Article 73 (1) states: "Authority assigned to a State officer —

(a) is a public trust to be exercised in a manner that —

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them."

³ Given its remarkable characteristics, the 2010 Constitution has been regarded as the most significant achievement in governance in Kenya since her independence in 1963. *See Report of the Commission for the Implementation of the Constitution, Quarterly Report, Jan-March 2011, Page 9.*

transformation.⁴ The Constitution tasked the courts to ensure realization of national values and protection of fundamental rights, and proclaimed that judicial authority comes from the people and should be exercised for their benefit.⁵

⁴ The recognition for a need for judicial restructuring is not new in Kenya, and had been recommended in 12 different government reports over many years. To examine the state of the judiciary and to make proposals to reform between 1963 and 2010 numerous committees and/or commissions were established. These reports pointed that a combination of persistent factors such as corruption, delays, tribalism, nepotism, manipulation and political interference, and general lack of independence had crippled the judiciary and led to an alarming decline in public perception and trust of the Bench. Real and perceived corruption had undermined rule of law and the capacity of the judiciary as an independent arbiter of disputes. (See e.g. Report of the Committee on the Administration of Justice, Committee on the Administration of Justice, 1998; Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya, Government of Kenya, 2003; Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Kenya Constitutional Review Commission, 2002; all cited in Wachira Letizia Muthoni, *Corruption in the Kenyan Judiciary, Will the Vetting of Judges and Magistrates Solve This Problem?*, Research Project Paper Submitted to the University Of Nairobi School of Law In Partial Fulfillment Of The Degree Of Master Of Laws, 2013.) The reports recommended a number of measure the government shall take to redeem judiciary's image. However most of these recommendations never saw the light of the day or were not effective in curbing the challenges of the judiciary. For example, a drastic measure was taken in 2003 when the Government set up the "Integrity and Anti-corruption Committee of the Judiciary in Kenya, 2003" to implement policy termed as "radical surgery". The Committee found examples of "judicial corruption, misbehaviour or want of ethics" in the conduct of five out of nine Court of Appeal Judge, and noted that 18 out of 36 High Court Judges and 82 out of 254 magistrates had engaged in improper conduct. Before the justices were given notice and a chance to question the findings about them, the "List of Shame" implicating the justices was published in the media. The Acting Chief Justice compelled the accused judges to either resign or face suspension. Most judges who challenged their removal decision in Courts succeeded in their cause of action and where reinstated to the Bench. The "radical surgery" was highly problematic; some reported that the findings of the commission was based on rumour and was prejudice to pave the road for the President to make judicial appointments that politically and ethnically benefited his party. Further, the whole process of removal was considered to undermine judicial independence and the right to due process. (See *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*, International Bar Association's Human Rights Institute, 2010, Page 31.) The challenges of judicial reform had become more urgent as time passed. In 2010, the Task Force on Judicial Reforms found that independence, integrity and administrative efficiency of the judiciary, as well as public confidence in the institution had reached an all-time low.⁴ The report characterized the state of the judiciary then as a failure; noting: "Over the years, patronage took hold at different levels of the institution, taking the form of political appointments; nepotism and tribalism; favoritism in appointments and promotion; and judicial subservience by some judicial officers." The report identify the reforms that need to be carried out and made a number of recommendations about judicial restructuring that were included in the new Constitution. (See *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*, International Bar Association's Human Rights Institute, 2010, Pages 33-4.

⁵ Article 159 (1) provides: "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

It required courts and tribunals to exercise their power in a manner that ensure justice is done to all, irrespective of status, that justice is not delayed, and that justice is administered without undue regard to procedural technicalities.⁶ Further in exercise of its interpretive functions, the judiciary is required to interpret the Constitution as such that it promotes its purposes, values and principles, advance the rule of law and human rights, permits the development of law, and contributes to good governance.⁷

The new Constitution compels for the independence of the judiciary, under Article 160, by reiterating that that “the Judiciary ... shall not be subject to the control or direction of any person or authority.” Financial and administrative independence of the judiciary was also entrenched in the Constitution.⁸ The new order restructured the judiciary by establishing a Supreme Court with original jurisdiction over constitutional matters and election disputes, reconstituted Judicial Service Commission, and introduced institutional and budgetary measures to enhance independence of this key institution.⁹

In order to reform and build public confidence in the judiciary and promote competency and efficiency it required the retirement of the Chief Justice in six months¹⁰ and required all judges and magistrates in the office at the time of promulgation to be vetted to establish their suitability before they continue to serve in the restructured judiciary.¹¹

⁶ Article 159 (2).

⁷ Article 259.

⁸ Articles 173, 160 (3) and 160 (4).

⁹ Article 163.

¹⁰ Article 24 stipulates:

“(1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either –

(a) to retire from the judiciary; or

(b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal.

(2) A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”

¹¹Article 23, Sixth Schedule, Constitution of Kenya. It must be noted that the initial proposal in the 2004 *Bomas* Constitution Draft was to dismiss the entire judiciary and require each former judge who wished to continue to reapply for re-appointment. In drafting of the 2010 Constitution the Committee took the view to

STATUTORY FRAMEWORK FOR VETTING JUDGES AND MAGISTRATES

The Sixth Schedule to the Constitution, which deals with transitional provisions, called upon the Parliament to pass, within one year of the Constitution coming to force, supportive legislation to establish “mechanisms and procedures for vetting within a timeline to be determined by the legislation, the suitability of all Judges and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159.”¹² The Constitution also provided that a “removal, or a process leading to the removal of a judge from office by virtue of the operation of legislation ... shall not be subject to question in, or review by, any court.”¹³ Consequently, Commission for the Implementation of the Constitution started drafting the Bill, after having conducted extensive consultation with stakeholder.¹⁴ As a result the Parliament enacted the Vetting of Judges and Magistrates Act, 2011 (the “Act”) which came into force on 22nd March 2011. The Act provided for mechanisms and procedure under which the vetting would be conducted. It also established an independent Judges and Magistrates Vetting Board (the “Board”).¹⁵

A. Vetting Board's Mandate, Function, and Objective

establish an independent vetting board that its mandate is guided by the Constitution. *See* the Final Report of the Committee of Experts on Constitutional Review, 2010, Pages. 74-76, 97.

¹² Article 23 (1), Sixth Schedule.

¹³ Article 23 (2), Sixth Schedule.

¹⁴ According to Judge and Magistrates Vetting Board’s Interim Report, prior to drafting the Act, the lawmakers extensively consulted with the legislation Kenya Magistrates and Judges Association (KMJA). As an outcome of consultations with KMJA, Parliament incorporated six elements into the Act: vetting hearings would be conducted in private, unless the judicial officer choose a public hearing; all information obtained by the vetting body including the personal interviews and records of the judicial officer should remain confidential; the proceedings shall be conducted according to rules of natural justice and guided by the standard of judicial independence, natural justice and international best practice; to ensure objectivity the Board shall comprise of judges from other Commonwealth countries; an internal appeal should be permitted on the limited grounds of newly available evidence and patent error on the record; and finally judges and magistrates would be given the option of retirement, with full benefits due, instead of going through the vetting procedure. *See* Interim Report September 2011-February 2013, Page 12, Judges and Magistrates Vetting Board, 2013 (the “Interim Report”), available at: <http://www.jmvpb.or.ke/downloads.html>.

¹⁵ Section 6 (1), The Act.

The mandate of the board is to vet the suitability of all the Judges and Magistrates who were in office on the effective date of the new constitution of Kenya to continue to serve in accordance with the values and principles set out in Article 10 and 159 of the constitution and the Act. According to the Board it's "objective was not to punish, discipline, exonerate or reward the judge, but to help restore public confidence in the judiciary."¹⁶

B. Powers of the Vetting Board

The Act defines vetting as "the process by which the suitability of a serving judge or magistrate to continue serving in the judiciary is determined in accordance with this Act."¹⁷ The Act bestowed the Board broad powers to gather information necessary for carrying out its functions. According to Section 14 (1) (a-c) the Board may:

- Gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;
- Interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and
- Hold inquiries for the purposes of performing its functions under this Act.

Vetting targets all judicial officers who were in office on or before 27 August 2010 when the new Constitution came into force. Judges and magistrates appointed after that date are not subject to vetting.

C. Composition and Structure of the Board

The Board consists of nine "members": the Chairperson, a Deputy Chairperson and seven other members.¹⁸ Six of the members are citizens of Kenya, of whom three must be lawyers and three non-lawyers, and the remaining three are eminent jurists from a

¹⁶ First Announcement on Determination, Judges and Magistrates Vetting Board, 25th April 2012, Page 11. Available at: <http://www.jmvpb.or.ke/reports/viewcategory/3-jmvpb-reports.html>.

¹⁷ Section 2, the Act.

¹⁸ Section 7, the Act.

Commonwealth Country.¹⁹ The non-Kenyan members must be serving or have served in high ranking judicial positions of Chief Justice or judges of a superior court in a Commonwealth country.²⁰ These foreign judges are appointed by the President in consultation with the Prime Minister and subject to approval of the Parliament.²¹

The administrative head of the Board is the Chairman who is also the spokesperson of the Board and the supervisor. The Chairman presides over meetings. The tenure of office of a member terminates on dissolution of the Board.²²

In terms of qualification for the Kenyan members Section 8 (2) of the Act specifies that the Chairperson and Deputy Chairperson shall have at least 20 years of legal experience in public or private sector as a judge of a superior court, or a legal scholar or relevant legal practice. Section 8 (3) read together with 8 (1) provide that a Board member shall hold a degree from a university recognized in Kenya and have at least 15 years of professional experience. Members of Parliament or a local authority or the executive organ of a political

¹⁹ Section 9 of the Act stipulates how these appointments shall be made. Members are appointed by the President in consultation with the Prime Minister and with the approval of the National Assembly. After a competitive interview process, the Public Service Commission convenes a selection committee. The selection committee comprises one representative each of the Cabinet Office; Office of the Prime Minister; Ministry of Justice; Office of Attorney General; Ministry in charge of matters relating to public service; Public Service Commission; Judicial Service Commission (who is not serving as a judicial officer); and Law Society of Kenya. The selection committee has the responsibility to interview and select at least three candidates qualified for appointment as Chairperson and eighteen candidates of whom at least six were lawyers, eligible for appointment as members. *See* Section 9 (5) of the Act. The names are forwarded to the President and Prime Minister to nominate the Chairperson and five other members, whom the National Assembly considers and approves. The Act guides that the process should ensure that the Board reflects the regional and ethnic diversity of the people of Kenya and that not more than two-thirds of the members are of the same gender. *See* Section 9 (12) of the Act.

²⁰ Section 9(13), the Act. The Commonwealth Judges who have served the Board are Justice (RTD) Albie Sachs of South Africa, Justice (RTD) Fredrick Chomba of Zambia, Chief Justice Georgina Woods of Ghana, Justice (RTD DCJ) Alice Mpagi-bahigeine of Uganda, Justice (RTD CJ) Barnabas Samatta of Tanzania, and Justice (RTD CJ) Joseph De-Silva of Sri-Lanka.

²¹ In addition to members the Board is supported by a Secretariat. The Secretariat is headed by a CEO who is also the Secretary to the Board and consists of Assisting Counsels, Finance Officer, Human Resource Officer, ICT Officer, Supply Chain Managers, Public Communication Officer, researchers, process servers, Hansard recorders, legal assistants, investigators, Administrative Assistants, drivers and security officers. Four staff members were seconded to the Secretariat from the Ministry of Justice, while others were competitively recruited. For more *see* the Interim Report, Page 18.

²² Section 8 (1), the Act.

party, or a person who is serving as a judge or magistrate in Kenya on the day the Constitution came to force are not eligible to join the Board. All members of the Board shall satisfy the requirements of Chapter Six of the Constitution on Leadership and Integrity.²³

D. Vetting Timeframe

The Act originally provided that the vetting process once commenced shall be completed in one year with a possibility of a one year extension by the National Assembly on request by the Board.²⁴ Before commencement of vetting the Board was given a preparatory period of two months.²⁵

The time period specified in the Act proved to be unfeasible. The Board was overtasked considering the personnel limitations and time consuming procedure of vetting a large number of judicial official.²⁶ It fell short of meeting the deadline and petitioned the Parliament for an extension.²⁷ Consequently through a number of Amendments²⁸ the internal time periods in relations to when the various categories of judicial officers were to be vetted were removed²⁹ and the Board's mandate to complete vetting was extended to 2015.

²³ Section 8 (1), the Act.

²⁴ Section 23, the Act.

²⁵ Article 23 (3), the Act.

²⁶ At the time of commencement the Board was tasked to complete vetting 53 judges and 316 magistrates and 13 kadhis in one year. *See* the Interim Report, Page 105.

²⁷ By 28th March, 2013, the Board had only managed to vet 55 of the 184 judicial officers due to be vetted according to the Act's schedule.

²⁸ Statute Law (Miscellaneous Amendments) Act 2012, 12th July 2012; The Vetting of Judges and Magistrates (Amendment) Act, 2012, No. 43 of 2012, Commencement 14th Dec 2012; The Vetting of Judges and Magistrates (Amendment) Act, 2013, No. 43 of 2013, Commencement: 10th January, 2014.

²⁹ Originally Section 23 (2) of the Act required that the vetting of the judges of the Court of Appeal to be completed within three months, similar timeframe was imposed for vetting of judicial officers of the High Court. Further the Act provided a six months period for the vetting of the magistrates and expressed that the review applications shall start and be finalized within one month after the vetting of all judges and magistrates had been completed.

GUIDING PRINCIPLES AND CRITERIA FOR VETTING

Both the Constitution and the Act outline the principles that the Board should consider while assessing suitability of judicial officers. The Constitution declares that vetting shall be done in accordance with the values and principles of governance set out in Articles 10 and 159.³⁰ Article 10 expresses that binding national values and principles of governance include rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. Article 159 enunciates three guiding principles of justice:

- It should be done to all irrespective of status;
- That it should not be delayed; and
- That it should be administered without undue regard to procedural technicalities.

The Act highlights that the Board shall at all times be guided by the principles and standards of judicial independence, natural justice and international best practices.³¹ More specifically, in determining the suitability of a judge, the Board must consider the criteria set in Section 18 (1) (a-e) of the Act:

- Constitutional criteria for appointment;
- Past work record, including prior judicial pronouncements, competence and diligence;
- Pending or concluded criminal cases or prosecutions against the judge or magistrate concerned; and
- Complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Attorney General, the Judicial Service Commission, Kenya National Human

³⁰ Article 23 (1).

³¹ Section 5, the Act.

Rights and Equality Commission, National Police Service Commission and other prescribed bodies.³²

The Board was expressly directed to consider the following qualities: professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience, and commitment to public and community service.³³

The Act specifically details the elements of the above qualities.

THE VETTING PROCEDURE

The Act provides general guidelines about how the vetting shall be conducted, and it gives the Board the power to regulate its own procedures.³⁴ With a view to provide a fair, just and effective vetting process as outlined in the Act, the Board devised its own vetting procedures and regulations. The Vetting of Judges and Magistrates (Procedure) Regulations (the “Regulations”) was published and gazetted on 24th January 2012.³⁵ Sections 8-12 of the Regulation details the systematic procedure that shall be adopted by the Board to discharge its Constitutional mandate.

A. Vetting Panels

³² Section 18 (1) (e), the Act, as amended in 2012.

³³ Section 18 (2), the Act.

³⁴ Section 33 of the Act provides:

“(1) Subject to the provisions of this Act, the Board may regulate its own procedure and make regulations generally for the better carrying into effect the provisions of this Act.

(2) ...[S]uch regulations may provide for among others-

(a) the conduct of the Board's operations and proceedings;

(b) the manner of receiving and processing complaints;

(c) any summary procedure the Board may adopt under sections 19 and 23 and;

(d) the steps that may be taken by the Board before a determination.

(3) The chairperson may issue directions for the just, efficient and economical determination of proceedings

(4) Nothing in this Act shall limit or otherwise affect the power of the Board conferred by the Constitution or under this Act, either on its own motion or on the application of a judge or magistrate, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Board.”

³⁵ The Vetting of Judges and Magistrates (Procedure) Regulations, 2011 was published through Legal Notice No 189 of 2011 on the 24th January 2012.

To ensure speedy disposal of matters before it, the Act allows the Chairperson to constitute three vetting panels comprising three members each to work concurrently. Each panel shall have one Kenyan lawyer, one Kenyan non-lawyer and one Commonwealth judge.³⁶

B. Confidentiality of the Proceedings

The Act specifies that all information obtained by the Board during personal interviews and records of the judge or magistrates under review shall be confidential.³⁷ It also states that the vetting hearings shall be held in private unless the concerned judge or magistrate requests a public hearing.³⁸

C. Order of Proceedings

The Act directs the Vetting Board to assess suitability of judicial officers in the following order: first judges of Court of Appeal judges, followed by the judges of the High Court, the Registrar of the High Court, the Chief Court Administrator, Chief Magistrates and finally all other magistrates.³⁹

D. Notice Requirement

The Act imposes a duty upon the Board to give the concerned judge or magistrate sufficient notice.⁴⁰ Accordingly the notice shall include a summary of complaints, if any, against the judge or magistrate.⁴¹

E. Requirement to Appear

According to the Act and the Regulation the judicial officer under review shall appear for an oral hearing. Section 13 of the Regulations establishes that a judge or magistrate who

³⁶ Section 17, the Act. Generally each Review Panel would be supported by an Assisting Counsel, a Research Assistant, a Board Clerk and two Hansard recorders. *See* the Interim Report, Page 30.

³⁷ Section 19 (2), the Act.

³⁸ Section 19 (5), the Act.

³⁹ Section 20, the Act.

⁴⁰ Section 19(3), the Act.

⁴¹ Section 19(4), the Act.

fails to comply with orders of the Board is considered to be in default.⁴² Section 14 states that if a judge or magistrate is in default “the Board may make such orders as the circumstances require that.”⁴³ In terms of section 15 (b) and Article 23 of the Regulations, if a judge or magistrate is absent during a vetting hearing the Board has the power to review evidence for or against the judicial officer and make a final suitability determination.⁴⁴

F. Representation by Counsel

The Regulation grants the judicial officer who is being reviewed the right to be represented by an advocate at their own expense. However representation by an advocate does not dispense with the personal attendance of the judge or magistrate during the vetting proceedings.⁴⁵

G. Addressing Complainants

The Board derives its power to seek information and complaints from any person or body, including the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Attorney General, the Judicial Service Commission, Kenya National Human Rights and Equality Commission and other prescribed bodies from the Act.⁴⁶ The Regulations empowers the Board, as it may consider necessary, to write to any person or body and “seek information on the existence of a complaint” or malfeasance against the judicial

⁴² Section 13 of the Regulations states: “A judge or magistrate is in default if they fail to—

- (a) comply with a notice of the Board;
- (b) file or serve a document as directed by the Board or as required under these Regulations; or
- (c) do any act required to be done by these Regulations.”

⁴³ Section 14, the Regulations.

⁴⁴ Section 15 of the Regulations states: “..[I]f a judge or magistrate is absent during the hearing of the vetting proceedings, the Board may—

- (a) adjourn the hearing to a specific date; or
- (b) hear and make a final determination on the vetting proceedings in relation to the judge or magistrate.”

Section 23 of the Regulations states:

“The Board may determine any vetting proceedings in the absence of the judge or magistrate if it considers it appropriate and in the interests of justice to do so.”

⁴⁵ Section 21, the Regulations.

⁴⁶ Section 18 (1), the Act.

officer.⁴⁷ Further, by means of nationwide newspaper advertising the Board shall invite members of the public to file complaints or provide other relevant information against the judges or magistrates.⁴⁸

If the Board has reasonable grounds to believe that an entity mandated by the Act to cooperate with the Board ⁴⁹ has relevant information or a complaint against a judicial officer, and that such complaint or information has not been brought to the attention of the Board, “the Board may issue a summons to the person or principal officer of the body, with a view to satisfying itself of the existence or non-existence of such complaint or other information.”⁵⁰

The Regulation stipulates that the Board may require the person who has lodged a complaint against a judge or magistrate to attend the vetting proceedings.⁵¹ The person appearing before the Board to provide information about the judicial officer or support their complaint is defined as “witness”.

H. Preservation and Inspection of Property

The Regulation empowers the Board to make any order for the purpose of preserving, inspecting, staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of any property or evidence relating to any proceedings before the Board.⁵²

VETTING MECHANICS

A. Public Sensitization and Awareness Campaigns

⁴⁷ Section 8 (1) (a), the Regulation. In its call for information the Board shall specify the period within a complaint may be filed. *See* Section 8(2), the Regulations.

⁴⁸ Section 8 (1) (b), the Regulation. The Board shall include ads in at least two daily newspapers with nationwide circulation. The ad shall indicate the period which public feedback about the judicial officer may be submitted to be considered in the proceedings.

⁴⁹ Section 18 (1) (e), the Act, as amended in 2012. The Act specifies Law Society of Kenya; Ethics and Anti-Corruption Commission; Advocates Disciplinary Tribunal; Advocates Complaints Commission; Attorney-General; Commission on Administrative Justice; Kenya National Human Rights and Equality Commission; National Intelligence Service; National Police Service Commission; and Judicial Service Commission, and other relevant bodies or persons.

⁵⁰ Section 8 (3), the Regulations.

⁵¹ Section 16, the Regulations.

⁵² Section 11, the Regulations.

To effectively implement its objective of restoring public confidence in the judiciary, at the onset of its formation, the Board embarked on a mass public sensitization campaign.

The sensitization campaign ran for a full year and its aims were to inform the public on the mandate of the Board, the reason it was formed, its composition, the strategy for discharging its statutory and constitutional mandate, the procedures employed during vetting process, and the criteria used to evaluate suitability of judges and magistrates.⁵³

During the sensitization forums the Board disseminated copies of the Act and its Regulations as well as its public complaint forms. It invited the public to register complaints. It instructed them on how to fill in the forms and where to submit them.

In order to ensure wide and effective public participation, in addition to the sensitization forums across the country, the Board carried out a variety of external outreach activities including engaging with media through briefings, interviews, and press releases; giving presentations at legal institutions; and conveying meetings with the Law Society of Kenya.⁵⁴

During these forums the Board gave the public an opportunity to voice their concerns and grievances about the judiciary and the vetting process.⁵⁵ The participants told the Board that they preferred the vetting hearings to be open and public rather than private.

Nevertheless, many expressed concerns about the confidentiality of the information they would be offering, and inquired about possible protection mechanism in place to prevent retaliation by the judicial official against whom they would provide adverse information.

The public also expressed dissatisfaction about the limited scope of the Board's mandate where only judges and magistrate would undergo vetting, leaving court clerks,

⁵³ The Interim Report, Page 20.

⁵⁴ The Interim Report, Page 116. According to the Interim Report from January of 2012 to February of 2013, in aggregate, the Board held a total of 37 public sensitization forums and 22 meetings at the Law Society of Kenya Continuing Legal Education. A total of 2,755 members of public and 245 representatives of the legal profession participated in these outreach activities.

⁵⁵ *Ibid.*

accountants, prosecutors, police and other officials involved in administration and delivery of justice unscreened.⁵⁶

In response to a call for public vetting hearings or the quest for confidential submission of adverse evidence, the Board explained the sensitive nature of vetting and described due process requirements. It noted that interests of justice had compelled the legislature as well as the Board to employ a process that strikes a delicate balance between restoring public confidence in the judiciary and conducting the vetting proceeding in a fair, impartial, and just manner.⁵⁷

B. Vetting Procedure in Action

In practice the general vetting process *prior* to the hearing is as follows:⁵⁸

- Requests are sent to judges and magistrates to fill in the vetting questionnaire⁵⁹ and bio data forms. Judges and magistrates are also required by the Ethics Commission⁶⁰ to provide a wealth declaration, together with bank statements, setting out their income, assets and liabilities.
- In addition to the original notice, the Board would dispatch an addendum to Notice to File Response to the judicial officer if she or he fails to disclose full information on the declaration of income, assets and liabilities form as required; or fails to provide full information on sources of income, full inventory of assets and financial statement of spouse; or if the Board has questions about the officer's past work record and judgment and rulings; or if a complaint or further information was received after the original notice was dispatched. The Notice to File Response and

⁵⁶ The Interim Report, Page 22.

⁵⁷ *Ibid.*

⁵⁸ For more on this topic see Chapter 2 of the Interim Report, Pages 19-37.

⁵⁹ See Annex A for a sample of the vetting questionnaire.

⁶⁰ The Public Officer Ethics Act, Chapter Declarations of Income, Assets, and Liabilities, 2003, revised 2009. Available at: http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Kenya_Public%20Officer%20Ethics%20Act_2003_revised%202009_EN.pdf.

the addendum would compel the judicial officer to submit the missing information within stated timeframe.⁶¹

- Complaints are received from members of the public and interested organizations.⁶² These complaints are acknowledged by the registry and may be investigated by Board Investigators.
- The full record as well as a summary of the information gathered from the vetting questionnaires, bio data forms, and complaints are provided to the Board.
- The Board analyze and evaluates the merits of the complaints received. Complaints that meet the Board's vetting threshold are summarized. A notice to file response that encloses the complaint is served upon the judge or magistrate.
- The judge or magistrate must file an answer within ten days. His or her response is filed and summarized for the Board to review.
- Regardless of whether there is a pending complaint against a judicial officer or not, every judge or magistrate who was in the office on or before the 2010 dispensation and wishes to remain in office⁶³ would be vetted and shall appear before a Panel of Board members for the vetting interview.
- Prior to the hearing each Board member will have a full record of the judicial officer. During the Panel interviews and Board reviews members will rely on the full record, which contains:⁶⁴
 1. The Notice to File Response and Notice to Appear;
 2. Curriculum vitae of the judge;
 3. Vetting questionnaire;
 4. The complaints and supporting documents;

⁶¹ The Interim Report, Page 25.

⁶² See footnote 46, referring to the bodies enumerate in Article 18 (1) (e), the Act, as amended in 2012.

⁶³ Note that judicial officers are offered the option to retire with full benefits instead of going through the vetting procedure.

⁶⁴ The Interim Report, Pages 25 and 31.

5. Response to the complaint;
6. Any recommendation received from the interested bodies;
7. Wealth declaration forms and the analysis of the same;
8. Bank statements;
9. Five sample judgments and or rulings issued by the judge;
10. The Judicial Service Commission transcript, for interviews conducted with the judicial officer concerned for any post applied for, if any;
11. Any past work record of the judge including rulings, judgments and academic dissertations.

The procedures *during* the hearing are as follows:

- The hearings are held in private unless the judicial officer opts for a public hearing.⁶⁵ All the information gathered prior and during the hearing are treated confidential.⁶⁶
- The interview starts with some introduction about the Board and its constitutional mandate. Next each officer is given an opportunity to state whether they have any objection to any members of the panel participating in the interview.
- During the hearing the Panel questions the judge or magistrate about the complaints; evaluates and analyzes the judge's suitability and takes into account factors enumerated in Section 18 of the Act along with the requirements set out in Articles 10 and 159 of the Constitution.

⁶⁵ Since the commencement of proceedings two of the High Court judges Honourable Lady Justice Martha Koome and Justice David Maraga elected to be vetted in public hearing. In a public hearing members of the public are allowed to attend, media is present and given the opportunity to air the proceeding. *See* Interim Report, Page 97.

⁶⁶ Section 19 (5), the Act.

- If a witness to a complaint is appearing before the Board to testify, the judicial officer is given an opportunity to cross-examine the adverse evidence presented. The Board asks the witnesses to keep the matters deliberated confidential.⁶⁷
- In the last stage of the interview the judicial officer and his counsel are offered an opportunity to make a final oral or written submission and closing remark. The Board invites the officer to give feedback on the fairness of the vetting process. The officer will be informed when to expect the determination.
- The entire interview proceeding is recorded verbatim by *Hansard*⁶⁸ Team and archived.⁶⁹ The interview record is transcribed and used by members while considering fitness of an officer or granting an unfit judicial officer the right to appeal unsuitability.⁷⁰

The procedures *after* the hearing are as follows:

- After the interview, the Panel discusses issues raised, produces a report and makes a recommendation on the suitability of the individual to the full Board. If the Panel's recommendation on suitability is not unanimous, the dissenting member provides an additional report detailing her or his reasoning for reaching a different conclusion.
- In drafting the report the Panel relies on documents, information and evidence submitted during the interview process, the officer's demeanor throughout the hearing, submissions and closing remarks of the official, sample of the best judgment supplied by the judicial official as well as past pronouncements discussed with the judge. The Panel also examines the matters stipulated in Section 18 of the Act, including: intellectual capacity, knowledge of the law, quality of legal

⁶⁷ The Interim Report, Page 97.

⁶⁸ The official record of the Kenyan National Assembly is called the *Hansard* which is named after the British publication of parliamentary proceedings.

⁶⁹ The Interim Report, Page 31.

⁷⁰ The Interim Report, Page 33

judgment, competence and diligence, ability to work with others, and finally organizational and administrative skills.⁷¹

- The panel reviews all the above measures and makes a tentative recommendation on the fitness of the judge or magistrate to continue serving the judiciary.
- The full Board meets, reviews the file, discusses the Panel's recommendation and makes a final Determination on the suitability of the judge or magistrate to remain in office.
- The Determination and the reasons for the determination is served to the judge or magistrate within 30 days⁷²

SUITABILITY CRITERION IN PRACTICE

In making a suitability determination, guided by the Constitutional and statutory enumerated requirement for fitness to serve, the Board has two tools at its disposal: first, a general consideration of suitability (“whether the judge ... meets the constitutional criteria for appointment as a judge or magistrate of the superior courts’ under the new Constitution”) and an inquiry into “the past work record of the judge”; second an inquiry into specific complaints received from resource bodies and the public.⁷³ The Panel starts its analysis by addressing any pending complaints against the judicial officer and then moves on to the general requirements.⁷⁴

A. Analysis of the Complaints

The complaints received would be immediately registered by the Board's legal department; thereafter evaluated and the merit of it would be assessed.⁷⁵ The register would categorize the complaints based on the statutory criteria including professional

⁷¹ The Interim Report, Page 32.

⁷² Section 21 (1), the Act.

⁷³ See Guiding Document, Cited in the Interim Report, Page 199. For more on the constitutional and statutory requirement see section Guiding Principles and Criteria For Vetting above.

⁷⁴ *Ibid.*

⁷⁵ The Interim Report, Page 24.

competence; written and oral communication skills; integrity; fairness; temperament; quality of judgment; delayed judgment; bias; and corruption.⁷⁶

The Board will reject complaints on any one of the following grounds:⁷⁷

- If the complaint fails to disclose sufficient evidence;
- If it is deemed frivolous or vexatious; and
- If it is in the nature of an appealing the Board about the findings of a judicial officer's judgment.

If the Board made a preliminary determination that there were complaints that a judge ought to respond to, the Board will provide a summary of the complaint(s), issue a Notice to File Response, and inform the judicial officer accordingly.⁷⁸

During the period where the justices of the Court of Appeals and High Court were being vetted, the registry received a total of 1,420 complaints, of which 363 were filed against Court of Appeal Justices.⁷⁹ According to the Board's Interim Report the majority of the complaints Court of Appeals justices related to professional competence (26%), fairness (21%), integrity (17%), delayed judgment (15%), and quality of judgment (12%). The fewest number of complaints involved allegations of bias (3%) and corruption (1%).⁸⁰ The Board observed that allegations of bias and corruption were included in the complaints on competence, fairness and integrity.⁸¹ Professional competence encompassed 44% of the 1,057 complaints registered against High Court judges; following by integrity (21%), fairness (11%), delayed judgment (9%).⁸² Similar to Court of Appeal Justices cases of bias

⁷⁶ The Interim Report, Page 119.

⁷⁷ The Interim Report, Page 24.

⁷⁸ The Notice to file response is set under the Vetting of Judges and Magistrate (Procedure) Regulation schedule as JMVB 2 under Regulation 10(2).

⁷⁹ The Interim Report, Page 119. The numbers include the complaints received by the bodies and institutions mentioned in 18 (1) (e) of the Act as well as members of the public. Note that the Interim Report does not spell out the proportion of complaints received from related bodies or Kenyan public.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

and corruption were not separately recorded, but were frequently included as part of complaints on competence and integrity against High Court judges.⁸³

With regards to the institutions that had legislative mandate to cooperate, the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Judicial Service Commission and the International Commission of Jurists, all furnished the Board with relevant helpful information and submitted complaints or positive recommendations. According to the Interim Report, limited information was also received from the National Intelligence Service.⁸⁴ However, despite repeated written requests from the Board, no complaints or information was received from the Advocates Disciplinary Committee, the Advocates Complaints Commission, the Office of the Attorney-General, Public Complaints Standing Committee, Kenya National Human Rights and Equality Commission, and the Police.⁸⁵

A. Analysis of the Constitutional and Statutory Requirements

As mentioned above the Act as well as the Constitution outline specific personal qualities and judicial skills that are necessary for proper and competent discharge of judicial duties in Kenya's new dispensation. The statutory qualities include professional competence; written and oral communication skills; integrity; fairness; temperament; quality of judgment; delayed judgment; bias; and corruption. Each of the qualities consists of detailed elements.⁸⁶

For example, **professional competence** is assessed through the following elements: intellectual capacity; legal judgments; diligence; substantive and procedural knowledge of the law; organizational and administrative skills; and ability to work well with a variety of people.⁸⁷ **Integrity** is said to include: history of honesty and high moral character in professional and personal life; respect for professional duty and the judicial code of

⁸³ *Ibid.* In the Interim Report, the Board states that it had received numerous complaints of corruption. However, it was difficult to substantiate these accusations with evidence.

⁸⁴ The Interim Report, Page 24.

⁸⁵ *Ibid.*

⁸⁶ Section 18(2), the Act.

⁸⁷ Section 18 (2) (a), the Act.

conduct; and ability to understand the need to maintain propriety and the appearance of propriety.⁸⁸ Similarly, **fairness** is said to include: ability to be impartial; commitment to equal justice under the law; and open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views.⁸⁹

Written and oral communication skills includes the following elements: ability to communicate orally and in writing; ability to discuss factual and legal issues in clear logical and accurate legal writing; effectiveness in communicating orally in a way that can readily be understood by people from all walks of life.⁹⁰ Accordingly **temperament** involves having compassion and humility; courtesy and civility; ability to maintain composure under stress, and ability to control anger and maintain calmness and order.⁹¹

Good judgment is considered when a judicial officer possesses common sense; sound balance between abstract knowledge and practical reality; and ability to make prompt decisions to resolve difficult problems in a way that makes practical sense within the constraints of law.⁹² **Legal and life experience**, includes the following elements: breadth and length of legal experience; broader qualities of life experience such as diversity of personal and educational history; exposure to interests outside legal field; exposure to varied cultures and ethnic groups. And finally **commitment to public and community service**, encompasses the extent to which the judicial officer has demonstrated a commitment to the community generally and to improving access to justice in particular.⁹³

DECISION OF THE BOARD AND CONDITIONS FOR APPEAL

The Act and the Constitution entitles the Board to have the first and last say on the suitability of the judges and magistrates. Upon determining that a judge or magistrate is unfit to remain on the bench, within 30 days of the determination, the Board shall inform

⁸⁸ Section 18 (2) (c), the Act.

⁸⁹ Section 18 (2) (d), the Act.

⁹⁰ Section 18 (2) (b), the Act.

⁹¹ Section 18 (2) (e), the Act.

⁹² Section 18 (2) (f), the Act.

⁹³ Section 18 (2) (h), the Act.

the concerned official of the determination in writing, specifying the reasons for its decision.⁹⁴ According to the Act once the judge or magistrate is informed of the decision of unsuitability she or he shall be considered to have been removed from office.⁹⁵ The decision to remove a judge or magistrate shall be made public.⁹⁶ As part of its objective to restore public confidence in the judiciary and in order to promote transparency the Board also makes announcements on its determinations of suitability.

Any judge or magistrate who is found unsuitable is given 7 days to file a request for review.⁹⁷ The 2012 Amendment to the Act clarified that a judge or magistrate requesting review shall be suspended from office pending the decision of the Board.⁹⁸ It reiterated the constitutional and statutory guideline where decisions of the Board leading to the removal of a magistrate shall not be subject to judicial challenge.⁹⁹

However successful litigation by some of the unfit judges led the Court of Appeal to opine that the High Court has supervisory jurisdiction over the board. Further the Court of Appeal held that those who were declared unsuitable have the right to petition a review to High Court for error of law apparent on the face of the Vetting Board's record.¹⁰⁰ The Board along with the Law Society of Kenya, Attorney-General, and Judicial Service Commission petitioned the Supreme Court to reverse the holding. The petitioners urged the Court to uphold Article 23 of the Constitution and bar the High Court from hearing cases that relate to judicial vetting process and its determinations. The case has been heard and is pending the Court's ruling.

⁹⁴ Section 21(1) of the Act and Section 22 (1) of the Regulations.

⁹⁵ Section 21 (2), the Act.

⁹⁶ Section 21(2), the Act.

⁹⁷ Section 22 (1), the Act.

⁹⁸ Vetting of Judges and Magistrates (Amendment) Act, 2012, No. 43 of 2012, Commencement 14th Dec 2012.

⁹⁹ *Ibid.*

¹⁰⁰ Petition No. 13A/2013, The Judges and Magistrates Vetting Board & The Law Society of Kenya vs. 12 others (consolidated Petition No.13A of 2013 and Petition No. 14 of 2013 and Petition No. 15 of 2013). The case was sat down on April 24, 2014 and heard by the full Bench on June 4, 2014.

REVIEW PROCESS IN PRACTICE

The grounds for granting appeal are set out in section 22 (2) of the Act. This section instructs that a review shall not be granted unless it is based on discovery of a new and important matter which was not within the knowledge of the judge or magistrate at the time of the determination, or on some mistake or error apparent on the face of the record.¹⁰¹ Consequently the Act seems to grant narrow and limited power to the Board to review its decisions.

In determining the scope of Section 22 (2) the Board seems to be conscious of the general context of vetting in Kenya.¹⁰² In arguing in favor of a more broad interpretation of the provision the Board balanced the following factors:

- Its special position as the first and last decision-maker;
- The profound impact that removal may have on an officer's reputation as well as her or his professional career;
- The fact that numerous petitions had been made to the High Court challenging the Board constitutionality as well as and other challenges to its vetting functioning;
- The legislature's demand for speedy completion of a very large number of determinations;
- Its responsibility "to proceed as swiftly, surely and fairly" with the vetting process as possible;
- The Constitutional requirement that justice shall be administered without procedural technicalities;

¹⁰¹ The Board defined the record of its proceedings as follows: "The complaints and other forms of information that were considered by the Board, the judge's response and the Hansard transcript of the interview with the judge, constitute the record of proceedings." *See Determinations Concerning the Judges of the Court of Appeal*, 25 April 2012, p 10, Para 26.

¹⁰² According to the Board's analysis, Section 22 (2) was "closely modelled on the limited power of a Kenyan court, in circumstances in which no appeal is possible or none is being pursued, to review its own decision. Although useful guidance can be found in the case law, the Board is mindful of the very specific context in which vetting takes place." *See Fourth Announcement*, 21st September, 2012 (the "Fourth Announcement")

- And finally the need to uphold principles of natural justice.

Considering all the above factors the Board concluded that it should interpret its power of review broadly and “not be ultra-technical or unduly formalistic”. Simultaneously the Board recognized that the scope cannot be overbroad as to conceiving a procedure that appeal is granted for every finding of unsuitability.¹⁰³

A. Granting Review

When the conditions set in 22 (2) is satisfied -- if the judge presents the board new evidence that is “important” and “so significant that it might materially have influenced the decision” of unsuitability; or if the judge establishes existence of a mistake or error apparent on the face of the record -- then the Board will grant review. If review is granted then the Board must decide whether a case for reversing the decision of unsuitability has been made in light of the new and important information introduced.¹⁰⁴

In addition the Board has opined that if a judge is able to establish that a member of the interviewing panel had actual or an appearance of bias, the determination of unsuitability would be null and void and a new proceeding shall be held.¹⁰⁵

For example during the review submissions of Honourable Justice Mohamed Khadir Ibrahim¹⁰⁶ and Justice Abida Ali Aroni¹⁰⁷, the Justices argued that their vetting proceedings had been tainted by bias on the part a Member. The Board was not convinced that the Judges made the case for bias or appearance of bias, and the Member concerned denied the accusation. However, in the interest of justice and fairness the concerned member voluntarily withdrew from the panel. Accordingly, in both cases, the decisions of unsuitability were found to be void and a fresh panel was composed. The Board explained the importance of preventing any appearance of bias: “If the core work of the Board is to

¹⁰³ See The Forth Announcement, paras 38- 56 for an analysis and interpretation of section 22(2) of the Act.

¹⁰⁴ *Ibid*, Para 54.

¹⁰⁵ *Ibid*. Para 55.

¹⁰⁶ The Forth Announcement, Paras 57-66.

¹⁰⁷ The Eighth Announcement, 22nd March 2013, Paras 6-13.

assist in restoring judicial integrity, it follows that the integrity of its own processes should not be open to doubt. If the Board finds it has not, wittingly or unwittingly, measured up to the high standards it has set itself, it will not hesitate to acknowledge the fact and respond appropriately.”¹⁰⁸

In the case of Honourable Lady Justice Jeanne Wanjiku Gacheche the Board ruled differently. She argued that one of the members should have disqualified himself given that the main complaint against the Judge, concerned insurance cases arising from Law Society Kenya in Mombasa, where the concerned Member had been an active Council member. The Board rejected her argument noting that prior to the proceeding she had full knowledge of the specific Member’s background and at the beginning of the interview the judge expressly stated that she had neither an objection to any member of the Panel sitting nor an objection to the jurisdiction of the Board. In this situation the Board opined: “A judge concerned about possible bias cannot idly sit by, do no investigation, raise no objection at the interview, and then, only claim bias after being found to be unsuitable.”¹⁰⁹

B. Review Panels

Generally, in order to prevent any appearance of bias during review, the Board decided to create fresh review panels where the members had not been the ones that made the initial decision on the judge’s suitability. The Review Panel would interview the judge and thereafter submit its recommendation to the full Board, which then would make the final decision on the suitability of a judge or otherwise. During the review process, the Board may confirm the determination of unsuitability; could find the individual suitable; may declare the vetting process void and require a new interview; or set aside its finding of unsuitability on other grounds and require a new determination to be made.¹¹⁰

DETERMINATIONS OUTCOMES

¹⁰⁸ The Fourth Announcement, Para 63.

¹⁰⁹ The Fourth Announcement, Paras 76-82.

¹¹⁰ *Ibid.* Para 56.

The Board began the vetting process on 23rd February, 2011 and to date has vetted over 154 judicial officers.¹¹¹ This includes 8 Judges of the Court of Appeal, 44 judges of the High Court, and a total of 142 Magistrates.¹¹² Up to now, the Board has found 35 judicial officers unsuitable to serve the Bench.¹¹³ At the time of writing this brief the Board had to complete vetting of 174 magistrates and 2 judges before the end of its term in 2015. In addition the Board has 14 review applications to hear and determine.¹¹⁴

CHALLENGES AND OPPORTUNITIES TO VETTING

The Following can be highlighted as key challenges faced by the Board:

First, the Kenyan vetting process was meant to be a transitional measure, leading the judiciary into the new constitutional dispensation. As such, it was seen as an urgent reform and the legislature required the Board to operate according to strict legal timelines that were unpractical. The timeframes were not only unfeasible in light of the enormous task before the Board, they also hindered the process rather to expedite it. This was because each time the Board lagged in achieving the internal deadlines, it had to suspend interviewing and wait for the Parliament to amend the Act to remove the timeline or extend it.

Second, litigation and judicial resistance significantly impeded or undermined the work of the Board - an independent body set up to clean the judiciary. Numerous litigations sought to overturn the removal of justices found by the Board,¹¹⁵ questioning the

¹¹¹ The Tenth Announcement on Determination, Judges and Magistrates Vetting Board, 31st January 2014, and the Eleven Announcement on Determination, Judges and Magistrates Vetting Board, 15th July 2014, Available at: <http://www.jmvb.or.ke/reports/viewcategory/3-jmvb-reports.html>.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ See Lady Justice Jeane Gacheche v. JMVb and against JMVb and 2 others v. the JMVb and the Judicial Service Commission, H.C.J.R. No. 295 of 2012, as consolidated with Centre for Human Rights and Democracy and 2 Others v. The JMVb and 2 Others, Eldoret H.C. Petition Number 11 of 2012, Justice R.S.C. Omolo v. The JMVb and 2 Others Nairobi H.C. Constitutional Petition No. 433 of 2012, Justice J. G. Nyamu v. The JMVb and 2 Others Nairobi H.C. Constitutional Petition No. 438 of 2012, Justice S.E.O. Bosire v. The JMVb and 2 Others; where the petitioners challenged the decisions of the JMVb pursuant to which four

Constitutionality of the body¹¹⁶, and stripping it from its power to lawfully investigate and evaluate a purportedly improper conduct, acts, and omissions on the part of the affected officer that arose after the day the Constitution was promulgated.¹¹⁷ These litigations had serious impact on the functioning of the Board; they caused delay, and drained energy, resources, and time of the Board.

Third, lack of political will by key resource bodies to cooperate in submitting complaints and sharing information against judges and magistrates had an adverse effect on the Board's effective function. In addition to refusing to comply with their constitutional obligation some key actors vitiated the vetting proceedings by joining unfit justices in litigating against the Board. Their actions certainly created a concern on the willingness of these institutions to assume a positive role during the vetting process; it also questioned their commitment to the broader efforts to transform the judiciary and entrench constitutionalism in Kenya.

Fourth, perhaps it can be said that the Vetting Board commenced its work with too much zeal, leading to creating a hostile situation with affected bodies and persons. For example in its First Determination which concerned judges of the Court of Appeal, the Board found

judges of the Court of Appeal and one judge of the High Court had been found unsuitable to continue serving in the judiciary. Despite the provisions of Section 23 (2) of the Sixth Schedule to the Constitution which expressly insulates the Board from judicial challenge, the High Court found that it enjoys a supervisory jurisdiction over the Board. Further, it granted itself the power to review unsuitability findings of the Board. The Court of Appeal dismissed the petition of the Board to reverse the High Court Holding. The matter is currently pending Supreme Court's decision.

¹¹⁶ See *Dennis Mogambi Mong'are v. Attorney General & 3 others*, H.C. Constitutional Petition No. 146 of 2011, unsuccessfully questioning Constitutionality of the vetting process.

¹¹⁷ See *The Kenya Magistrates and Judges Associations v. Judges and Magistrates Vetting Board and the Attorney General*, the Court of Appeal in the Civil Appeal No. 93 of 2014, (Appeal from the judgment of the High Court of Kenya at Nairobi (Ngugi, J.) dated 26th March, 2014 in HCCC No. 64 of 2014). The Court of Appeal confirmed the ruling of the High Court concluding that the Board may not vet judicial officers with respect to acts or omissions occurring after the date the Constitution was promulgated; further judicial officers vetted in respect of allegations arising after 27th August, 2010 were subjected to unlawful and unfair treatment contrary to Article 27 of the constitution and such treatment was, therefore null and void to the extent of its reference to such conduct, acts, omissions and information; and finding that the court had jurisdiction to 'read in' into section 18 of the Vetting of Judges and Magistrates Act words that would confine vetting to acts and omissions occurring on or before the effective date.

four of the nine Appeal judges to be unsuitable to hold office. The Eighth Determination concerned suitability of some judges and magistrates who had received their bench appointments from the Judicial Service Commission after passing tests and interviews. However, the Board averred some of the said officers as unsuitable to continue holding the office of the Judge. In Civil Appeal No. 93 of 2014 the Court ruled that any inquiry into a judicial officer's conduct purportedly arising after the Constitutional promulgation shall be within exclusive jurisdiction of the Judicial Service Commission. With the lack of clear guidelines in respect of the roles of the two institutions it may appear that at times the Board is interfering in the mandate of the Judicial Service Commission.

Last, the Board encountered a number of challenges in accessing information.¹¹⁸ Various stakeholders did not possess correct and accurate information with regard to affecting officers. Witnesses who file a complaint were unwilling to come forward to testify and substantiate their allegations. The claim of corruption missed key evidence. Judicial officers often delayed submitting their wealth declarations. The submitted forms missed key information and were incomplete. In addition the Board faced obstacles in obtaining existing material including telephone records, personal files of the judge, court files and number of cases heard by the individual and numbers of delayed judgment.¹¹⁹

However the following factors kept the process moving forward and contributed to its success:

First, the Board enjoys a firm legal foundation and strong legitimacy by deriving its mandate from the new Constitution. In seeking to create an independent body, the

¹¹⁸ The Interim Report, Page 114.

¹¹⁹ In reviewing the wealth declaration of magistrates the Board found: "Most judicial officers have a challenge maintaining proper financial records. The financial records do not distinguish between business accounts and personal accounts. Few keep proper records and /or file returns with KRA regarding their additional income, this affects assessment of their financial probity. In some cases judicial officers permit the earnings of the spouse to be channelled through their personal accounts. Several admit to not knowing how to properly complete the wealth declarations." See Tenth Announcement, 31st January, 2014, Para 9.

Constitution vested the first and final power to review in the Board. In the context of Kenya, where Constitutionalism is slowly rooting, the benefits of Constitution guarding the vetting process cannot be overstated. The sensitive function of removing from positions of judicial authority persons associated with abuses of past, and contributing to reconstructing a judiciary that is bound by the rule of law, would have likely not succeeded without a clear constitutional mandate.

Second, to reduce attempts in judicial and political interference and intimidation, the visionaries of judicial reform in Kenya engaged in a sustained consultation effort with affected stakeholders including Kenya's Judges and Magistrates Association. It must be noted that despite this engagement a variety of affected bodies resisted and petitioned against vetting.

Third, the Board took a painstaking effort to create and implement a transparent, fair and participatory process. These efforts contributed to increasing credibility of the Board, restoring public confidence in the judiciary and strengthening the legitimacy of judicial officers in the eyes of public. The measures that the Board took included publishing detailed reports of its decisions, having a transparent process, voiding a determination even if there was a slight chance of appearance of bias, irregularity, among others. Also it seems that having foreign eminent Commonwealth judges contributed to its independence and circumventing any allegation that vetting to be deemed as "revenge".

In fact by examining its record it seems clear that the Board was duty-bound to function at all times in manner that showed full respect to rule of law, the Constitution, and principles of natural justice. It was certainly exemplary in manifesting adherence to these principles. Finally, the Board engaged in extensive public outreach activities. These successful public awareness campaigns informed the public and increased public support for the Board and

consequently reduced the political pressure that would come from affected actors. It also helped achieve restoration of trust in the judiciary.¹²⁰

¹²⁰ An international Commission of Jurist survey on the perceptions of the Judiciary conducted in 2012 across the country found that the majority of respondents were aware of the on-going vetting of Judges and Magistrates, and 84 percent trusted the courts. See Promoting and Protecting Human Rights, Democracy and the Rule of Law Judiciary Perception Survey Presentation” Infotrak Research and Consulting, September 2012.