

**‘IS LITTLE TO BE GAINED BY LAMENTING THE PAST?  
ASSESSING THE EXTENT TO WHICH ADDRESSING THE PAST  
LEGACY OF THE SOUTH AFRICAN AND KENYAN  
JUDICIARIES, BY MEANS OF TRANSITIONAL JUSTICE  
MECHANISMS, HAS CONTRIBUTED TO ACHIEVING THE  
OBJECTIVES OF JUDICIAL REFORM IN BOTH THESE  
COUNTRIES’**

**Dissertation by:** Jessica Boast

**Student No.:** BSTJES001

**Supervisor:** Hugh Corder

**Total Word Count:** 23, 171

A minor dissertation submitted in partial fulfillment of the requirements for the award of the degree of Masters of Philosophy in Transitional Justice (Human Rights Stream).

**Faculty of the Humanities**

**University of Cape Town**

**2013**

**COMPULSORY DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## ABSTRACT

The purpose of this dissertation is to determine whether it is important for the future development of legal systems in post-authoritarian or post-conflict states to confront the unjust past legacy of their judiciaries. In order to determine this, one has to assess the extent to which addressing the unjust past legacy of such judiciaries, by means of transitional justice mechanisms, has contributed to achieving the objectives of judicial reform in these contexts. This is accomplished by firstly, analysing the contribution of the TRC Legal Hearing to judicial reform in post-Apartheid South Africa. Secondly, the contribution which the vetting of the Kenyan judiciary made to achieving judicial reform in Kenya after the 2007 Election crisis is assessed. In both circumstances, the final contributions of these transitional justice mechanisms to achieving the objectives of judicial reform are weighed against the contributions of other mechanisms. It is argued that both the transitional justice mechanisms of truth commissions and judicial vetting contributed to achieving objectives of judicial reform in South Africa and Kenya. However, the extent of the contributions differed in each case because of unique political factors. It is concluded that confronting the unjust past legacy of judiciaries in post-authoritarian and post-conflict states is indeed important for the future development of their legal systems.

## CONTENTS

	FOREWORD	5
1	CHAPTER 1: ANALYTICAL FRAMEWORK	
1.1	Judicial Institutions in Post Authoritarian and Post-Conflict States	9
1.2	Definition of the Rule of Law	11
1.3	The Re-establishment of the Rule of Law in Post-Authoritarian and Post- Conflict States	13
1.4	The Objectives of Judicial Reform Efforts	16
1.5	Transitional Justice Mechanisms	22
1.6	Concluding Remarks	25
2	CHAPTER 2: TRUTH COMMISSIONS AND JUDICIAL VETTING	
2.1	Truth Commissions	26
2.1	Judicial Vetting	32
2.3	Concluding Remarks	35
3	CHAPTER 3: SOUTH AFRICA	
3.1	Introduction	36
3.2	Background Information	37
3.3	The Decision made against the Vetting of the Apartheid Judiciary	38
3.4	The TRC Legal Hearing	41
3.5	Other Mechanisms that helped achieve the Objectives of Judicial Reform	55
3.6	The Interim Constitution	56
3.7	The Constitutional Court	57
3.8	The Final Constitution	63
3.9	Conclusion	74
4	CHAPTER 4: KENYA	
4.1	Background Information	76
4.2	The ‘Radical Surgery’	78
4.3	The 2007 Election Crisis	81
4.4	The Kenyan National Dialogue and Reconciliation Forum	84
4.5	CIPEV’s Recommendations and the ICC’s Investigation	85

4.6	Judicial Reform under the 2010 Constitution	86
4.7	The Vetting of Judges and Magistrates	90
4.8	Summary of Decisions made by the Vetting Board	94
4.9	Opposition to the Decisions made by the Vetting Board	96
4.10	Criticism of the Vetting Procedure	101
4.11	The 2013 Kenyan Elections	103
4.12	Conclusion	107
5	CHAPTER 5: CONCLUSION	110
	WORKS CITED	114

## FOREWORD

There have been times in history where judiciaries have failed to conduct themselves according to the international standards expected of the profession. Instances of judicial misconduct, judicial corruption, unfair bias, enforcement of unjust laws, and judicial complicity in a regime's oppression of its citizens, have been and can be found in states all over the world.

When the time has come to reform the judiciary in such states, different approaches have been taken in order to deal with a legacy of injustices and wrongs of a particular judiciary. These range from putting the judges of the Nazi Regime on trial for their implementation of unjust laws at Nuremberg, to vetting procedures applied to the judiciaries in many former communist states, and the decision taken against vetting in South Africa.<sup>1</sup> Kenya is possibly the first African state that has attempted to use a vetting board to assist in reforming their judiciary.<sup>2</sup>

South Africa and Kenya are African states that have taken different routes to reforming their respective judiciaries. The political situations that prevailed and the acts of improper judicial behaviour were different in both countries. Yet both have had the similar goal of successfully reforming their judiciaries and ensuring that their judiciaries conduct themselves accordingly in the future.

---

<sup>1</sup> Jonathan Klaaren 'Institutional Transformation and the Choice Against Vetting in South Africa's Transition' in Alexander Mayer-Rieckh and Pablo De Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2007) 148.

<sup>2</sup> Jan van Zyl - Smit *Reforming the Kenyan Judiciary 2003-2012: A Comparative Perspective* (Unpublished paper presented at the African Network of Constitutional Lawyers annual conference in Lagos, Nigeria, Oxford-Brookes University, 2012) 2.

Judicial reform in post-Apartheid South Africa is a case of such reform in a post-authoritarian setting, which decided against vetting its judiciary because of the nature of its negotiated transition.<sup>3</sup> Instead, the legacy of the former Apartheid judiciary was dealt with in a special hearing by the South African Truth and Reconciliation Commission (hereafter referred to as the ‘TRC’). Kenya, an example of judicial reform in a post-conflict setting, chose however to have a vetting board for the judiciary in the aftermath of the 2007 electoral violence.<sup>4</sup>

The title of this dissertation, ‘Is little to be gained by lamenting the past?’ is derived from a quote and must be seen in context. The quote was made by Arthur Chaskalson, the first President of the South African Constitutional Court. He was considering whether it was indeed wise to dwell on the judicial record of the South African courts, in terms of the TRC’s work, when he stated:

‘That they could have done better than they did is, I think, now clear. But that is true of us all, and little is to be gained by lamenting the past.’<sup>5</sup>

To expand on this statement, several concepts may be explored. Firstly, it is clear that by merely dwelling on the past or mourning ‘what should have been’ or ‘what could have been done better’ will not achieve much. Yet confronting the past, acknowledging the truth about what was wrong and the

---

<sup>3</sup> Jan van Zyl – Smit *Vetting Judges after a Constitutional Transition: Comparative Experiences from East Germany, Bosnia and Herzegovina and South Africa* (Unpublished paper presented at the International Commission of Jurists (Kenya branch) conference, in Mombasa, Kenya, Oxford-Brookes University 2010) 6.

<sup>4</sup> Jan van Zyl – Smit op cit note 2 at 9.

<sup>5</sup> David Dyzenhaus *Judging the Judges, Judging Ourselves* (1998) 20.

mistakes that were made and using these to assist in rebuilding a nation, may be useful.

The purpose of this dissertation is to determine whether it is important for the future development of legal systems in post-authoritarian or post-conflict states to confront the unjust past legacy or former abusive record of their judiciaries. In other words this dissertation seeks to establish if addressing the unjust past legacy of a judiciary in one of these contexts, via the means of transitional justice mechanisms, is a meaningful or pointless exercise.

Hence the question this dissertation poses is: To what extent has addressing the past legacy of the South African and Kenyan judiciaries, by means of transitional justice mechanisms, contributed to achieving the objectives of judicial reform in both of these countries?

Chapter 1 will provide an introductory framework for the discussion to follow. The key concepts will be defined and expanded upon in order for the reader to gain a better understanding of the framework in which the country-specific discussion will take place.

Chapter 2 will provide a theoretical analysis of the two transitional justice mechanisms (truth commissions and judicial vetting) that were used in South Africa and Kenya to aid in the reform of their judiciaries.

Chapter 3 will assess the extent to which the TRC Legal Hearing contributed to achieving the objectives of judicial reform in South Africa.

Chapter 4 will assess the extent to which the vetting of the Kenyan judiciary contributed to achieving the objectives of judicial reform in Kenya.

By way of conclusion, it is submitted that both the transitional justice mechanisms of truth commissions and judicial vetting contributed to achieving the objectives of judicial reform in South Africa and Kenya. The extent of the contributions made differed in both cases. However, it was ultimately determined that it is important for the future development of legal systems in post-authoritarian and post-conflict states to confront the unjust past legacy of their judiciaries.

## CHAPTER 1

### ANALYTICAL FRAMEWORK

In order to answer the question posed by this dissertation, it is necessary to establish a framework within which this discussion will take place. This chapter will define the key concepts that are relevant for the purposes of this discussion and use them to establish the analytical framework required.

#### 1.1 JUDICIAL INSTITUTIONS IN POST-AUTHORITARIAN AND POST-CONFLICT STATES

For the purposes of this dissertation it is important to understand the environment that prevails within legal systems in post-authoritarian and post-conflict states.

A post-authoritarian situation exists when a state is emerging from a system of autocratic rule. A post-conflict situation refers to a state that is emerging from a war, internal rebellion or where general conflict and chaos has ensued. Usually in such states there has been either a severe deterioration or complete breakdown of the Rule of Law, and their judiciaries have not conducted themselves accordingly.

In post-authoritarian states (in which a relatively sophisticated but tainted legal infrastructure might remain) there is, as Corder discusses in his article ‘Judicial Authority in a changing South Africa’, ‘the need urgently to design institutions of governance to facilitate democratic transformation’.<sup>6</sup> In

---

<sup>6</sup> Hugh Corder ‘Judicial Authority in a changing South Africa’ (2004) 24 *Legal Studies* 253 at 253.

essence this is where one is dealing with, as put by Dyzenhaus, ‘a systematic problem which amounts to a failure of the institutions of a democratic state to live up to its ideals’.<sup>7</sup> Judiciaries in these states are often tainted by too close an association with the previous authoritarian regime, or have a clear record of complicity with the previous regime in the commission of human rights violations.

Ndulo and Duthie discuss in their article ‘The role of judicial reform in development and transitional justice’, that in many post-conflict states one legacy of the conflict these states share is:

the lack of national institutions to deal with past and present human rights violations, to advance good governance, to deal with massive poverty, violence, and displaced populations, and to support socioeconomic development.<sup>8</sup>

They continue to explain that often in these states there only exists a very basic legal infrastructure that has survived the damage done by the conflict.<sup>9</sup> Often the key personnel that managed this legal infrastructure have ‘fled, been killed, or been compromised by association with the previous regime’.<sup>10</sup> The legal infrastructure’s functioning in such contexts is often severely hampered by both human and operational shortages.

---

<sup>7</sup> Dyzenhaus op cit note 5 at 146.

<sup>8</sup> Muna B. Ndulo and Roger Duthie ‘The Role of Judicial Reform in Development and Transitional Justice’ in Pablo De Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (2009) 251.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

Thus, in many post-authoritarian and post-conflict states the improper conduct of their judiciaries has contributed to the severe deterioration or complete breakdown of the Rule of Law that has occurred.

## 1.2 DEFINITION OF THE RULE OF LAW

For the purposes of this dissertation it is essential to explain the doctrine of the Rule of Law.

Mathews viewed the Rule of Law as a doctrine that was ‘concerned with the relationship between the government and citizen and with the legal control of the government in the interests of freedom and justice’.<sup>11</sup>

Accordingly he believed that all writings concerning the Rule of Law could be grouped according to four categories: (1) law enforcement theories; (2) theories of the Rule of Law as procedural justice; (3) the Rule of Law as justice in the material or substantive sense; and (4) theories of the Rule of Law as the protection of the citizen’s basic rights through definite rules administered by independent tribunals.<sup>12</sup>

Mathews regarded the first three of these approaches as unsatisfactory. He maintained that the fourth approach, that of Dicey’s doctrine, was the most compelling.<sup>13</sup> This was his chosen theory, and the definition that follows below is Mathews’ reformulation of Dicey’s doctrine in a modern manner.

---

<sup>11</sup> Anthony S. Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) XXX.

<sup>12</sup> Ibid.

<sup>13</sup> Mathews op cit note 11 at 20.

The definition of the Rule of Law that should be adopted for the purposes of this dissertation is as follows:

- (1) Government, according to the Rule of Law, means that with a view to the preservation of the basic rights enumerated in the second proposition below, the relevant laws shall take the form of pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures;
- (2) The basic freedoms of person, conscience, speech, information, movement, meeting and association shall be equally guaranteed by the law to all citizens of the society;
- (3) Any limitations on the civil rights or freedom enumerated in the second proposition shall be in the form of rules conforming to the requirements of legality expressed in the first proposition. Furthermore, restrictions on the basic freedoms shall be limited in scope and, except in times of genuine crisis or emergency, shall not encroach upon the essential content of such freedoms.<sup>14</sup>

Mathews referred to this definition as the ‘substantive content’ of the Rule of Law. Following is the ‘procedural machinery’ which consists of legal institutions, procedures and traditions which give ‘practical reality’ to the idea.<sup>15</sup> Of these ‘procedural machinery’, the judiciary is of vital importance.

Mathews observed that:

---

<sup>14</sup> Ibid.

<sup>15</sup> Mathews op cit note 11 at 23.

The Rule of Law and an independent judiciary vested with power to adjudicate over basic rights are so closely related to each other as to be like opposite sides of the same coin.<sup>16</sup>

### 1.3 THE RE-ESTABLISHMENT OF THE RULE OF LAW IN POST-AUTHORITARIAN AND POST-CONFLICT STATES

The re-establishment of the Rule of Law has therefore been accepted as ‘essential for reconstruction and long-term stability’ in post-authoritarian and post-conflict states.<sup>17</sup> Extensive Rule-of-law projects are now engaged in by conflict management, peace-building and development actors, with the belief that the re-establishment of the Rule of Law ‘will contribute to good governance, conflict resolution, protection of human rights, and economic development’.<sup>18</sup>

As per Mathews’ definition, two important requirements for the re-establishment for the Rule of Law are a functioning legal system and an independent judiciary. Dr. Rama Mani argues that in order to facilitate restoration of the Rule of Law in a post-authoritarian or post-conflict state institutional reform of the justice system (the judiciary, police and the prisons) is required.<sup>19</sup> This dissertation is clearly concerned with the reform of the judiciary, which Mani also views as one of the essential pillars for the restoration of the Rule of Law.<sup>20</sup>

---

<sup>16</sup> Ibid.

<sup>17</sup> Ndulo and Duthie op cit note 8 at 253.

<sup>18</sup> Ibid.

<sup>19</sup> Rama Mani *Beyond Retribution: Seeking justice in the shadows of war* (2002) 56.

<sup>20</sup> Mani op cit note 19 at 5.

Mani's argument is that long-term sustainable peace cannot exist in a post-authoritarian or post-conflict state, unless justice has been achieved for past atrocities and human rights violations.<sup>21</sup> She identifies three different dimensions of justice that need to be achieved, these being rectificatory justice, legal justice and distributive justice.<sup>22</sup>

For these three dimensions of justice to be achieved; the necessary starting point is to understand and address the corresponding injustices suffered by ordinary people during the authoritarian regime or conflict.<sup>23</sup>

Therefore, in order to restore legal justice or the Rule of Law (as they are interchangeable terms) in post-authoritarian or post-conflict states, the corresponding legal injustices need to be understood and addressed. These legal injustices could include:

the breakdown of the Rule of Law, the political manipulation of the legal system, the corruption of law makers, law enforcers and judges, and the consequent lack of legal redress for injustices and grievances experienced by the population.<sup>24</sup>

In order to be successful in reforming the judiciary and ultimately the restoration of the Rule of Law, there needs to be an understanding of how and why there was a complete deterioration of the Rule of Law in the first place.

---

<sup>21</sup> Rama Mani 'Balancing Peace with Justice in the Aftermath of Violent Conflict' (2005) 48 *Palgrave Macmillan Journals Thematic Section Development* 25 at 25.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Mani op cit note 21 at 26.

Mani submits that she has observed the Rule of Law programmes established in many post-authoritarian or post-conflict states.<sup>25</sup> Some of these programmes are very quick to use the restoration of the Rule of Law to only re-establish order and security.<sup>26</sup> They focus on reforming institutions, mechanics, and the form and structure of the Rule of Law, rather than the ethos of it. These programmes also tend not to incorporate knowledge and integration of cultural and historical specificities, and the needs of individual societies, in to their reform efforts.<sup>27</sup> There is not enough emphasis on ensuring that the fundamental principles of the Rule of Law are entrenched in society, and that the institutions reformed enjoy public trust and political commitment.<sup>28</sup>

In one of her articles on this matter Mani quotes an observation made in the context of post-conflict reconstruction in Rwanda:

The real challenge (in restoring the judicial system) is not of marshalling sufficient human and technical resources, but of institutionalising a new political culture in which differences are settled through discussion, accommodation, and sound civil institutions and not through bloodshed.<sup>29</sup>

According to Mani, the only way to instil a ‘new political culture’ in the new judiciary which entrenches the ‘ethos’ of the Rule of Law, is if the root causes of legal injustices are understood and addressed by reform efforts.

---

<sup>25</sup> Mani op cit note 21 at 30.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Mani op cit note 21 at 31.

<sup>29</sup> Rama Mani ‘Conflict Resolution, Justice and Law; Rebuilding the Rule of law in the Aftermath of Complex Political Emergencies’ (1998) 5 *International Peacekeeping* at 14.

Only by doing this and understanding local grievances with the previous judicial sector, and incorporating these into reform efforts, will the Rule of Law (substantially and formatively) be restored. The Rule of Law can only be effectively restored in post-authoritarian and post-conflict states if it is understood how the conduct of judiciaries in such contexts contributed to its deterioration.

#### 1.4 THE OBJECTIVES OF JUDICIAL REFORM EFFORTS

The next concept that needs to be addressed is that of judicial reform. It has been argued that such reform is vital for the restoration of the Rule of Law, but how such reform is actually achieved requires further attention.

Judicial reform can be defined as ‘measures intended to reform the courts, prosecutors’ office, and other institutions that make up the judicial system’.<sup>30</sup>

There are many international standards or types of ‘codes of good practice’ such as the ‘Basic Principles of the Independence of the Judiciary’ that provide excellent guidelines as to how a judicial institution should function in a modern state. These have provided valuable guidelines as to what the objectives of judicial reform efforts should be.

---

<sup>30</sup> Ndulo and Duthie op cit note 8 at 257.

Some authors believe that judicial reform can be considered in terms of three key institutional objectives: judicial independence; judicial accountability; and judicial legitimacy.<sup>31</sup>

#### *1.4.1 Judicial Independence*

Judicial independence means that a separation of powers must exist between the three ruling spheres of government: the executive, legislature and the judiciary.<sup>32</sup> Therefore, the functions of making the law, executing the law, and resolving disputes through the application of the law should be kept separate and performed by different government officials.<sup>33</sup> Judicial authority must reside in the judiciary as a separate organ of government, composed of different people from and independent to, those who compose the executive and legislature.<sup>34</sup> This independent judicial body must also serve as a check to the execution of the executive's and legislature's power. One of the most common forms of a check on the power of the executive and legislature is 'the power of the judiciary to review laws and the conduct of the executive and the administration'.<sup>35</sup>

One of the leading international instruments that establishes the guidelines for judicial independence is The United Nations Basic Principles on the Independence of the Judiciary ('Basic Principles'). Trebilcock and Daniels highlight the main mechanisms, stated in this instrument, for enduring judicial independence as: (i) A transparent, merits-based appointment

---

<sup>31</sup> Michael J. Trebilcock and Ronald J. Daniels *Rule of Law reform and development: Charting the fragile path of progress* (2008) 5.

<sup>32</sup> Ian Currie and Johan de Waal *The New Constitutional and Administrative Law* (2001) 91.

<sup>33</sup> Currie and de Waal op cit note 32 at 95.

<sup>34</sup> Ndulo and Duthie op cit note 8 at 253.

<sup>35</sup> Currie and de Waal op cit note 32 at 95.

process<sup>36</sup>; (ii) Security of Tenure – that judges cannot be easily or arbitrarily removed, to ensure they are not vulnerable to internal or external pressures in their consideration of cases<sup>37</sup>; and (iii) Adequate financing – ensuring adequate remuneration, conditions of service, pensions etc. This is to attract and retain the most qualified and capable candidates, and protect against corruption. These must also have adequate legal resources, ‘basic legal materials, competent support staff, and physical and technological infrastructure’.<sup>38</sup>

#### *1.4.2 Judicial Accountability*

In terms of judicial accountability, not only must courts remain independent to fulfil their role of restraining executive power, but they must also act as legislators ‘in their interpretation, application, and, principally in common law jurisdictions, creation of legal rules’.<sup>39</sup> But these powers are only tenable if the judiciary is held in some way accountable or answerable for them.

Therefore, judicial accountability ‘permits the appropriate and legitimate exercise of the legislative function of the judiciary in balance with its role of independence’.<sup>40</sup> Judicial accountability should ensure that certain appropriate standards of ethical behaviour are maintained by the Judiciary.<sup>41</sup>

---

<sup>36</sup> Trebilcock and Daniels op cit note 31 at 61.

<sup>37</sup> Trebilcock and Daniels op cit note 31 at 62.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Trebilcock and Daniels op cit note 31 at 59.

<sup>41</sup> Ndulo and Duthie op cit note 31 at 254.

It has been pointed out that it remains ‘difficult, if not impossible’ to classify an ‘accepted gold standard’ of the judiciary.<sup>42</sup> It has been argued that accountability can strengthen the independence of the judiciary, as it ‘may reduce the judiciary’s vulnerability to external pressures’.<sup>43</sup> The Beijing Principles in Articles 23 – 28 state that ‘Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes that judge unfit to be a judge’.<sup>44</sup> The judging of such unfitness requires a public hearing, subject to independent review.

Trebilcock and Daniels define three types of judicial accountability: (i) Operational Accountability; (ii) Decisional Accountability and; (iii) Behavioural Accountability. Operational requires transparency with case-management, budgetary concerns and that judges should not have too much power to negotiate with parties about course, timing, and scope of pre- and post-trial litigation.<sup>45</sup> Decisional Accountability requires a certain quality of decisions rendered, as well as quality of reasoning used for them. It requires some form (in the least) of a decision-making review mechanism (either like a constitutional court or multi-level court approach).<sup>46</sup> And finally, Behavioural Accountability requires answerability for dereliction of duty, misuse of office, undignified behaviour, bias or pre-judgment, harmful or offensive conduct or disrespect for the law.<sup>47</sup> Either judges higher up in the judicial hierarchy are traditionally responsible for this, or there is an external institution such as a judicial ombudsman or council. The authors also point

---

<sup>42</sup> Trebilcock and Daniels op cit note 31 at 58.

<sup>43</sup> Trebilcock and Daniels op cit note 31 at 60.

<sup>44</sup> LAWASIA ‘Beijing Principles’, available at <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf>, accessed on 31 May 2012.

<sup>45</sup> Trebilcock and Daniels op cit note 31 at 63.

<sup>46</sup> Trebilcock and Daniels op cit note 31 at 65.

<sup>47</sup> Ibid.

out that in terms of Behavioural Accountability a broad consensus of the public expects judges to be answerable for such behaviour as listed above.<sup>48</sup>

### *1.4.3 Judicial Legitimacy*

Legitimacy of a state institution refers to the level of civic trust it enjoys.<sup>49</sup> If there is a legacy of serious abuse, this will have severely undermined the legitimacy of an institution.<sup>50</sup> Successful judicial reform requires that the public accepts the judicial institution. Courts hold much power in society, and it is critical that the public trusts and has confidence in the courts to respect and abide by their decisions.<sup>51</sup> If this trust or confidence is broken, re-establishing it may be difficult.<sup>52</sup> Rebuilding the integrity of the judiciary may not be enough. Efforts such as ‘verbal and symbolic measures such as memorials, apologies, and changing insignia that reaffirm a commitment to overcoming the legacy of abuse’ may be necessary.<sup>53</sup>

### *1.4.4 Other necessary objectives for judicial reform efforts*

Ndulo and Duthie also elaborate on the elements that they believe are essential for successful judicial reform. They are in agreement with the three key elements (as explained above). They argue that in addition to these there should also be: (i) a fully representative judicial body (that all persons are

---

<sup>48</sup> Ibid.

<sup>49</sup> Lauren Davis ‘Justice-sensitive Security sector reform in the Democratic Republic of the Congo’ *International Centre for Transitional Justice* (2009), available at [http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice\\_Sensitive\\_Security\\_System\\_reform\\_in\\_the\\_DRC-2.pdf](http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC-2.pdf) , accessed 1 October 2012..

<sup>50</sup> Ibid.

<sup>51</sup> Trebilcock and Daniels op cit note 31 at 66.

<sup>52</sup> L Davis ‘Justice-sensitive Security sector reform in the Democratic Republic of the Congo’ *International Centre for Transitional Justice* (2009), available at [http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice\\_Sensitive\\_Security\\_System\\_reform\\_in\\_the\\_DRC-2.pdf](http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC-2.pdf) , accessed 1 October 2012).

<sup>53</sup> Ibid.

represented, therefore to have a judiciary from a wide range of backgrounds, as well as gender equality); (ii) an oversight institution or body (to ensure human rights protection, good governance and accountability (for example: a Human Rights Commission or Ombudsman); (iii) gender sensitivity (ensure a legal system provides accessible and gender-sensitive assistance to women in terms of human rights violations, sexual and violent crimes, and traditional and customary law aspects); and (iv) access to justice (increased access to the courts and agencies charged with human rights protection by the populations that these institutions are designed to protect).<sup>54</sup>

Another important component to consider would be the restoration of the integrity of the judiciary. Many times in post-authoritarian or post-conflict states the actual integrity of the judiciary has been compromised by too close an association with the previous regime, or by them playing a role in that regime's oppression of its citizens. Therefore there should be a focus on restoring the integrity of the judiciary in such states. This concept overlaps with, and is part of many other goals of the judicial reform process. Integrity is defined as 'the quality of being honest and having strong moral principles'.<sup>55</sup> The integrity of a judicial institution refers to it cultivating the ethos of the principles of the Rule of Law.<sup>56</sup> This may be achieved through the ensuring of judicial accountability, as well as establishing codes of

---

<sup>54</sup> Ndulo and Duthie op cit note 8 at 253 – 256.

<sup>55</sup> J Sykes (ed) *The Concise Oxford Dictionary* 6ed (1976) 67.

<sup>56</sup> L Davis 'Justice-sensitive Security sector reform in the Democratic Republic of the Congo (2009) available at

[http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice\\_Sensitive\\_Security\\_System\\_reform\\_in\\_the\\_DRC-2.pdf](http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC-2.pdf), accessed 1 October 2012.

conduct, professional standards and disciplinary measures if these are not adhered to.<sup>57</sup>

## 1.5 TRANSITIONAL JUSTICE MECHANISMS

It is now important to establish which mechanisms can actually be used to confront the unjust past record of judiciaries in post-authoritarian and post-conflict states. In real-life examples, transitional justice mechanisms have been used to address the unjust past record of judiciaries in such contexts.

The definition of ‘transitional justice’, as stated by the UN Security Council in their Report by the Secretary General entitled ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict societies’ is:

the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>58</sup>

A UN Security Council report defines transitional justice mechanisms as:

either judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>59</sup>

---

<sup>57</sup> Ibid.

<sup>58</sup> Office of the United Nations High Commissioner for Human Rights ‘The Rule of law and transitional justice in conflict and post-conflict societies’ available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> accessed on 16 May 2012.

<sup>59</sup> Office of the United Nations High Commissioner for Human Rights ‘The rule of law and transitional justice in conflict and post-conflict societies’ available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> , accessed on 16 May 2012.

Essentially, Transitional Justice efforts have two main aims: (1) to address the human rights violations of the previous regime (to provide justice to the victims, and eliminate a culture of impunity); and (2) to build peace through reforming abusive state institutions and promoting reconciliation.<sup>60</sup> The second aim is relevant for the purposes of this dissertation.

When it comes to reforming abusive state institutions, institutional reform can be viewed in two contexts. The first context refers to reform efforts that seek to establish the regulations and procedures for addressing the past human rights violations.<sup>61</sup> The second context refers to reform efforts that seek to improve these institutions in terms of preventing or managing conflicts within society and being more accountable in the future. This is to prevent the human rights violations from happening again.<sup>62</sup> These two contexts work together simultaneously. If these regulations and procedures are established to understand and address past violations and injustices, the re-occurrence of such violations and injustices can be prevented in the future.

The main premise behind using transitional justice mechanisms to help facilitate the reform of formerly abusive institutions is not to see this abusive past as a ‘structural deficit’ to achieving objectives in the present.<sup>63</sup> Focus should not be placed solely on achieving accountability, transparency and

---

<sup>60</sup> Migai Akech ‘Institutional Reform in the New Constitution of Kenya’ *International Centre for Transitional Justice* October 2010 at 14 available at <http://ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>, accessed on 4 January 2013

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Alexander Mayer-Rieckh and Roger Duthie ‘Enhancing Justice and Development through Justice-Sensitive Security Sector Reform’ in Pablo De Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (2009) 229.

legitimacy for these institutions in the present and future, but also placed on dealing with why these objectives were absent in the past.<sup>64</sup> Instead of attempting to start from a clean slate and viewing the confrontation of an abusive past of a particular institution as a ‘waste of resources’, this abusive past should be seen as a tool to aid reform efforts of these institutions to achieve their goals.

Mayer-Rieckh and Duthie refer to this as a ‘justice sensitive’ approach to reform efforts of judicial or security sector institutions.<sup>65</sup> The essence of this argument is that there will be consequences if past abuses, or involvement of a state institution in the previous regime’s oppression of its citizens go ignored. These consequences could be that the legitimacy of the reformed institution in the post-authoritarian or post-conflict state, as well as chances of preventing re-occurrence of such abuses, are compromised.<sup>66</sup> Therefore, if a ‘justice sensitive’ approach is taken with reform efforts, such an approach will aim to establish accountability not only for present and future abuses but for past abuses as well.<sup>67</sup> A link is seen between establishing accountability of an institution for past abuses, and strengthening and ensuring accountability of the same institution in the future.

If accountability for past abuses of an institution is found in post-authoritarian and post-conflict states, this can give greater currency to the newly reformed judicial and other institutions, and ensure the further

---

<sup>64</sup> Ibid.

<sup>65</sup> Mayer-Rieckh and Duthie op cit note 63 at 230.

<sup>66</sup> Ibid.

<sup>67</sup> Mayer-Rieckh and Duthie op it note 63 at 232.

accountability of these bodies in the future.<sup>68</sup> Addressing the past record of judicial and other institutions in reform efforts can help to build the integrity of the institution, confirm its legitimacy, or empower state citizens to see themselves as right-bearers instead of objects of state oppression.<sup>69</sup>

Hence, if transitional justice mechanisms can be used to aid the reform efforts of certain institutions by understanding and addressing past injustices, all these aforementioned objectives may possibly be achieved.

## 1.6 CONCLUDING REMARKS

The following country-specific discussions of South Africa and Kenya will therefore take place within the following analytical framework. It will be assessed, according to the objectives of judicial reform, to what extent the use of transitional justice mechanisms has contributed to judicial reform efforts in these cases. If these contributions are of a great or significant extent, then it can be concluded that it is important for the future development of legal systems in post-authoritarian and post-conflict states to confront the unjust past legacy of their judiciaries.

---

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

## CHAPTER 2

### TRUTH COMMISSIONS AND JUDICIAL VETTING

This chapter provides a theoretical analysis of how the use of the transitional justice mechanisms of truth commissions and vetting can contribute to achieving the objectives of judicial reform in post-authoritarian or post-conflict states.

#### 2.1 TRUTH COMMISSIONS

##### *2.1.1 Definition and purpose of a truth commission*

The UN Security Council report defines ‘truth commissions’ as:

official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations.<sup>70</sup>

Cobián and Reátegui argue that truth commissions enable ‘the record to be set straight’ and promote the acknowledgement of the abuses and social recognition for the abused.<sup>71</sup> Their view is that recovering the truth of what really happened

---

<sup>70</sup> Office of the United Nations High Commissioner for Human Rights ‘[The Rule of law and transitional justice in conflict and post-conflict societies](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement)’ available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> accessed on 16 May 2012.

<sup>71</sup> Rolando Ames Cobián and Félix Reátegui ‘Toward Systemic Social Transformation: Truth Commissions and Development’ in Pablo De Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (2009) 148.

serves as a cornerstone of justice and a triggering device for legal justice, reparations, and institutional reforms aimed at preventing massive abuses from ever happening again.<sup>72</sup>

This approach emphasises that not only justice for past crimes may be reached by a truth commission, but also the deactivation of the ‘political, institutional, social, and cultural mechanisms that made atrocious violence possible’.<sup>73</sup>

Cobián and Reátegui point out that truth commissions can be the perfect avenue to affect such a ‘deactivation’. This is because a truth commission process would have the weight of the new political order behind it and in a short period of time be able to focus ‘a high degree of democratic energies’.<sup>74</sup>

Ndulo and Duthie agree with this as they believe that truth commissions, in particular, could contribute to the development of a state’s legal infrastructure and re-establishment of the Rule of Law in several ways. These include revealing the role of the judicial system in past abuses and exposing compromised personnel, making specific recommendations to improve efficiency and effectiveness of the judiciary, promoting the Rule of Law by helping to fulfil international legal obligations, promoting a richer understanding of the Rule of Law, stimulating debates about what constitutes a ‘good society’, and promoting trust in the institutions of the judicial system.<sup>75</sup> Therefore, understanding and addressing the unjust past

---

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Cobián and Reátegui op cit note 71 at 146.

<sup>75</sup> Ndulo and Duthie op cit note 8 at 267.

record of a judiciary via a truth commission could help to install a new political culture and entrench the Rule of Law substantively in the new judicial institution.

### *2.1.2 The different types of 'truth' that can be ascertained*

It needs to be discussed how, by understanding and addressing the 'truth' of an abusive past institution's record, it can help to reform it. This depends on what type of 'truth' is established. Chapman and Ball in their article, 'Levels of Truth: Macro-Truth and the TRC', assert that there are two different types of 'truths' that a truth commission could be mandated to find. There is the 'macro-truth' which they define as 'the assessment of contexts, causes, and patterns of human rights violations'.<sup>76</sup> The type of accountability this type of 'truth' seeks to determine is 'a framework of understanding the structural causes of violence leading to an identification of the broader cause and intellectual authors of the abuse'.<sup>77</sup>

Then there is the 'micro-truth' which is the 'specifics of particular events, cases, and people'.<sup>78</sup> The type of accountability the 'micro-truth' establishes is 'the circumstances and the identification of the individuals, groups, or the units of the security or the armed forces that committed particular crimes'.<sup>79</sup>

Chapman and Ball explain that often truth commissions miss the 'bigger picture'. Whilst it is important for victims to identify their perpetrators and

---

<sup>76</sup> Audrey R. Chapman and Patrick Ball 'Levels of Truth: Macro-Truth and the TRC' in Audrey R. Chapman and Hugo van der Merwe (eds) *Truth and Reconciliation in South Africa: Did the Truth Deliver?* (2008) 144.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

detail their abuse, it is also important for them to understand ‘the context and causes of these crimes in order to place them in a broader context’.<sup>80</sup> They are of the opinion that to do this a truth commission ‘needs to assess how an entire legal, ideological, political, and military system was responsible for years or decades of human rights violations’.<sup>81</sup>

It is the establishment of this ‘macro-truth’ by a truth commission which would be useful to helping achieve judicial reform. This ‘macro-truth’ would help identify the causes and provide a framework for understanding what went wrong, and caused the breakdown of the Rule of Law. It is important not to view the process of a truth commission as a form of trial, where no perpetrators are punished for their improper conduct. Rather truth commissions should be seen as a forum, within which the causes of the human rights violations and abuses can be understood and addressed. This would help to prevent the human rights violations and abuses committed by a specific institution from re-occurring.

### *2.1.3 Acknowledgement and Reconciliation*

Truth commissions do not seek to punish those responsible for atrocities committed (and indeed do not have the authority to do so), but rather to achieve healing and reconciliation on an individual or national level. ‘National Reconciliation’ is achieved when ‘societal and political processes function and develop without reverting to previous patterns or the

---

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>81</sup> Ibid.

framework of conflict'.<sup>82</sup> To achieve this and help understand and address the legacy of an abusive judicial institution, a certain amount of participation in the establishment of the 'truth' or narrative by those responsible would be encouraged.

Chapman discusses in her article, 'Truth recovery through the TRC's institutional hearings process', that:

Reconciliation in post-conflict societies requires the open and shared acknowledgement of the injuries suffered and losses experienced, preferably accompanied by the willingness of those responsible to take responsibility and offer some sort of apology.<sup>83</sup>

She then quotes John Lederach who declared:

'Acknowledgement is decisive in the reconciliation dynamic. It is one thing to *know*, it is yet a very different social phenomenon to *acknowledge*.'<sup>84</sup>

To explain or deviate into the psychology behind this, Montville (an experienced practitioner and theorist in political conflict resolution) argues in his article, 'The healing function in political conflict resolution', that the acknowledgement of injustices committed is very important for political conflict resolution.<sup>85</sup>

---

<sup>82</sup> Eirin Mobikk 'Transitional Justice and Security Sector Reform: Enabling Sustainable Peace' (2006) 13 *Geneva Centre for the democratic control of armed forces (DCAF) Occasional Paper* 1 at 2.

<sup>83</sup> Audrey R. Chapman 'Truth recovery through the TRC's institutional hearings process' in Audrey R. Chapman and Hugo van der Merwe (eds) *Truth and Reconciliation in South Africa: Did the Truth Deliver* (2008)177.

<sup>84</sup> Chapman op cit note 83 at 178.

<sup>85</sup> J Montville 'The healing function in political conflict resolution' in J Sandole and H van der Merwe (eds) *Conflict Resolution and Practice: Integration and Application* (1993)112.

He is convinced that healing and reconciliation in ethnic or religious conflicts depends on a reciprocal exchange of contrition and forgiveness between aggressors and victims.<sup>86</sup> This process is an indispensable requisite for the forging of a new relationship between the parties, based on acceptance and reasonable trust.<sup>87</sup> This process depends on a 'joint analysis of the history of the conflict, recognition of injustices and resulting historic wounds, and acceptance of moral responsibility where due'.<sup>88</sup>

In his discussion of the importance of acknowledgement in this process Montville points out that it is often said that the opposite of love is not hate, but indifference.<sup>89</sup> Acknowledgment by the responsible party or institution of the injustices committed and their responsibility for these where due, is important. It confirms to the victims or sufferers that they are people with values and valued and unique identities.<sup>90</sup> It is an important step in establishing a working trust between the parties to the conflict.

If a truth commission is used in such a manner to understand and address the past historical record of the judicial institution, such a mechanism could help achieve certain objectives of judicial reform. Some form of acknowledgement, from the members of the relevant judiciary which has an unjust past record, of the role they played would be required for such a process to work. Participation from both sides in the truth commission process (those victimised and those responsible) could help legitimise the new judicial institution. A truth commission could assist in renewing civic

---

<sup>86</sup>Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Montville op cit note 85 at 115.

<sup>90</sup> Ibid.

trust in the judiciary, restoring the judiciary's compromised integrity, and entrenching, on a substantial level, the principles of the Rule of Law.

## 2.2 VETTING

Duthie defines vetting as a process:

aimed at screening public employees or candidates for public employment to determine if their prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions.<sup>91</sup>

This screening process may apply to screening current employees in an institution, and if their conduct does not meet applicable standards this could result in termination of their employment. It also applies to criteria to consider when hiring new employees for an institution.<sup>92</sup>

De Greiff maintains that there have been efforts to distinguish vetting processes from mass summary dismissals or purges of public institutions.<sup>93</sup>

They should be differentiated rather not because of the numerical quantity of dismissals that occur, but because of the different criteria used for vetting.<sup>94</sup>

Vetting relates to processes where the criterion for assessment is based on individual behaviour or conduct, which calls for individual review.<sup>95</sup> Mere membership of an organisation or political party is not a primary ground for

---

<sup>91</sup> Roger Duthie 'Introduction' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as prevention: Vetting Public Employees in Transitional Societies* (2007)17.

<sup>92</sup> Ibid.

<sup>93</sup> Pablo de Greiff 'Vetting and Transitional Justice' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as prevention: Vetting Public Employees in Transitional Societies* (2007) 524

<sup>94</sup> Ibid.

<sup>95</sup> de Greiff op cit note 93 at 524.

dismissal in a vetting process, but rather conditions relating to specific individual abusive behaviour.<sup>96</sup>

Vetting is a non-criminal sanctioning mechanism that is important as it ensures that even though individuals who are responsible for past abuses will not be criminally prosecuted, such individuals are at least excluded from public service.<sup>97</sup> In post-authoritarian or post-conflict situations, large scale obstacles often prevent the criminal prosecution of many abusers. Therefore, the possibility that they may no longer be employed provides a punitive sanction for their past abuses, as well as illustrating to the victims of abuse that the state recognises the harm they suffered at the hands of these people. For the abusers the loss of their income and the public disgrace for the loss of their job creates the punitive sanction.

The vetting of past abusers means that an institution is repopulated by completely new people. Whilst it serves well as a punitive sanction for past abusers, it is also primarily seen as a measure to reform abusive institutions (fulfilling the two-fold aims of transitional justice efforts).<sup>98</sup> If a state retains or hires abusive individuals it is unlikely that citizens (especially former victims of abuse) would trust the new institution. Citizens would not have many reasons to have confidence in the new institution and be able to believe that things have changed or that injustices would not continue.<sup>99</sup> Therefore, because past perpetrators have been removed from office or have

---

<sup>96</sup> Ibid.

<sup>97</sup> Alexander Mayer-Rieckh 'On Preventing Abuse: Vetting and Other Transitional Reforms' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as prevention: Vetting Public Employees in Transitional Societies* (2007) 484.

<sup>98</sup> Mayer-Rieckh op cit note 97 at 483.

<sup>99</sup> Mayer-Rieckh op cit note 97 at 485.

not been allowed to take office, this can help establish civic trust, as well as re-legitimising and strengthening the accountability of the reformed institutions.

One of the cautions in terms of vetting institutions in post-authoritarian or post-conflict situations is that it may eventuate that a large majority of the personnel in an institution are dismissed. Then a vacuum of capacity in terms of skills, experience and training may be created in the institution that was vetted. For that reason a practical balance must be found. A balance needs to be found between providing accountability for past abuses and preventing their reoccurrence, and the need for skilled and experienced personnel to continue to be present in those institutions so that they can still function.<sup>100</sup> Also, it must be ensured that the vetting procedures are done according to the rules of due process. If vetting processes are conducted unfairly this will severely undermine the re-establishment of the Rule of Law in such societies.<sup>101</sup>

It is therefore emphasised that the nature of the political conflict must be carefully considered before vetting is chosen as an option. In some political circumstances (such as the South African transition) due to the nature of the political settlement, vetting was not considered a viable option. In such situations other measures were used to understand and address the past legacy of the judicial institution. Whereas in Kenya, it was the specific transitional justice mechanism chosen to help facilitate reform within the judiciary.

---

<sup>100</sup> Mobikk op cit note 82 at 69.

<sup>101</sup> Mobikk op cit note 82 at 73.

### 2.3 CONCLUDING REMARKS

Ndulo and Duthie emphasise that the most important argument to be made on the matter is that the final impact of transitional justice mechanisms will be dependent on the other reforms to the judicial system, and other efforts related to the Rule of Law reformation and conflict transformation.<sup>102</sup> Hence, it is important that transitional justice mechanisms are used in conjunction with such other reform efforts to achieve the best final result.<sup>103</sup>

The next two chapters will evaluate the extent to which the transitional justice mechanisms of truth commissions and judicial vetting have contributed to achieving the objectives of judicial reform in South Africa and Kenya. Such evaluations will prove interesting in order to see how the theory discussed has been applied practically in these real-life cases.

---

<sup>102</sup> Ndulo and Duthie op cit note 8 at 271.

<sup>103</sup> Ndulo and Duthie op cit note 8 at 270.

## CHAPTER 3

### SOUTH AFRICA

#### 3.1 INTRODUCTION

The purpose of this chapter is to assess the extent to which the TRC Legal Hearing contributed towards achieving the objectives of judicial reform in post-Apartheid South Africa. However, it is not possible to assess the extent of this contribution without assessing the contributions of the other mechanisms used to achieve the objectives of judicial reform in South Africa at this time.

Judicial reform efforts in post-Apartheid South Africa must be seen in the light of four important mechanisms. These are: (1) The adoption of the Interim Constitution<sup>104</sup> in 1993; (2) The subsequent creation of the Constitutional Court ('the CC'), which heard its first case in 1995; (3) The adoption of the Final Constitution<sup>105</sup> in 1996, and (4) the TRC Legal Hearing that was held in October of 1996.

Ultimately, the TRC Legal Hearing's contribution will be weighed against those of the other three, in order to determine the full extent of its contribution to achieving the objectives of judicial reform.

---

<sup>104</sup> The Interim Constitution of the Republic of South Africa, 1993.

<sup>105</sup> The Constitution of the Republic of South Africa, 1996.

### 3.2 BACKGROUND INFORMATION

Apartheid has been described as 'the most systematic programme of racial segregation and oppression that the modern world has seen'.<sup>106</sup> It was a political policy of racial segregation and consequential racial discrimination which was embodied in a series of statutes that made up the Apartheid legislation.<sup>107</sup> This legislation was applied and enforced by the courts of law, turning the law into an instrument of oppression.<sup>108</sup> Due to this, the judiciary, as a sphere of government, was largely seen by the anti-Apartheid forces as being complicit in the Apartheid government's oppression of black South Africans.<sup>109</sup> The courts upheld unjust laws that discriminated on racial lines and resulted in many violations of fundamental human rights.<sup>110</sup> Rule by law certainly existed, but the Rule of Law had been severely eroded.

During this time the South African judiciary was almost exclusively white, male and conservative (with some notable exceptions).<sup>111</sup> In terms of the selection of judges, political considerations played an important part of the process.<sup>112</sup> There was definitely a history of political appointments to ensure compliance with the views of the executive.<sup>113</sup> Therefore, at the advent of

---

<sup>106</sup> MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *SALJ* 708 at 709.

<sup>107</sup> Such as the Bantu Education Act, prohibition against inter-racial marriages, pass laws, Group Areas Act and the Internal Security Act (which meant that from 1985-1987 South Africa was in an almost perpetual state of emergency).

<sup>108</sup> Duard Kleyn and Frans Viljoen *Beginner's guide for law students* 3 ed (2002) 37.

<sup>109</sup> *Ibid.*

<sup>110</sup> Such violations included: detention, arrest and incarceration without formal charges, .detainment without access to lawyers, families or medical attention' sopping of protests with excessive force, banning of many individuals and organisations, media censorship, and discrimination against black people in the courts and sentencing, as well as the imposition of the death penalty.

<sup>111</sup> Moerane *op cit* note 106 at 710.

<sup>112</sup> John Dugard *Human Rights and the South African legal order* (1978) 285.

<sup>113</sup> *Ibid.*

democracy in 1994, it was clear that reform of the judiciary was of vital importance.

### 3.3 THE DECISION MADE AGAINST THE VETTING OF THE APARTHEID JUDICIARY

It is important to remember that in South Africa prior to the 1994 transition, ‘political institutions were relatively well established (despite their exclusionary nature), civil society was strong, and local technical and legal capacity was highly developed.’<sup>114</sup> As a result, the legal capacity of South African courts had been highly developed during Apartheid times and post-Apartheid judicial reform efforts would therefore not have to focus on rebuilding an entire legal system. As the courts remained intact with a competent functioning capacity, the question arose of what would become of the judges remaining in office from the Apartheid regime.

Corder wrote of the matter:

The options were clear: retain them all; dismiss them all; reappoint them all, subject to a formal process; or dismiss them all, requiring those who wished to serve the future state to apply for reappointment according to the new method for selecting judges.<sup>115</sup>

However, the question remained as to which option should be taken. During the negotiations for the creation of the CC, certain things became clear to the

---

<sup>114</sup> David Pottie and Shireen Hassim ‘The politics of institutional design in the South African transition’ in Sunil Bastion and Robin Luckham *Can democracy be designed? The politics of institutional choice in conflict-torn societies* (2003) 60.

<sup>115</sup> Corder op cit note 6 at 260.

negotiators involved.<sup>116</sup> It was clear that whilst the new legislative and executive spheres of government would largely consist of different people, the judicial sphere would probably continue to be dominated (at least initially) by the same people as before.<sup>117</sup>

South Africa's democratic transition in 1994 was a product of political compromise, because by 1990 the Apartheid system could neither be sustained by the Apartheid government nor defeated by anti-Apartheid forces.<sup>118</sup> Therefore, in the negotiated political settlement, concessions were made on both sides. Both the NP and ANC had reasons to protect certain members of their organisations from possible legal prosecutions that could arise from certain conduct during Apartheid.<sup>119</sup> This resulted in the passage occasionally referred to as the 'postamble' to the Interim Constitution.<sup>120</sup> This ensured that a mechanism for amnesty in respect of 'acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past' was provided for.<sup>121</sup> In the TRC's final report (Volume 5) it detailed that 'lustration' was not appropriate in a South African context.<sup>122</sup> Therefore, the TRC chose specifically not to recommend the disqualification or removal from public office of those responsible for human rights violations under Apartheid.<sup>123</sup>

---

<sup>116</sup> Ibid.

<sup>117</sup> Currie and de Waal op cit note 32 at 274.

<sup>118</sup> Klaaren op cit note 1 at 149.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Klaaren op cit note 1 at 150

<sup>123</sup> Klaaren op cit note 1 at 151.

It is ventured that it was government policy during the transition for the ‘postamble’ in the Interim Constitution not only to provide amnesty from civil or criminal actions, but from any possible vetting processes as well.<sup>124</sup> Also, due to the strong legal position created by the newly formulated Bill of Rights, other constitutional mechanisms and strong labour law regulations, it is doubtful that any vetting mechanism would have succeeded.<sup>125</sup>

The main point to take from this is that it was obvious that vetting of the remaining judges from the Apartheid era was a ‘clear political nonstarter’.<sup>126</sup> Therefore, the judges of the Supreme Courts and the Appellate Division were allowed to continue in office.<sup>127</sup> The main reasons for this decision (apart from the fact that any vetting procedure was not an option) were the requirements of political continuity and practicality.

As part of the negotiated settlement and the need for as peaceful a transition to power as possible, there was a need for some semblance of political continuity.<sup>128</sup> The ANC and other anti-apartheid forces had for decades been touted by Apartheid propaganda as communist-inspired and terrorist revolutionaries. Therefore, the creation of some form of continuity was a crucial element in convincing those who had been in power, and were used to being in power, to yield it.<sup>129</sup>

---

<sup>124</sup> Klaaren op cit note 1 at 155.

<sup>125</sup> Klaaren op cit note 1 at 157.

<sup>126</sup> Klaaren op cit note 1 at 159.

<sup>127</sup> Hugh Corder ‘Towards a South African Constitution’ (1994) 57 *The Modern Law Review* 491 at 522.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

Another important fact was that the running of everyday criminal and civil trials had to continue.<sup>130</sup> Therefore, the running of these trials and cases could not be suspended until the Judicial Service Commission had had time to appoint or re-appoint new judges in the various divisions of the Supreme Court. If the judges from the Apartheid era were excluded as eligible candidates for the judiciary in the new dispensation, there would only be a small pool of suitable lawyers to draw possible candidates from.<sup>131</sup>

These factors, as well as the spirit of reconciliation amongst the negotiators, contributed to the judges of the Supreme Courts and the Appellate Divisions being allowed to continue in office, providing they swore an oath of allegiance to the new Constitution.<sup>132</sup> All the members of the ‘old’ judiciary subsequently did. Therefore, when the Interim Constitution was adopted in December 1993, Section 241 (2), entitled ‘Transitional arrangements: The Judiciary’, provided that all the judges holding office before the commencement of the Interim Constitution would continue to hold office.

Due to this fact, and the fact that vetting had been firmly ruled out as an option for dealing with the record of the judiciary under Apartheid, the holding of the TRC Legal Hearing was very important.

### 3.4 THE TRC LEGAL HEARING

For the purposes of this dissertation, the cumulative effect of the Legal Hearing shall be analysed through a certain lens. The focus of this lens will

---

<sup>130</sup> Corder *Judicial Authority* op cit note 6 at 260.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

be on which members of the judiciary participated in the Legal Hearing, and *how* their participation contributed to achieving the objectives of judicial reform in South Africa. The cumulative effect of the Legal Hearing will then be weighed against the contributions of the other mechanisms, as discussed above.

#### *3.4.1 Background to the Legal Hearing of the TRC*

In 1996 a human rights lawyer by the name of Krish Govender made a submission at a TRC Victim Hearing.<sup>133</sup> In his submission to the TRC he named the ‘victim’ as ‘The South African People’ and the ‘Nature of the Violation’ as ‘Injustice under the Apartheid Judiciary’.<sup>134</sup> Dyzenhaus confirmed that the debate this submission started led to the decision to hold a hearing for the legal sector.<sup>135</sup>

It is important to remember that the Legal Hearing did not form part of the Victims’ Hearings of the TRC, but rather the Institutional Hearings. The Institutional Hearings were the TRC’s major effort to deal with the structural elements of the Apartheid system and to assess the context, causes and patterns of human rights abuses that occurred in order to discover the so-called ‘macro-truth’.<sup>136</sup>

This can be seen in the TRC’s mandate under Section 3(1) (a) of the Promotion of National Unity and Reconciliation Act<sup>137</sup> that declares:

---

<sup>133</sup> Dyzenhaus op cit note 5 at 36.

<sup>134</sup> Ibid.

<sup>135</sup> Dyzenhaus op cit note 5 at 37.

<sup>136</sup> Chapman op cit note 83 at 147.

<sup>137</sup> 34 of 1995.

The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by.....*establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights* which were committed during the period from 1 March 1960 to the cut-off date.

Therefore, in order to understand and address the structural elements (and ascertain some form of ‘macro–truth’) of the Apartheid system, the TRC held six institutional hearings with the goal of achieving an understanding of the broader institutional context that facilitated or gave rise to the human rights violations under Apartheid.<sup>138</sup> Each sector chosen was selected because they had been the subject of accusations of complicity with the Apartheid system. The six sectors were the media, business and labour, prisons, the faith community, the health sector, and of course, the legal system.<sup>139</sup>

For each of the hearings, the TRC drew up a set of pertinent questions and invited all stakeholders from each sector and from all sides of the political equation to make oral or written submissions on the questions at hand.<sup>140</sup> Participants could, however, be selective as to which of the issues they addressed.

In the invitation issued to relevant stakeholders in the legal community, the TRC assured these stakeholders that the purpose of the hearing was not to establish individual guilt or responsibility, but to gain a better understanding

---

<sup>138</sup> Chapman op cit note 83 at 171.

<sup>139</sup> Ibid.

<sup>140</sup> Chapman op cit note 83 at 172.

of the role the Apartheid legal system played in contributing to past human rights violations and injustices.<sup>141</sup>

The TRC stated that in terms of the institutional hearings it was of crucial importance for both 'sides' to be present, so as to both be able to speak of their experiences and perceptions.<sup>142</sup>

It was clear that many NGO's, Human Rights lawyers and activists, and individuals and associations from within the legal community that had been heavily opposed to Apartheid, would definitely participate. It was, however, considered very important that the most senior institution responsible for applying Apartheid laws, the judiciary, should participate as well, especially given the fact that all of the 'old order' judiciary had remained in office after the transition.

The actual physical participation by members of the judiciary in the Legal Hearing was considered so vital that the draft programme issued five days before the actual hearing still had members of the judiciary scheduled to appear on the first day.<sup>143</sup> However, no judge from the old order or new presented themselves for questioning before the TRC, though some from both orders made written submissions to the TRC.<sup>144</sup>

---

<sup>141</sup> Truth and Reconciliation Commission of South Africa Report (Volume 4) *Institutional and Special Hearings* (1998) at 95.

<sup>142</sup> Truth and Reconciliation Commission of South Africa Report (Volume 4) *Institutional and Special Hearings* (1998) at 2.

<sup>143</sup> *Ibid.*

<sup>144</sup> Jonathan Klaaren 'The truth and reconciliation commission, the South African judiciary, and constitutionalism' 57 (1998) *African Studies* 198 at 201.

Both Archbishop Desmond Tutu and Professor Dyzenhaus<sup>145</sup> deplored the non-attendance of the members of the judiciary and the lack of taking or acknowledging responsibility for their conduct under Apartheid. At least one of the University Law Schools and the press in general also condemned the judges' refusal to give oral testimony.<sup>146</sup>

In his opening address to the Commission at the Legal Hearing, Professor Dyzenhaus argued that judges from the old order should be present at the hearing 'to answer to a charge of dereliction of duty'.<sup>147</sup>

### *3.4.2 The Judges' written submissions to the TRC*

In order to assess the extent of the contribution of the Legal Hearing to achieving the objectives of judicial reform, the contents and the authors of the judges' written submissions to the TRC need to be analysed.

A combination of 'old order' and 'new order' judges made written submissions. These submissions encompassed a range of opinions on the Apartheid legal order, opinions on the TRC process, and varied responses of acknowledgement, contrition, and justification towards the conduct of members of the judiciary during Apartheid.

Dyzenhaus ventured that due to the physical absence of any 'new order judges' like Justice Mahomed, or 'old order judges' like Former Chief

---

<sup>145</sup> Professor of Law and Philosophy at the University of Toronto, author of a book about the Legal Hearing *Judging the Judges: Judging Ourselves*, and opening speaker at the TRC's legal hearing.

<sup>146</sup> Klaaren op cit note 144 at 201.

<sup>147</sup> Dyzenhaus op cit note 5 at 31.

Justice Corbett at the Legal Hearing, it was ‘almost inevitable that no judge who had enthusiastically served the old order would come forward’.<sup>148</sup>

Dyzenhaus wrote of these judges’ silence in response to the call for their accountability:

one can safely venture that many of those judges feel they have nothing to apologise for, that they would have attended only if an oral submission threatened to make a compelling case for their submission.<sup>149</sup>

The first written submission was made by Judge Michael Corbett<sup>150</sup> (at that time Chief Justice) in direct response to Govender’s Victims’ Hearing contribution.<sup>151</sup> Upon analysis of Corbett’s submission it is clear that he was quite defensive about the judiciary’s record under Apartheid. Corbett admitted that it would be ‘foolish’ to claim that the courts did all they could have done under Apartheid, but that ‘the broad picture is, in my estimation, a favourable one and very different from that portrayed by Mr Govender’.<sup>152</sup> He defended the ‘bad spots’ on the judiciary’s Apartheid record on the grounds of the fact that Parliament was supreme, and hence judges were bound to interpret the law as they found it.<sup>153</sup> He felt strongly that judges should not have to ‘account’ to the TRC on the grounds that it would involve ‘re-trying’ cases, and therefore be very ‘impractical’.<sup>154</sup> He also felt that any type of ‘accounting’ to the TRC would severely undermine the

---

<sup>148</sup> Dyzenhaus op cit note 5 at 41.

<sup>149</sup> Ibid.

<sup>150</sup> Described by Dyzenhaus as ‘one of the few judges of the old era, and one of a small minority in the old order Appellate Division, who had consistently displayed his genuine commitment to the rule of law’.

<sup>151</sup> Dyzenhaus op cit note 5 at 37.

<sup>152</sup> Truth and Reconciliation Commission ‘The Truth and Reconciliation Commission, and the bench, legal practitioners and legal academics: written presentations’ (1998) 115 *SALJ* 15 at 18.

<sup>153</sup> Dyzenhaus op cit note 5 at 46.

<sup>154</sup> Truth and Reconciliation Commission op cit note 152 at 21.

independence of the judiciary, as in his view, members of the judiciary should not have to account to parliament or a commission.<sup>155</sup> Corbett did not express any form of apology for judicial conduct under Apartheid.

The next submission made was a joint submission by five judges from the old and new order. The judges representing the ‘new order’ were: Arthur Chaskalson (President of the CC), Ismail Mahomed (Chief Justice), and Pius Langa (Deputy President of the CC).<sup>156</sup> The ‘old order’ were represented in this submission by H J O van Heerden (Deputy Chief Justice), and again Michael Corbett (Former Chief Justice).<sup>157</sup> The contributions of Mahomed and Langa were of special importance, as they were submissions from two high-ranking black judges. Justice van Heerden’s contribution was also of special relevance, as Dyzenhaus described him as:

a respected though conservative member of the old order Appellate Division, who had dissented twice when he found himself on Rabie’s Emergency Team<sup>158 159</sup>.

This submission was very important because its contents were legitimised by being a combined opinion of both high-ranking new and old order judges. This submission offered an institutional analysis of the situation, in that it provided an in-depth structural and clinical perspective of the legal system’s and judiciary’s role in upholding and maintaining the Apartheid system. It

---

<sup>155</sup> Ibid.

<sup>156</sup> Truth and Reconciliation Commission op cit note 152 at 21.

<sup>157</sup> Dyzenhaus op cit note 5 at 40.

<sup>158</sup> ‘Rabie’s Emergency Team’, refers to Justice PJ Rabie, who was Chief Justice from 1982 -1989. During the years of 1985 – 1990, an almost perpetual ‘State of Emergency’ was declared in South Africa. All civil liberties were suspended, and Justice Rabie led a team of judges in the Appellate Division which upheld most of the Emergency legislation. This resulted in many injustices and human rights violations occurring.

<sup>159</sup> Dyzenhaus op cit note 5 at 55.

embodied the very essence of an official statement by the judiciary of South Africa (crafted by old and new order judges, of different backgrounds and races) in response to the invitation by the TRC.

This submission presents the opinion that it is important for the purpose of the future development of the legal system, to understand the role played by the judiciary during the Apartheid regime.<sup>160</sup> These five judges directly acknowledged that the law was one of the main mechanisms by which human rights violations occurred under Apartheid.<sup>161</sup> They also acknowledged that more often than not, judges did not adopt statutory interpretations that favoured the protection of fundamental human rights.<sup>162</sup> These judges held that this acknowledgement was ‘pivotal’ for the future development of the legal system.<sup>163</sup> They believed that it was not ‘an end in itself’, but a pre-requisite for all judges of the present and future to undertake, in order to fully discharge their constitutional responsibilities.<sup>164</sup>

This submission represented a good ‘macro-historical’ analysis of the legal system and the judiciary’s role in upholding and maintaining Apartheid, and the pivotal nature of this role. However, it is an impersonal submission that is devoid of contrition or some form of apology for the judiciary as a whole.

---

<sup>160</sup> Truth and Reconciliation Commission op cit note 152 at 22.

<sup>161</sup> Truth and Reconciliation Commission op cit note 152 at 25.

<sup>162</sup> Truth and Reconciliation Commission op cit note 152 at 31.

<sup>163</sup> Truth and Reconciliation Commission op cit note 152 at 35.

<sup>164</sup> Truth and Reconciliation Commission op cit note 152 at 35.

The next submission was made by members of the Supreme Court of Appeal (hereafter referred to as the “SCA”): Justice J W Smalberger, Justice C T Howie, Justice R M Marais and Justice D G Scott.<sup>165</sup>

Dyzenhaus highlights it is important to note that, although these were all ‘old order judges’, ‘none of the judges involved in drafting the Smalberger *et al.*’s submission had been part of Rabie’s emergency team’.<sup>166</sup>

These judges did not see value in evaluating the role the legal system had played in upholding Apartheid and its associated injustices. The tone is defensive, with an underlying current of irritation of having been summoned in this manner, to confront the past record of the Apartheid judiciary. It must be remembered that the Legal Hearing took place approximately three and half years after South Africa’s transition to democracy. Therefore, the stance this submission has taken is that due to the adoption of the Constitution and the CC, the past has been dealt with and compensated for effectively.

Whilst this submission acknowledged that the Apartheid judiciary’s record was not ‘perfect’, it defended the judiciary’s record on several bases. The submission justified the record on the basis that the Apartheid judiciary was functioning in an ‘undemocratic system’, where Parliament was supreme<sup>167</sup>, and that ninety-five percent of the work that judges were exposed to were not ‘racial’ laws.<sup>168</sup> This submission rationalised that, despite the shortcomings and injustices of the Apartheid system, everyday life had to go

---

<sup>165</sup> Truth and Reconciliation Commission op cit note 152 at 42.

<sup>166</sup> Dyzenhaus op cite note 5 at 61.

<sup>167</sup> Truth and Reconciliation Commission op cit note 152 at 42.

<sup>168</sup> Truth and Reconciliation Commission op cit note 152 at 45.

on.<sup>169</sup> Therefore, even though many judges who took up appointments to the bench were at odds with the morals of the political system, if they had refused such appointments, total chaos would have reigned and even more injustices would have occurred.<sup>170</sup>

These judges did concede that the fact that no persons of colour were appointed to the Supreme Court was indefensible and regrettable.<sup>171</sup> These judges included themselves amongst those who believed more could, and should, have been said and done to prevent the injustices created by Apartheid. They were also of the view that the judiciary was not free from any blame for the role it played in the period under review, but that the substantial contribution it did make during that era should not be denigrated by the TRC process.<sup>172</sup>

Therefore there was acknowledgement of the role that the judiciary played, yet no apology or real contrition was expressed. What these judges had displayed was deep unwillingness to face up to the past record of the judiciary under Apartheid, and when they did face it, they attempted to justify and defend that record.

In addition to his contribution to the Chaskalson *et al.* submission, Justice Langa made an individual submission that was personal and moving. Amongst many things, he recounted the harshness and injustice of the legal system and how the pass-laws severely violated the dignity of black

---

<sup>169</sup> Truth and Reconciliation Commission op cit note 152 at 44.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Truth and Reconciliation Commission op cit note 152 at 50.

people.<sup>173</sup> In direct contrast to the Smalberger *et al* submission, he believed that the restoration of trust by the public in the judiciary was not something that could be assumed because of the creation of a new Constitution.<sup>174</sup> Langa believed that a further process had to take place in order to reassure the formerly oppressed about the judiciary's rededication to justice for all.<sup>175</sup>

Justice WP Schutz, who was appointed to the SCA in 1995, wrote the next submission and aligned himself with the Smalberger *et al.* submission.<sup>176</sup> He felt that further investigation into the Apartheid Judiciary's record would prejudice the future, even though the past was wrong and undesirable.<sup>177</sup>

Justice Ackermann (who was appointed as a CC Judge in 1994) made a more personal submission to the TRC, in which he said he was very moved by Langa's submission.<sup>178</sup> He endorsed the Chaskaslon *et al.* submission as well.<sup>179</sup> Ackermann was a judge from the old order who resigned from the bench in 1987 as a matter of conscience, as he had declared that he could no longer be a judge in a system that did not treat all human beings as equals.<sup>180</sup> In his submission he stated that he believed that in the past he had not done enough and he acknowledged and regretted these failures.<sup>181</sup> He said that he wanted to personally apologise for these failures.

---

<sup>173</sup> Truth and Reconciliation Commission op cit note 152 at 39.

<sup>174</sup> Truth and Reconciliation Commission op cit note 152 at 37.

<sup>175</sup> Truth and Reconciliation Commission op cit note 152 at 37.

<sup>176</sup> Truth and Reconciliation Commission op cit note 152 at 50.

<sup>177</sup> Truth and Reconciliation Commission op cit note 152 at 50.

<sup>178</sup> Truth and Reconciliation Commission op cit note 152 at 51.

<sup>179</sup> Ibid.

<sup>180</sup> Truth and Reconciliation Commission op cit note 152 at 53

<sup>181</sup> Truth and Reconciliation Commission op cit note 152 at 54.

In another submission, Justice Goldstone (a member of the bench since 1980) endorsed the Chakaslou *et al* submission and said he deeply regretted that he did not do enough to resist apartheid in his legal career and on the bench.<sup>182</sup> He gave the submission in order to personally acknowledge the role the legal system played in upholding Apartheid and its associated injustices.<sup>183</sup>

Justice Friedman (the then Judge President of Cape High Court) and whom Dyzenhaus describes as a ‘liberal old order judge’<sup>184</sup>, also gave a submission. He provided that, ‘here it must be acknowledged that by and large, prior to 1990, the judiciary's record was indefensible.’<sup>185</sup>

Justice Edwin Cameron (a new order judge under Nelson Mandela, and a celebrated human rights lawyer prior to that) also made a submission. He felt that ‘the complicity of all judges who held office under apartheid is therefore incontestable’.<sup>186</sup>

Two other judges of the old order also gave short submissions to the TRC. Justice Eloff, the then Judge President of the Transvaal Provincial Division (and an old order judge) aligned himself with Corbett’s original submission and called the TRC Legal Hearing a ‘meaningless exercise’.<sup>187</sup> Judge CS

---

<sup>182</sup> Truth and Reconciliation Commission op cit note 152 at 56.

<sup>183</sup> Truth and Reconciliation Commission op cit note 152 at 56.

<sup>184</sup> Dyzenhaus op cit note 5 at 63.

<sup>185</sup> Truth and Reconciliation Commission op cit note 152 at 61.

<sup>186</sup> Edwin Cameron ‘Submission on the role of the judiciary under Apartheid’ (1998) 115 *SALJ* 436 at 436

<sup>187</sup> Truth and Reconciliation Commission op cit note 152 at 64.

White (another old order judge) held that the judicial record under Apartheid was impeccable.<sup>188</sup>

### *3.4.3 The actual contribution of the TRC Legal Hearing*

Upon analysis of the judges' submissions to the TRC, there are two opposing schools of thought represented. A clear divide existed between those judges who viewed understanding and acknowledging the judiciary's complicity in Apartheid's injustices as useful for the legal system's future development and those who did not.

There were judges who believed that the adoption of the Constitution and the creation of the CC were enough to compensate for the past record of the Apartheid judiciary. Thus, directly confronting the past record was unnecessary.

However, it is specifically stated by respected sources, (Haysom, Langa and Dyzenhaus etc.), that the creation of the Constitution and CC was not enough and more had to be done.

It is submitted that neither the forms 'acknowledgement' present nor the judicial participation levels achieved by the judges' submissions would be sufficient for Montville's purposes of achieving some form of political reconciliation. Whilst the Legal Hearing did explore the contribution of the legal system as a whole to the injustices committed under Apartheid, it can barely be described as a 'joint analysis' of the historical record. Despite these factors, it is still important that the Legal Hearing happened. Although

---

<sup>188</sup> Truth and Reconciliation Commission op cit note 152 at 65.

no judges came in person, or no judges who zealously served the Apartheid government even gave written submissions, or that within the written submissions there was more justification than contrition, the whole process was definitely not in vain.

In April of 2010, in celebration of the South African Judiciary being one hundred years old, Justices Langa and Cameron wrote a chronology of the South African judiciary's journey and so addressed the non-appearance of the judges at the TRC hearing, by writing:

While the written submissions (including submissions by each of us) had significant value, we think the judiciary's decision to stay out of the TRC was wrong.<sup>189</sup>

They explained the judiciary's physical absence by saying many members feared participation would be dangerous as at the time a distinct difference existed between law and politics, and that the Legal Hearing would be 'stalking horse' for personal scores.<sup>190</sup> Langa and Cameron wrote that they regretted the decision made by leaders of the judiciary not to appear, as:

Their participation [the leaders of the judiciary] would have legitimated both the TRC and the judiciary itself. It would have countered the perception that judges viewed themselves as somehow separate from and above the politics of the rest of the country.<sup>191</sup>

Dyzenhaus wrote that whatever level of participation occurred, and however imperfect it was, it still contributed to the creation of a historical archive. It

---

<sup>189</sup> Pius Langa and Edwin Cameron 'The Constitutional Court and Supreme Court of Appeal after 1994' (2010) 23(1) *Advocate* 28 at 30.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

did this by telling the story of the Apartheid judiciary's contribution (good or bad) as a whole and by exposing the 'raw pain' that had occurred which nobody could deny in the future.<sup>192</sup> He wrote 'an archive has an independence and potential which escapes the control of any contributor to it.'<sup>193</sup>

Therefore, whilst the Legal Hearing did not achieve its full potential, it did create a narrative with some form of participation from both sides of the political equation.

This narrative or archive helps one gain an understanding of *how* the Rule of Law deteriorated during Apartheid and *how* many legal injustices occurred (thereby helping restore the Rule of Law). Therefore, it is concluded that the TRC Legal Hearing contributed to the re-establishment of the Rule of Law on a substantive level. This is because it furthered the understanding of the truth of what went wrong under Apartheid, it upped public awareness of the subject, stimulated debate, and it compelled some members of the judiciary to officially acknowledge, via written statement, the role which the Apartheid judiciary played in the past injustices of that time.

### 3.5 OTHER MECHANISMS THAT HELPED ACHIEVE THE OBJECTIVES OF JUDICIAL REFORM

The TRC Legal Hearing occurred last in the sequence of mechanisms that mainly contributed to judicial reform efforts in post-Apartheid South Africa. The Interim Constitution, the CC and the Final Constitution had all made

---

<sup>192</sup> Dyzenhaus op cit note 5 at 178.

<sup>193</sup> Dyzenhaus op cit note 5 at 180.

their mark before the Legal Hearing was held. As can be seen throughout the judges' submissions to the TRC at the Legal Hearing, some thought that in this light, the holding of the Legal Hearing was entirely pointless. In order to determine if there is any strength to this argument, the actual extent of the Legal Hearing's contribution needs to be compared with the contributions of the Interim Constitution, the CC and the Final Constitution.

### 3.6 THE CONTRIBUTION OF THE INTERIM CONSTITUTION

South Africa's transition to democracy was unique in that the transition of power took place within a carefully constructed constitutional framework.<sup>194</sup> The Interim Constitution was seen as a 'transitional instrument' because it brought about the demise of the Tri-cameral Constitutional system and the Apartheid regime it upheld.<sup>195</sup> The Interim Constitution accomplished several important changes. The first major change that occurred was the transforming of South Africa's political system from a system of parliamentary supremacy to one of constitutional supremacy, with the Constitution becoming the supreme law of the land.<sup>196</sup> It was now a justiciable Constitution which meant that the courts were mandated to enforce the Constitution, even to the point of 'striking down decisions of the democratically elected legislature'.<sup>197</sup> The role of the judicial institution in South Africa's constitutional and political order was also changed.<sup>198</sup> This

---

<sup>194</sup> Jan Erik-Lane and Murray Faure 'Introduction' in Murray Faure and Jan-Erik Lane (eds) *South Africa: Designing new political institutions* (1996) 1.

<sup>195</sup> Currie and de Waal op cit note 32 at 64.

<sup>196</sup> Corder *South African Constitution* op cite note 127 at 511.

<sup>197</sup> Ibid.

<sup>198</sup> Currie and de Waal op cit note 32 at 156.

change to a system of constitutional supremacy resulted in a shift of power away from the legislature and executive, to that of the judiciary.<sup>199</sup>

### 3.7 THE CONTRIBUTION OF THE CC

Due to the fact that the composition of the South African judiciary was going to, at least initially, largely remain unchanged in the new dispensation, the creation of the new CC became of utmost importance.<sup>200</sup> The CC was not only envisaged as the ‘designated guardian, protector, and enforcer of the Constitution’, but also as the ‘institutional embodiment of South Africa’s new democracy’.<sup>201</sup> It also represented a decisive break from the past, not only in terms of doctrine, but in terms of its personnel.<sup>202</sup> At the negotiating rounds for the creation of the CC, the anti-Apartheid forces were determined that the members of the new CC were at least to be selected and appointed afresh, bringing much needed new blood to the Bench.<sup>203</sup>

During these negotiations, the members of the former Apartheid government and judiciary tried to ensure that the power of the old court system was not usurped by the creation of this new one. One of the prime issues discussed during the CC creation debates was whether the CC would be a separate court from the Appellate Division (the former highest court). The Law Commission and the Department of Justice (on behalf of the old South African government) both favoured the view that the CC should be set up as

---

<sup>199</sup> Corder *South African Constitution* op cite note 127 at 526.

<sup>200</sup> Klaaren op cit note 1 at 159.

<sup>201</sup> Richard Spitz and Mathew Chaskalson *The Politics of Transition* (2000) 191.

<sup>202</sup> Klaaren op cit note 1 at 159.

<sup>203</sup> Ibid.

a fully fledged chamber of the Appellate Division of the Supreme Court.<sup>204</sup> The Department of Justice's view was that professional judges from the existing Apartheid legal system were more competent than anyone else to be appointed as CC judges. If the CC was an additional chamber to the Appellate Division, the CC judges should be appointed in the same manner as Appellate Division members.<sup>205</sup>

The ANC and other progressive organisations, as well as the Technical Committee for Constitutional Issues, favoured the idea of the CC being a separate court from the Appellate Division.<sup>206</sup>

On 12 November 1993 the government and the ANC presented a document on Chapter 7 of the Interim Constitution agreed in bilateral talks. This document stated that the CC would be a separate court from the Appellate Division.<sup>207</sup> The CC was vested with exclusive constitutional jurisdiction over constitutional matters and with the sole power to strike down legislation or executive conduct that was not in line with the Constitutional principles.<sup>208</sup>

The Appellate Division was afforded no constitutional jurisdiction.<sup>209</sup> This has been called 'an effective sanction for its track record in the protection of fundamental rights'.<sup>210</sup> The Appellate Division remained the court of final

---

<sup>204</sup> Spitz and Chaskalson op cit note 201 at 192.

<sup>205</sup> Ibid.

<sup>206</sup> Spitz and Chaskalson op cit note 201 at 193.

<sup>207</sup> Spitz and Chaskalson op cit note 201 at 197.

<sup>208</sup> Langa and Cameron op cit note 189 at 29.

<sup>209</sup> Ibid.

<sup>210</sup> Corder *Judicial Authority* op cit note 6 at 260.

instance for all civil and criminal matters. The ordinary courts were granted limited constitutional jurisdiction.<sup>211</sup>

Haysom<sup>212</sup> wrote in an article entitled ‘A Constitutional Court for South Africa’ published in 1991, that the CC is the foremost guardian of the Constitution.<sup>213</sup> It symbolises a clean break from the past, and creates a distance from the previous political order.<sup>214</sup> He noted that in other post-authoritarian states that had created Constitutional Courts in their new democracies (for example Germany, Spain and Italy), much caution was taken when judicial appointments were made for these new Constitutional Courts.<sup>215</sup> These states had to be careful that there were no suspicions of any links between the roles that any judges appointed played under the previous despotic dictatorships and the roles these judges played in the new Constitutional Courts.<sup>216</sup> Interestingly though, it is ventured that this is not nearly as important a factor in terms of the adjudication of non-constitutional matters.<sup>217</sup> The CC, therefore, should be a factor of unity and not discord and division in the new South Africa. In summary, Haysom felt that the creation of the CC would be able to reform the prevailing inadequacies of the current legal system, by ‘allowing for more appropriate appointments, a more representative bench’.<sup>218</sup> As a result of this, a bench would exist that was ‘better equipped to foster and develop a human rights culture’.<sup>219</sup>

---

<sup>211</sup> Spitz and Chaskalson op cit note 201 at 197.

<sup>212</sup> Nicholas Haysom, human rights lawyers, former Professor of law at Wits, and former legal advisor to President Nelson Mandela.

<sup>213</sup> NRL Haysom ‘A CC for South Africa’ (1991) 14 *CALS Occasional Paper* 2 at 12.

<sup>214</sup> Haysom op cit note 213 at 17.

<sup>215</sup> Haysom op cit note 213 at 18.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Langa and Cameron op cit note 189 at 29.

From the start, the CC was a firm catalyst for judicial reform efforts and ‘reflected a new direction for the judiciary’.<sup>221</sup> Judicial appointments to the CC started the process of personnel turnover that would slowly transform the composition of the judiciary.<sup>223</sup>

The eleven members of the CC were finalised in mid-October of 1994. This Bench was far more representative in terms of race, gender and life experience.<sup>224</sup> Arthur Chaskalson (a celebrated human rights lawyer and ANC sympathiser) was appointed by President Mandela (upon consultation with his Cabinet and the then Chief Justice Corbett), as President of the CC.<sup>225</sup> Four of the judges had to be appointed from amongst the ranks of existing Supreme Court judges.<sup>226</sup> The other six appointments were made by the President in consultation with the Cabinet, and after consultation with the President of the CC, from a list prepared by the Judicial Services Commission (discussed in more detail under the next heading).<sup>227</sup> The Judicial Service Commission tendered its list of candidates after a vigorous round of public interviews.<sup>228</sup> The four Justices chosen from the ranks of the Supreme Court were Ackermann, Goldstone, Madala and Mahomed.<sup>229</sup> The Justices chosen from the JSC’s list were Didcott, Kriegler, Langa, Mokgoro, O’Regan and Sachs.<sup>230</sup> It appeared that no judges who were very

---

<sup>221</sup> Ibid.

<sup>223</sup> Klaaren op cit note 1 at 160.

<sup>224</sup> Ibid.

<sup>225</sup> Kieron O’Malley ‘The Constitutional Court’ in Murray Faure and Jan-Erik Lane (eds) *South Africa: Designing new political institutions* (1996) 83.

<sup>226</sup> Section 99(3) of the Interim Constitution of South Africa, 1993.

<sup>227</sup> Section 99(4) of the Interim Constitution of South Africa, 1993.

<sup>228</sup> Langa and Cameron op cite note 189 at 30.

<sup>229</sup> O’Malley op cit note 225 at 84.

<sup>230</sup> Ibid.

conservative or had anti-ANC views were considered by the JSC for appointment.<sup>231</sup>

In terms of the Final Constitution, certain changes were made to the jurisdiction of the CC. This was to account for the fact that it was proving difficult to define a clear divide between constitutional and other matters.<sup>232</sup>

In terms of the Final Constitution, the CC now shares much of its previously exclusive constitutional jurisdiction with the SCA and High Courts. It acts as a court of exclusive jurisdiction to the certain subject-matters of constitutional disputes between organs of state or national and provincial governments; disputes over constitutionality of provincial or Parliamentary bills; determining whether Parliament or the President has failed to comply with their constitutional duty; and the certification of provincial constitutions.<sup>233</sup> The CC also hears appeals from other courts concerning constitutional and other issues. Due to the Seventeenth Constitutional Amendment<sup>234</sup> promulgated in February of 2013, the ambit of the CC's jurisdiction has increased. Section 167(3) of the Constitution has been substituted with the following provision:

(3) The Constitutional Court –

(a) is the highest court [in all constitutional matters] of the Republic;

And

(b) may decide [only] –

(i) constitutional matters [ and issues connected with decisions on constitutional matters]; and

---

<sup>231</sup> Ibid.

<sup>232</sup> Langa and Cameron op cite note 189 at 30.

<sup>233</sup> Currie and de Waal op cit note 32 at 280.

<sup>234</sup> Constitution Seventeenth Amendment Act, 2012.

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court; and

(c) makes the final decision whether a matter is [a constitutional matter or whether an issue is connected with a decision on a constitutional matter] within its jurisdiction.

Therefore the CC can now function as a court of general jurisdiction in the circumstances as referred to in Section 167(3) (b) (ii).

Section 167 (5) of the Final Constitution requires that any order made by any of the High Courts of the SCA on whether any Act of Parliament, or Provincial Act, or conduct of the President is invalid will only have force when that order is confirmed by the CC.<sup>235</sup>

The CC has been seen as a ‘crown jewel’ of the new court system and constitutional dispensation. In the CC’s first judgment of *S v Makwanyane*<sup>236</sup>, it dismantled one of the most harrowing and controversial trademarks of Apartheid, the death penalty.<sup>237</sup> This decision showed immediately that the new CC would play an important role in the new South Africa by adjudicating upon issues that had political, social and economic consequences, as well as legal ones.

However, the attainment of all hopes and goals in the arena of judicial reform could not be achieved by the creation of one new court alone. Haysom quoted Johan van der Westhuisen saying that, ‘a Constitutional

---

<sup>235</sup> Ibid.

<sup>236</sup> 1995 (2) SACR 1. Hereafter referred to as *S v Makwanyane*

<sup>237</sup> *S v Makwanyane* at 1.

Court cannot save a nation without a will to be democratic'.<sup>238</sup> It was simply not enough to hold a seriously divided society together. Therefore according to Haysom, the mere creation of a new CC for South Africa was not enough to compensate entirely for the legal injustices that had occurred during the Apartheid era.

### 3.8 THE CONTRIBUTION OF THE FINAL CONSTITUTION

The Final Constitution of the Republic of South Africa was first adopted by the Constitutional Assembly on 8 May 1996 and was signed into law on 10 December 1996. This document was instrumental for the reformation of the judiciary. Its adoption was of vital importance for achieving the objectives of judicial reform in South Africa as discussed below.

#### *3.8.1 The principles of the Rule of Law, Separation of Powers, and Judicial Independence*

The principles of the Rule of Law, Separation of Powers, and Judicial Independence are all enshrined in the Final Constitution. The Rule of Law is one of the founding provisions of the Final Constitution.<sup>239</sup>

The principle of the Separation of Powers was enshrined specifically in Constitutional Principle VI of the Interim Constitution. This principle is not specifically stated as such in the Final Constitution, but is recognised under various provisions: Section 165 vests the judicial authority in the courts; Sections 85 and 125 vest the executive authority on a national level to the President and on a provincial level to the Premiers; Section 43 vests the

---

<sup>238</sup> Haysom op cit note 213 at 30.

<sup>239</sup> Section 1(c) of the Constitution of the Republic of South Africa, 1996.

legislative authority on a national level to Parliament and on a provincial level to Provincial legislatures.<sup>240</sup>

The principle of judicial independence is guaranteed by various provisions in the Final Constitution. Section 165 of the Constitution provides that ‘The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’. The section further supplies that no person or organ of state may interfere with the functioning of the courts.

Having these principles entrenched as fundamental by the Final Constitution has contributed to achieving these objectives of judicial reform efforts.

### *3.8.2 The Judicial Service Commission*

Under the Apartheid regime the executive had distinctive control over the appointment of Supreme Court judges, as the Supreme Court judges were appointed by the President acting on the advice of the cabinet.<sup>241</sup> During the negotiations for the creation of the CC, the Technical Committee had proposed that an all-party parliamentary committee, chosen from amongst members of the newly elected Legislature, should be selected.<sup>242</sup>

This parliamentary committee would assist in the appointment of CC judges. Both the ANC and the NP government had, however, objected to this proposal because they wished for the practice of executive appointment of

---

<sup>240</sup> Ibid.

<sup>241</sup> Currie and de Waal op cit note 32 at 301.

<sup>242</sup> Heinz Klug *Constituting democracy: Law, Globalism, and South Africa's political reconstruction* (2000) 137.

judges to continue.<sup>243</sup> This previous appointment procedure had obviously not been successful due to there being a history of political factors favoured over merit, when judicial appointments were considered.<sup>244</sup>

Therefore, as provided for in the Interim Constitution and confirmed by the Final Constitution, the appointment of judges no longer remains solely in the hands of the executive. Now it is a participatory process that involves the Judicial Service Commission (JSC). In terms of composition, the twenty-three members of the JSC consist of ten members of Parliament, the Minister of Justice, four members appointed by the President (after consulting with leaders of the political parties in the National Assembly), and the remaining represent the judiciary and legal profession.<sup>245</sup>

As per Section 174(3) of the Constitution:

The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

In terms of appointing judges to the CC, the JSC draws up a list of possible choices (the list must comprise of three more names than number of posts to be filled).<sup>246</sup> Should the President consider the nominees unacceptable, he/she may (whilst providing reasons) request the JSC to supplement the

---

<sup>243</sup> Currie and de Waal op cit note 32 at 301.

<sup>244</sup> Currie and de Waal op cit note 32 at 301.

<sup>245</sup> Ibid.

<sup>246</sup> Section 174(4) (a) of the Constitution of the Republic of South Africa, 1996.

list.<sup>247</sup> After consulting with the Cabinet, the Chief Justice, and leaders of the political parties in the National Assembly, the President then makes his/her selection.<sup>248</sup>

After consulting with the JSC, the President also appoints the President and Deputy President of the SCA. Other judges of the superior courts (SCA and High Courts) are chosen on the basis of recommendations made by the JSC. The President is bound to accept the JSC's recommendations for the appointments and therefore does not have control over appointments of superior court judges.<sup>249</sup> The public may attend the interviews of nominees by the JSC, but they cannot participate in the choosing of who becomes a new judge.<sup>250</sup> Therefore, the appointment of judges is now open and transparent and not cloaked in mystery as it was under Apartheid.<sup>251</sup>

In its functions as described above, the JSC can be seen as a 'personnel-selection institution' of sorts, as it has played a vitally important role in staffing the CC and members of the other courts since the advent of democracy.<sup>252</sup>

Clearly, the selection criteria the JSC follow to recommend nominees for appointment is very important. Section 174 (2) of the Final Constitution provides that:

---

<sup>247</sup> Section 174(4) (b) of the Constitution of the Republic of South Africa, 1996.

<sup>248</sup> Section 174(4) of the Constitution of the Republic of South Africa, 1996.

<sup>249</sup> Currie & de Waal op cit note 32 at 304.

<sup>250</sup> Ibid.

<sup>251</sup> Moerane op cit note 106 at 712.

<sup>252</sup> Klaaren op cit note 1 at 160.

The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

One no longer has to be a practising advocate (though this is the norm) to be considered eligible to be a judge. Section 174 provides that ‘any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer’. However, any person to be appointed to the CC must also be a South African citizen. Such measures have been created so as to widen the pool of eligible candidates for judicial appointments from ranks such as experienced and senior attorneys, legal academics and magistrates.

Clearly, it is important to transform the judiciary from a race and gender perspective, yet the quality of the judicial candidates selected is very important too (especially for purposes of judicial reform, and maintaining the Rule of Law).

Firstly, candidates recommended for appointment must have the capability and skills to perform judicial functions. It has ‘almost hardened into a rule’ that candidates should have acted preferably (though not imperatively) in the Division within which they seek appointment.<sup>253</sup> This will demonstrate to the JSC whether they have the necessary motivation and industry to dispense justice ‘effectively, efficiently, and without delay’.<sup>254</sup>

---

<sup>253</sup> Moerane op cit note 106 at 713.

<sup>254</sup> Ibid.

Secondly, no matter the candidate's race or gender, they must have a certain mind set and possess certain attributes.<sup>255</sup> They must:

demonstrate a commitment to the values that underpin the Constitution, such as respect for the human dignity of each and every person, the achievement of equality, the advancement of human rights and freedoms, non-racism and non-sexism, the supremacy of the Constitution and the Rule of Law.<sup>256</sup>

This determination will be made upon the JSC considering the candidate's *Curriculum Vitae*, comments received about the candidate from professional and other bodies, judgments they have made or publications they have written, the candidate's reputation within their profession, and how they performed at their public interview.<sup>257</sup>

The JSC will also consider the symbolic value of a specific recommendation for appointment. Hence, if a specific candidate's recommendation would give a very positive message to a certain community at large, this may prove to be a deciding factor in a recommendation for appointment.<sup>258</sup>

As per its constitutional mandate the JSC has played a large role in re-staffing the judiciary in the post-Apartheid era, in terms of a gradual personnel turnover. By 2003, sixty percent of the judiciary was comprised of post-Apartheid appointments.<sup>259</sup>

---

<sup>255</sup> Ibid.

<sup>256</sup> Moerane op cit note 106 at 714.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Klaaren op cit note 1 at 160.

The creation of the JSC has therefore contributed to achieving judicial independence, by taking the power of making judicial appointments away from the exclusive domain of the executive. The fact that it is now a more transparent and merit-based appointment system has also helped strengthen the independence of the judiciary. The JSC has also been instrumental in transforming the bench to be more reflective of South African society from a race and gender perspective.

### *3.8.3 Employment conditions of the judiciary*

As part of a longer statement, Sawant J of the Supreme Court of India pointed out that:

Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice.<sup>260</sup>

The United Nations Basic Principles on the Independence of the Judiciary<sup>261</sup> make it very clear that the principles of security of tenure, as well as adequate financing for the Judiciary, are vital to ensure judicial independence.

These principles are addressed in the South African context by Section 177 of the Final Constitution. As per Section 177, it is very difficult to remove a judge from office.

---

<sup>260</sup> Malcom Wallis 'Judges: Servants or Civil Servants?' (2012) *SALJ* 652 at 659.

<sup>261</sup> LAWASIA 'Beijing Principles' available at <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf>, accessed on 31 May 2012.

A judge may only be removed on grounds of incapacity, gross misconduct or incompetence.<sup>262</sup> The JSC must establish these grounds and a resolution calling for that judge's removal based on these grounds must be approved by two-thirds of the National Assembly. When this resolution has been adopted, the President must remove the judge from office.

Therefore the JSC, once again, plays a vitally important role in ensuring the Behavioural Accountability of members of the judiciary. Any complaints of judicial misconduct, incapacity, or incompetence must be raised with the JSC.

In terms of actually holding office, the principle applied is that of 'once a judge, always a judge', and judges receive a monthly salary from when they start working as judges until death.<sup>263</sup> Upon a judge's death, this salary is translated into a pension for that judge's surviving spouse or partner. Section 176 (3) of the Constitution provides that a judge's salary, allowances and benefits may not be reduced. The Judges' Remuneration and Conditions of Employment Act<sup>264</sup> regulates judges' conditions of service.<sup>265</sup>

Therefore, it seems that in the South African context judges enjoy relative security of tenure and adequate financing in terms of salaried and pension remuneration. However, an interesting question has been raised by Malcolm Wallis (a judge at the SCA). In his article, 'Judges Servants of Justice or

---

<sup>262</sup> Section 177 (a) of the Constitution of the Republic of South Africa, 1996.

<sup>263</sup> Wallis op cit note 260 at 668.

<sup>264</sup> 88 of 1989.

<sup>265</sup> Currie & de Waal op cit note 32 at 307.

Civil Servants?’, Wallis discussed the question of how independent or removed from government, in practical terms, the judiciary really is.<sup>266</sup>

Wallis points out that judges, like all people, have to fill out forms for mundane things such as cellular phone contracts or loans. For example, when judges have to fill out the ‘employer section’, they often, for practicalities sake, have to put ‘The Department of Justice’.<sup>267</sup> However, to emphasise that judges are *not* employees of the executive, judges’ salaries are excluded from the allocation of funds to government departments. Their salaries are paid directly from the state revenue fund.<sup>268</sup>

This distinction is all good and well to make but judges are in actual fact entirely dependent on the state in terms of the premises they work at, the resources they use, the staff that assist them, how the court budget is allocated, and so forth.<sup>269</sup>

However, Wallis concluded that a judge is a holder of public office in the same way as a member of the legislature and exercises the sovereign judicial power of the state.<sup>270</sup> Judges represent the state and therefore are not ‘employees’ of the state such as their administrative staff are, nor are judges governed by the Public Service Act<sup>271</sup>.<sup>272</sup> This is a very important distinction to be emphasised for the principle of judicial independence.

---

<sup>266</sup> Wallis op cit note 260 at 652.

<sup>267</sup> Ibid.

<sup>268</sup> Currie & de Waal op cit note 32 at 307.

<sup>269</sup> Wallis op cit note 260 at 669.

<sup>270</sup> Wallis op cit note 260 at 659.

<sup>271</sup> 103 of 1994.

<sup>272</sup> Wallis op cit note 260 at 659

The criteria of security of tenure and adequate financing for the judiciary are accommodated for by South African law, and therefore contribute to achieving the objective of judicial independence further.

#### *3.8.4 Civil Liability*

The South African judiciary enjoys limitation of civil liability so that they can conduct themselves and perform in their profession safely and without unnecessary fear. In terms of the common law as developed in South Africa, a judge or magistrate can only be held civilly liable for defamatory remarks if it is proved that 'he or she made those statements out of personal spite, ill-will, or an improper, unlawful or ulterior motive'.<sup>273</sup> In terms of section 25 (1) of the Supreme Court Act,<sup>274</sup> this prohibits the issuing of a civil summons or subpoena against a judge without the permission of the court out of which the process will be served.<sup>275</sup> The process is similar in the CC as no issuing of a summons or subpoena may occur without the consent of the President of the CC.<sup>276</sup>

#### *3.8.5 Re-structuring of the Court System*

Section 166 of the Final Constitution created a new hierarchy of courts in South Africa. The Appellate Division of the Supreme Court was replaced by the SCA and was no longer a special division of the Supreme Courts but a fully fledged entity of its own.<sup>277</sup> The Final Constitution also created a new High Court system, in which each division has a geographical limitation on

---

<sup>273</sup> Ibid.

<sup>274</sup> 59 of 1959.

<sup>275</sup> Ibid.

<sup>276</sup> Currie & de Waal op cit note 32 at 308.

<sup>277</sup> Ibid.

their jurisdiction, usually in line with a Provincial parameter.<sup>278</sup> These Provincial divisions of the High Court were created by amalgamating and restructuring the former provincial and local divisions of the former Supreme Court and from the variety of superior courts of the former TBVC (homeland states). The Magistrates' Courts and other lower courts created by statute remained unchanged.<sup>279</sup>

In varying degrees of authority the courts are empowered to enforce the Constitution when an aspect of the Constitution has been infringed, violated or ignored.<sup>280</sup>

Section 172 (2) (a) of the Constitution provides that:

The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the CC.

The restructuring of the entire court system, with the CC at the helm, has helped achieve the objective of Decisional Accountability. The new court hierarchy has created a new decision-making review system that further achieves this. The placing of the CC at the helm of this new court system also helped legitimise the system in the new constitutional era.

---

<sup>278</sup> Currie and de Waal op cit note 32 at 279.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

### *3.8.6 The Judicial Oath*

Upon appointment as a judge or an acting judge of the High Courts, SCA and CC, such judge must swear an oath of solemn affirmation. This oath as set out in 6(1) of schedule 2 of the Final Constitution, provides that the judicial officer taking it must be faithful to the Republic of South Africa, uphold the Constitution and the human rights entrenched within it, and administer justice without discrimination or bias. This oath serves as a verbal and symbolic measure to the new constitutional and human rights era. The taking of this oath by the members of the Apartheid judiciary remaining in office contributed to restoring their integrity, and strengthening the legitimacy of the judiciary in the new dispensation.

## 3.9 CONCLUSION

Of the four mechanisms that were vital for achieving the objectives of judicial reform in South Africa, the cumulative contributions of the Interim Constitution, the CC and the Final Constitution were greater than the Legal Hearing's. These mechanisms (that are to a great extent interwoven and interdependent) contributed to achieving the objectives of: judicial independence, judicial accountability, judicial legitimacy, and a more representative bench in terms of race and gender.

The Legal Hearing succeeded in creating a narrative of the role played by Apartheid judiciary in the legal injustices and human rights violations that occurred under Apartheid. Weighed cumulatively however, with the contributions of the other mechanisms of judicial reform, the extent of the Legal Hearing's contribution was small. The creation of the CC and the

Interim and Final Constitutions were the real catalysts for change within the South African judiciary. Despite this, the Legal Hearing's contribution remains significant to this day.

## CHAPTER 4

### KENYA

This chapter explores the use of judicial vetting in Kenya in the aftermath of the 2007 election violence. The extent to which judicial vetting has contributed towards achieving the objectives of judicial reform in Kenya will also be assessed.

#### 4.1 BACKGROUND INFORMATION

Kenya, a former British Colony, gained its independence in 1964.<sup>281</sup> Kenya was declared a one-party state in 1982, but was restored to a multi-party democracy in 1991.<sup>282</sup> Since then violence has been commonplace in most of Kenya's subsequent elections, except the 2002 elections when Mwai Kibaki of the NARC (National Alliance of Rainbow Coalition) party was elected to the presidency.<sup>283</sup> Despite the restoration of a multi-party democracy in Kenya in 1991, the Kenyan judiciary enjoyed dwindling public support and trust in the later years of the 1990's and the early millennium.

Upon analysis it becomes clear that in those years a culture of corruption, bribery, selling justice at a price to the highest bidder, favouritism, favours and general unethical behaviour had developed within the Kenyan

---

<sup>281</sup> Stephen P. Elliot *et al.* (eds) *Webster's New World Encyclopaedia* (1992) 618.

<sup>282</sup> United Nations Office of the High Commissioner for Human Rights 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008' *United Nations Office of the High Commissioner for Human Rights* 28 February 2008 at 6, available at

<http://www.ohchr.org/Documents/Press/OHCHRKenya-report.pdf>, accessed on 4 January 2013.

<sup>283</sup> *Ibid.*

judiciary.<sup>284</sup> The previous constitutional order (before the 2010 Constitution was adopted) contributed to this.<sup>285</sup> Successive amendments to the previous Constitution meant that the President's powers would increase more and more rapidly. Hence, as the President gained more control over government agencies, the powers of counterbalancing institutions such as the legislature and judiciary decreased.<sup>286</sup>

This is demonstrated in how judges were appointed.<sup>287</sup> All of the members of the Judicial Service Commission were directly or indirectly chosen by the President.<sup>288</sup> The procedure was described by a recent task force assigned to report on judicial reform in Kenya, as not being 'transparent, competitive, or based on any publicly known or measurable criteria'.<sup>289</sup>

Many of the judges selected were also from other African or Commonwealth countries, and were not given permanent positions.<sup>290</sup> Such judges were awarded short-term contracts that had to be renewed every few years. This severely compromised the judiciary's security of tenure and independence, as such judges could have easily been vulnerable to executive pressure or external influences.<sup>291</sup> Such factors meant that judicial officers in such positions could have thought it in their best interests to either favour the interests or shield the transgressions of the selecting authority.

---

<sup>284</sup> Ahmednasir Abdullahi 'Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission's agenda for reform' available at <http://www.kenyalaw.org/klr/index.php/fileadmin/pdfdownloads/bills/2011/index.php?id=894>, accessed on 19 January 2013.

<sup>285</sup> Akech op cit note 60 at 12.

<sup>286</sup> Ibid.

<sup>287</sup> van Zyl-Smit op cit note 2 at 3.

<sup>288</sup> Akech op cit note 60 at 29.

<sup>289</sup> Ibid.

<sup>290</sup> van Zyl-Smit op cit note 2 at 3.

<sup>291</sup> Akech op cit note 60 at 29.

The Chief Justice (the head of the Judiciary) also had wide powers in their position such as:

the power to determine which judges hear what cases, where litigants can file their cases and how, supervising and disciplining judges and other judicial officers, allocation of office space, housing, and cars for judicial officers, transferring judicial officers from one geographic station to another, and initiating the process of removal of judges.<sup>292</sup>

These powers were not regulated or limited and were easily open to abuse. The Chief Justice would allocate certain cases to ‘politically compliant’ magistrates or judges, and if there were those who would not oblige in such a manner, they would be intimidated with threats such as a transfer to a remote post or dismissal.<sup>293</sup> The 1963 Constitution of Kenya also awarded complete discretion of the appointment or dismissal of the position of Chief Justice to the President. Together these factors undermined the legitimacy of the judiciary and the decisional independence of judicial officers.<sup>294</sup>

#### 4.2 THE ‘RADICAL SURGERY’

When Kibaki was elected as president of Kenya in 2002, this was the first change of government since 1983. One of Kibaki’s election promises was that judicial reform would occur under his rule.<sup>295</sup> Acting on this promise,

---

<sup>292</sup> Akech op cit note 60 at 30.

<sup>293</sup> van Zyl –Smit op cit note 2 at 3.

<sup>294</sup> Akech op cit note 60 at 30.

<sup>295</sup> International Commission of Jurists ‘Kenya: Judicial Independence, Corruption and Reform’ April 2005 *International Commission of Jurists* at 15, available at <http://old.icj.org/IMG/pdf/kenyareport.pdf>, accessed on 4 January 2012.

Kibaki set up the ‘Integrity and Anti-Corruption Committee’.<sup>296</sup> This committee had a mandate to investigate and identify corruption within the judiciary.<sup>297</sup>

It was on the basis of the findings of this report that a ‘radical surgery’ of the judiciary occurred. Upon investigation this committee found that there was a culture of corruption and bribery within the judiciary, and even listed estimates of the amounts payable that would secure a judgment in various types of cases.<sup>298</sup> Once the committee’s report (known as the Ringera Report) was released, it implicated five out of nine Court of Appeal justices, eleven out of thirty-six High Court justices, and eighty-two out of two hundred and fifty-four magistrates as corrupt.<sup>299</sup> In October of 2003 a ‘list of shame’ was published in the media, naming those justices implicated in the report. This was before any of those implicated were actually informed of the allegations against them.<sup>300</sup> An ultimatum delivered by the Chief Justice followed, providing that all those implicated could either resign, ‘retire’ quietly within two weeks, or face suspension without pay and a tribunal. Within weeks fifteen members of the judiciary had resigned and only seven chose to face the tribunal.<sup>301</sup> This resulted in a very low morale amongst the remaining judges, as many feared for their security of tenure.<sup>302</sup>

The ‘radical surgery’ was largely seen as a failure as it had severely compromised the security of tenure of the judiciary and was not done

---

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> van Zyl-Smit op cit note 2 at 4.

<sup>299</sup> International Commission of Jurists op cit note 295 at 3.

<sup>300</sup> International Commission of Jurists op cit note 295 at 20.

<sup>301</sup> van-Zyl-Smit op cit note 2 at 5.

<sup>302</sup> International Commission of Jurists op cit note 295 at 20.

according to the principles of due process. Upon recommendations of the Chief Justice, President Kibaki appointed two tribunals staffed entirely of members of the Kenyan judiciary (one for the Court of Appeal and one for the High Courts), to deal with the judges implicated in corruption.<sup>303</sup> Tribunal procedures were complicated and lengthy, often due to the fact that the judges facing charges were challenging the legality of the actions taken against them.<sup>304</sup> A huge backlog of cases occurred and did not result in public opinion of the judiciary improving.<sup>305</sup> Another reason for this was that the new judges whom President Kibaki chose to replace the old judges (dismissed due to the ‘radical surgery’) were not hailed as much better than their predecessors.<sup>306</sup> Important sectors of the legal profession were very concerned about the lack of appropriate academic qualifications and experience of the newly appointed judges.<sup>307</sup> As one observer commented to the researchers from the International Commission of Jurists, ‘Kenya has gone through radical transformation but has remained the same.’<sup>308</sup>

This precise sentiment was demonstrated fully in the aftermath of the 2007 election crisis, when public confidence in the judiciary was extremely low with only twenty-seven percent of Kenyans having confidence in the court system.<sup>309</sup>

---

<sup>303</sup> International Commission of Jurists op cit note 295 at 16.

<sup>304</sup> van Zyl-Smit op cit note 2 at 5

<sup>305</sup> van Zyl-Smit op cit note 2 at 6.

<sup>306</sup> International Commission of Jurists op cit note 295 at 3.

<sup>307</sup> International Commission of Jurists op cit note 295 at 28.

<sup>308</sup> International Commission of Jurists op cit note 295 at 20.

<sup>309</sup> van Zyl –Smit op cit note 2 at 8.

### 4.3 THE 2007 ELECTION CRISIS

Kenya's fourth multi-party elections since 1991, a tightly competitive and charged affair, saw the incumbent President Kibaki (now of the Party of National Unity 'PNU') pitted against Raila Odinga of the Orange Democratic Party (the 'ODM').<sup>310</sup> Kenya has over seventy distinct ethnic groups with the five largest being the Kikuyu, Luo, Luhya, Kalenjin and Kamba.<sup>311</sup> Since Kenya gained her independence, her elections have been dominated by ethnic ties. The ODM was strongly supported by the ethnically rooted political constituencies of the Luo, Luhya and Kalenjin, whereas the PNU was strongly supported by that of the Kikuyu.<sup>312</sup> During the lead up to the elections, opinion polls showed that Odinga maintained a slight lead over Kibaki throughout.<sup>313</sup> On the morning of the 29<sup>th</sup> of December 2007 the Electoral Commission released the voting results of half of Kenya's constituencies, showing Odinga roughly ahead by just less than 600,000 votes. However, as the day progressed, the final counting of the total presidential vote was delayed and delayed, and notions that fraud was occurring began to mount.<sup>314</sup>

The Kenyan Police force and its paramilitary (the General Service Unit) moved into the national tallying centre, and all broadcasters and media (except the state-controlled Kenyan Broadcasting Association) were told to

---

<sup>310</sup> United Nations Office of the High Commissioner for Human Rights op cit note 282 at 5.

<sup>311</sup> International Coalition for the Responsibility to Protect 'Crisis in Kenya' available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013.

<sup>312</sup> Ibid.

<sup>313</sup> United Nations Office of the High Commissioner for Human Rights op cit note 282 at 7.

<sup>314</sup> United Nations Office of the High Commissioner for Human Rights op cit note 282 at 8.

leave.<sup>315</sup> In the afternoon of the same day, the Electoral Commission announced results that largely dismissed Odinga as having a lead. The next day the Electoral Commission announced Kibaki as the winner of the presidential elections.<sup>316</sup> Odinga and his party, the ODM, instantaneously rejected the election results, citing that the results were fraudulent and that the election had been rigged.<sup>317</sup> Many foreign election observer missions (such as the EU) agreed with them.

The Chief Justice, Evan Gicheru, acted very inappropriately in the aftermath of the disputed election results.<sup>318</sup> Less than a half hour after the election results were announced and night was falling, Gicheru hurriedly swore Kibaki in as president in Nairobi State House.<sup>319</sup> Gicheru's presence at the ceremony severely shattered the average reasonable and well-informed Kenyan citizen's trust in the judiciary.<sup>320</sup> This conduct severely contradicted Gicheru's judicial oath, and his previous call for increased judicial accountability.

Due to this, it became clear that it would be highly unlikely that any judicial inquiry into the challenge of the election results would be an impartial one.<sup>321</sup> The ODM saw the Kenyan courts as 'instruments of the state' that clearly would not be able to conduct an unbiased investigation into the

---

<sup>315</sup> L Muthoni Wanyeki 'The International Criminal Court's cases in Kenya: origin and impact' 2012 *Institute for Security Studies* 1 237 at 3.

<sup>316</sup> Ibid.

<sup>317</sup> International Coalition for the Responsibility to Protect 'Crisis in Kenya' available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013.

<sup>318</sup> Edwin Odhiambo Abuya 'The Role of the Judiciary in promotion of free and fair elections' available at <http://www.juridicas.unam.mx/wccl/ponencias/1/1.pdf7>, accessed on 5 January 2013

<sup>319</sup> Muthoni Wanyeki op cit note 315 at 4.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

election results dispute.<sup>322</sup> The ODM claimed that the judiciary had already been warned by the executive branch of government in advance to dismiss any electoral petition by the ODM.<sup>323</sup>

Following the announcement of the results and the swearing in of Kibaki as president, the country erupted and there were waves of attacks that were spontaneous, organized and retaliatory.<sup>324</sup> The attacks occurred throughout January 2008 with,

the reported death of over 1,200 persons, the displacement of over 268, 300 individuals, and the destruction of over 41,000 houses, the looting of numerous shops, commercial outlets and crops.<sup>325</sup>

The United Nations Office of the High Commissioner for Human Rights mission to Kenya found that a lot of reliable evidence existed, including various witness testimonies that Kenyan police had used excessive force to deal with the crowd demonstrations.<sup>326</sup> Many of the Kenyans that this Mission spoke to identified a lasting culture of impunity as a large contributing factor to the cause of the violence.<sup>327</sup> There was a general feeling that the State institutions had failed their citizens.<sup>328</sup>

---

<sup>322</sup> Ibid.

<sup>323</sup> Muthoni Wanyeki op cit note 315 at 4.

<sup>324</sup> United Nations Office of the High Commissioner for Human Rights op cit note 295 at 7.

<sup>325</sup> Ibid.

<sup>326</sup> United Nations Office of the High Commissioner for Human Rights op cit note 295 at 10.

<sup>327</sup> United Nations Office of the High Commissioner for Human Rights op cit note 295 at 16.

<sup>328</sup> Ibid.

#### 4.4 THE KENYAN NATIONAL DIALOGUE AND RECONCILIATION FORUM

On 10 January 2008 the PNU and the ODM accepted Kofi Annan<sup>329</sup> as the African Union's Chief Mediator.<sup>330</sup> Annan headed an internal mediation by the African Union Panel of Eminent African Personalities.<sup>331</sup> This panel, also consisting of Benjamin Mkapa and Graca Machel, brought the ODM and PNU into the Kenyan National Dialogue and Reconciliation (KNDR) forum.<sup>332</sup> The main aim of this political dialogue was 'to achieve sustainable peace, stability and justice through the Rule of Law and respect for human rights'.<sup>333</sup>

The parties agreed to a four point agenda. The main point for the purposes of this discussion was Agenda Item 4. Agenda Item 4 aimed at addressing long-term issues, including undertaking constitutional, legal and institutional reforms; land reform; tackling poverty and inequality as well as combating regional development imbalances; tackling unemployment, particularly among the youth; consolidating national cohesion and unity; and addressing transparency, accountability and impunity.<sup>334</sup>

---

<sup>329</sup> The former United Nations Secretary-General.

<sup>330</sup> International Coalition for the Responsibility to Protect 'Crisis in Kenya' available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013.

<sup>331</sup> Relief Web 'The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya - Background Note' available at <http://reliefweb.int/report/kenya/kenya-national-dialogue-and-reconciliation-building-progressive-kenya-background-note>, accessed on 5 January 2013.

<sup>332</sup> Ibid.

<sup>333</sup> United Nations Office of the High Commissioner for Human Rights op cit note 295 at 4.

<sup>334</sup> Relief Web 'The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya - Background Note' available at <http://reliefweb.int/report/kenya/kenya-national-dialogue-and-reconciliation-building-progressive-kenya-background-note>, accessed on 5 January 2013.

This panel facilitated the National Accord and Reconciliation Act, and this ‘power-sharing’ deal was signed by both the PNU and ODM on 28 February 2008.<sup>335</sup> Kibaki would be President, with Odinga filling the newly created role of Prime Minister.<sup>336</sup> This agreement details that both parties would nominate a deputy Prime Minister. The other ministry portfolios would be distributed equally between the two parties. This agreement also made way for the establishment of three commissions – the Commission of Inquiry on Post-Election Violence (CIPEV), the Truth, Justice and Reconciliation Commission, and the Independent Review Commission on the General Elections.<sup>337</sup>

Items of Agenda Four (as agreed to in the KNDR) would be given special attention, as per this agreement the coalition government would work together to resolve the identified long-term goals in this agenda.<sup>338</sup> Therefore, legal and institutional reforms of government institutions were high on the list of the newly formed coalition government’s priorities.

#### 4.5 CIPEV’S RECOMMENDATIONS AND THE ICC INVESTIGATION IN KENYA

The full CIPEV report on the 2007 election violence included a list of persons from the highest levels of government that were believed to be most

---

<sup>335</sup> International Coalition for the Responsibility to Protect ‘Crisis in Kenya’ available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013.

<sup>336</sup> BBC News ‘Kenyan rivals agree to share power’ available at <http://news.bbc.co.uk/2/hi/africa/7268903.stm>, accessed on 5 January 2013.

<sup>337</sup> International Coalition for the Responsibility to Protect ‘Crisis in Kenya’ available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013.

<sup>338</sup> Akech op cit note 60 at 11.

responsible for the 2007 violence.<sup>339</sup> CIPEV also recommended that a Special Tribunal be set up, comprising of joint Kenyan domestic, African regional, and international participation at every level.

However, by 2009 it was clear that legal accountability for the post-election violence would not be able to be adjudicated upon in a fair or unbiased manner by Kenyan domestic courts.<sup>340</sup> As Parliament voted against the Bill to establish a Special Tribunal and with the clear lack of political will to bring legal accountability for the victims of the post-election violence, a lead mediator handed the list over to the International Criminal Court.<sup>341</sup>

This instance illustrates again how important judicial reform was in Kenya, so that the judiciary could again be seen as independent arbiters of justices.

#### 4.6 JUDICIAL REFORM UNDER THE 2010 KENYAN CONSTITUTION

The new Kenyan Constitution, promulgated on the 27<sup>th</sup> of August 2010, set up a critical framework for the realisation of the goals listed in the Items of Agenda Four in the KNDR.<sup>342</sup> As in South Africa's case, the process of judicial reform in Kenya in the aftermath of the 2007 crisis has largely taken place within a constitutional framework.

The 2010 Constitution established the Judiciary as a separate entity from the Executive. Article 159 (1) stipulates that 'Judicial authority is derived from

---

<sup>339</sup> Muthoni Wanyeki op cit note 315 at 8.

<sup>340</sup> Muthoni Wanyeki op cit note 315 at 9.

<sup>341</sup> Muthoni Wanyeki op cit note 315 at 10

<sup>342</sup> Ibid.

the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution'. Article 159 (2) (a) – (e) provide specific guidelines and principles that the courts should follow when administering justice. This contributes to further achieving the objective of judicial independence, by entrenching the principle of separation of powers constitutionally.

Article 171 of the 2010 Constitution establishes the Judicial Service Commission (JSC) consisting of eleven members: the Chief Justice, who would be the chairperson of the Commission; one Supreme Court judge elected by the judges of the Supreme Court; one Court of Appeal judge elected by the judges of the Court of Appeal; one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates; the Attorney-General; two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates; one person nominated by the Public Service Commission; and one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.<sup>343</sup>

The President only has the power to appoint judicial officers in the Supreme Courts based on the recommendations of the JSC.<sup>344</sup> Therefore, the creation of the JSC has been of vital importance to judicial reform efforts because it took away the personal discretion of the President to appoint judicial

---

<sup>343</sup> Republic of Kenya: The Judiciary 'The Judicial Services Commission' available at <http://www.judiciary.go.ke/portal/the-judicial-service-commission.html>, accessed on 0 January 2013.

<sup>344</sup> Ibid.

officers.<sup>345</sup> It has strengthened the independence of the judiciary by creating a more transparent, democratic and merit-based appointment mechanism.

Article 168 (1) deals with the grounds on which a judge may be removed from office and Article 168 (2) provides that the removal of a judge can only be initiated by the JSC (on its own initiative or on the basis of an individual's complaint). The President will make a final decision based on the recommendations of the JSC and of a tribunal consisting of former members of the judiciary, an advocate and persons experienced with public affairs. Should the judge be suspended until the final decision is taken, they will receive half their usual pay until they are released or re-instated. Therefore, these provisions have provided the Kenyan judiciary with more security of tenure, enshrined principles of due process for disciplinary procedures, and curbed the previous powers of the Kenyan President in this regard. Behavioural Accountability of members of the judiciary is further ensured through this process.

In terms of Article 160(4) of the 2010 Constitution, the remuneration and benefits payable to, or in respect of, a judge would not be varied to the disadvantage of that judge. The retirement benefits of a retired judge would not be varied to their disadvantage during the lifetime of that retired judge. In terms of Article 173 (1) a judicial fund was established for administrative expenses of the judiciary to be administered by the Chief Registrar (the administrator and accounting officer of the judiciary). Therefore, the 2010

---

<sup>345</sup> Judges and Magistrates Vetting Board 'First Report' *Judges and Magistrates Vetting Board* 30 March 2012 at 4 available at <http://www.jmvb.or.ke/reports/finish/3-jmvb-reports/11-first-jmvb-report/0.html>, accessed on 14 January 2013.

Constitution has further enhanced the independence of the judiciary by ensuring they have security of tenure, and adequate financing.

The 2010 Constitution has also made specific provision for the decentralisation of judicial authority, by restructuring the court system and its hierarchy.<sup>346</sup> Under the new constitutional order, three superior courts systems (the Supreme Court, the Court of Appeal, and the High Courts) were established, with each separate tier having their own Chief Justice elected by the judges of that tier.<sup>347</sup> The original role of Chief Justice still exists as head of the entire judiciary, but the position's powers are circumscribed under the new 2010 Constitution.<sup>348</sup> The new positions of deputy Chief Justice (Deputy of the Judiciary), and Chief Registrar of the Judiciary (head administrator and accounting officer of the Judiciary and administrator of the Judicial Fund) have been created.<sup>349</sup>

Decisional Accountability is ensured through this decentralisation of power, and by the creation of a decision-making review system through having a multi-level court approach. Article 159 (2) of the 2010 Constitution also requires that the courts and tribunals be guided by certain principles when dispensing justice, thereby further ensuring the quality of decisions and behaviour of the judiciary.

Thus, the 2010 Kenyan Constitution contributed to achieving certain objectives of judicial reform efforts. It really helped achieve the objective of

---

<sup>346</sup> Akech op cit note 60 at 11.

<sup>347</sup> Ibid.

<sup>348</sup> Article 166 of the Constitution of Kenya, 2010.

<sup>349</sup> Article 173 of the Constitution of Kenya, 2010.

judicial independence in different ways by establishing the judiciary as an independent and autonomous institution, which was free from executive control. Judicial accountability was also ensured to a much greater extent than under the 1962 Constitution.

Yet, before the 2010 Constitution was promulgated, the new Kenyan government faced the same dilemma that had arisen in the South African context, this dilemma being as to what would be the fate of the judges still remaining in office at that time.

#### 4.7 THE VETTING OF JUDGES AND MAGISTRATES

The final decision to vet the judiciary was reported on in the ‘Final report of the Committee of Experts on Constitutional Review’ in October 2010.

There were two clear opinions on the subject. One group felt that all the remaining judges should be removed from office once the 2010 Constitution was promulgated, but with the option to re-apply and be re-appointed.<sup>350</sup> The other was in favour of a ‘gentler’ approach, that the judges remain in office and all undergo vetting. It was decided that in the Kenyan context it would be ‘inappropriate’ to simply allow the remaining judges to continue in office without requiring them to first account for their past conduct in some manner.<sup>351</sup>

---

<sup>350</sup> Committee of Experts on Constitutional Review ‘Final Report of the Committee of Experts on Constitutional Review 11<sup>th</sup> October 2010’ *Multi-level Government Initiative* at 75 available at [http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE\\_final\\_report.pdf](http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf), accessed on 4<sup>th</sup> September 2013.

<sup>351</sup> Committee of Experts on Constitutional Review op cit note 350 at 76.

It was decided vetting was the best option to follow, as it would have similar results as forcing all members of the judiciary to re-apply but would be less problematic.<sup>352</sup> Before the publishing of the Final Report of the Committee of Experts of Constitutional Review, the judges and magistrates (after considerable hesitation and suspicion) accepted that the vetting process would occur as it was necessary for judicial reform.<sup>353</sup>

Article 23 (1) of the Sixth Schedule of the 2010 Kenyan Constitution provided that Parliament would enact legislation to establish a Board for the vetting of judges and magistrates.

In March 2011 the Kenyan parliament enacted the Vetting of Judges and Magistrates Act (the Vetting Act) which established an independent board called the Judges and Magistrates Vetting Board (the Board).<sup>354</sup>

According to its official website the Board's main objective is to:

vet the suitability of all the Judges and Magistrates who were in office on the effective date of the new constitution of Kenya to continue to serve in accordance with the values and principles set out in Articles 10 and 159 of the constitution. It shall operate for one year from the date of operationalisation.<sup>355</sup>

The aim of the Board was not to carry out a 'purge', but to restore the public's confidence in the judiciary and the courts.<sup>356</sup> In order to prevent affecting the Rule of Law, events that happened in the 'radical surgery', and

---

<sup>352</sup> Ibid

<sup>353</sup> Committee of Experts on Constitutional Review op cit note 350 at 9.

<sup>354</sup> Judges and Magistrates Vetting Board *First Determination* op cit note 345 at 6.

<sup>355</sup> Judges and Magistrates Vetting Board 'Objectives' available at <http://www.jmvpb.or.ke/index.php/about-us/72-objectives> accessed on 11 January 2013.

<sup>356</sup> Judges and Magistrates Vetting Board *First Determination* op cit note 345 at 6.

to not go against the principles of due process, the Board must discharge their mandate according to the values of teamwork, integrity, respect, accountability and transparency, efficiency and effectiveness, and professionalism.<sup>357</sup> If the processes followed by the Board were arbitrary and its decisions were not solidly based on material before it, the main goal of restoring public confidence in the judiciary would not be achieved.<sup>358</sup> The Board comprised of nine members, six Kenyans<sup>359</sup> and three foreigners<sup>360</sup>.<sup>361</sup>

Section 18 of the Vetting Act details the relevant considerations that the Board would consider when determining the suitability of the candidate to continue being a judicial officer or magistrate under the new 2010 Constitution. These criteria are: constitutional criteria for appointment; past work record, including prior judicial pronouncements; criminal cases or prosecutions against the judge or magistrate concerned; and complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Kenya Anti-Corruption Commission, the Attorney General, the Judicial Service Commission and other identified bodies.<sup>362</sup>

---

<sup>357</sup> Judges and Magistrates Vetting Board 'Core-values' available at <http://www.jmvb.or.ke/index.php/about-us/core-values>, accessed on 14 January 2013.

<sup>358</sup> Judges and Magistrates Vetting Board *First Determination* op cit note 345 at 6.

<sup>359</sup> These members being Mr. Sharad Rao-Chairperson (Lawyer), Mrs. Roseline A. Odede-Vice Chairperson (Lawyer), Mr. Justus Munyithya, HSC (Lawyer), Ms. Meuledi Iseme- (Non-lawyer), Prof. Ngotho Kariuki (Non-lawyer) and Mr. Abdirashid Abdullahi (Non-lawyer).

<sup>360</sup> The foreign members being The Hon. Chief Justice Georgina Wood from Ghana, Hon. Justice Albie Sachs from South Africa and Hon. Justice Frederick Chomba from Zambia (all retired Judges from Commonwealth countries).

<sup>361</sup> Judges and Magistrates Vetting Board *First Determination* op cit note 345 at 6.

The Board would ideally use these criteria to arrive at a fair and appropriate determination, once considered in conjunction with the answers and impression made by the vetting candidate at their interview.

Section 19 (2) of the Vetting Act provides that all information gathered throughout the interview and the consideration process remains confidential. Section 19 (3) follows that all candidates who undergo vetting shall be given sufficient notice of when the procedure will begin, as well as receiving a summary of any complaints lodged against them. The vetting procedure and interviews would also be conducted in private, unless the candidate to be vetted requests a public hearing. Section 19 (6) also affirms that all proceedings would happen according to principles of natural justice.

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

Sections (2) and (3) of the Vetting Act assert that if a Judge elects to leave office voluntarily instead of submitting to vetting procedures or is found unsuitable by the vetting board, they will be deemed as qualified for early retirement. Therefore, such a judge would be entitled to the terminal benefits of early retirement. An important innovation is that all judges and

magistrates that would be subject to the vetting procedure would remain in office, unless and until they were found unsuitable in terms of the Vetting Act.<sup>363</sup> The judges and magistrates were to be vetted in stages: first the Court of Appeal judges, then the High Court judges, with the vetting of the Registrar of the High Court, the Chief Court Administrator, Chief Magistrates, and then other magistrates following.<sup>364</sup>

#### 4.8 SUMMARY OF DECISIONS MADE BY THE VETTING BOARD

On the 25<sup>th</sup> of April 2012 the Board released its first outcome.<sup>365</sup> The Board declared four of Kenya's top judges from the Court of Appeal unsuitable to continue in office.<sup>366</sup> Justices Emmanuel Okubasu, Samuel Bosire, Riaga Omollo and Joseph Nyamu failed to pass the integrity test. The reasons for this determination were that, 'it [the first determination] found that some of the judges lacked independence, showed bias towards the high and mighty in society, favoured impunity and limited democratic expression among others'.<sup>367</sup> The Board cleared several other judges as being fit to continue in office.

On the 2<sup>nd</sup> of July 2012 the second determination issued by the Board found that Justice Mohammed Ibrahim was unsuitable to continue in office.<sup>368</sup>

---

<sup>363</sup> van Zyl-Smit op cit note 2 at 12.

<sup>364</sup> Judges and Magistrates Vetting Board *First Determination* op cit note 345 at 10.

<sup>365</sup> Jillo Kadida 'Kenya: Four Appeal judges sacked' *The Star* 25 April 2012, available at <http://allafrica.com/stories/201204261253.html>, accessed on 18 January 2013.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Judges and Magistrates Vetting Board 'Second Determination' *Judges and Magistrates Vetting Board* 20 July 2012 at 17, available at [http://www.jmvb.or.ke/images/documents/second\\_determination.pdf](http://www.jmvb.or.ke/images/documents/second_determination.pdf), accessed on 18 January 2013.

Justice Roselyn Naliaka Nambuye was also found to be unsuitable.<sup>369</sup> Several other judges were cleared. The four Court of Appeal judges who had been declared unsuitable in the first determination had sought a review of this decision, but in this determination the Board confirmed its previous ruling.<sup>370</sup>

In the third determination, the Board was reviewing judges holding office in the High Courts. In the announcement made on the 3<sup>rd</sup> of August 2012, only one judge, Justice Jeanne Gacheche, was declared unfit to continue in office.<sup>371</sup> Several other High Court judges were declared fit to remain in office.

In the fourth determination announced on the 21<sup>st</sup> of September 2012, Justice Joyce Nuku Khaminwa was found unsuitable to remain in office due to ill health.<sup>372</sup> Both Judges Mohammed Ibrahim and Roslyn Nambuye were granted review applications of their rulings of unsuitability and were to be subjected to fresh vetting.<sup>373</sup>

In the fifth determination announced in December 2012, five High Court Judges (Justices Mary Ang'awa, Leonard Njagi, Joseph Serگون, Nicholas

---

<sup>369</sup> The Sunday Nation 'Supreme Court Judge Ibrahim 'unfit to serve'' *The Sunday Nation* on 20 July 2012, available at <http://www.nation.co.ke/News/politics/-/1064/1458952/-/9ereni/-/index.html>, accessed on 18 January 2013.

<sup>370</sup> Ibid.

<sup>371</sup> Lordrick Mayabi 'Justice Jeanne Gacheche declared unfit for office' *Capital News* 3 August 2012, available at <http://www.capitalfm.co.ke/news/2012/08/justice-gacheche-declared-unfit-for-office/>, accessed on 19 January 2013.

<sup>372</sup> Judges and Magistrates Vetting Board 'Fourth Determination' *Judges and Magistrates Vetting Board* 21 September 2012 at 33, available at [http://www.jmvpb.or.ke/images/documents/fourth\\_determinations.pdf](http://www.jmvpb.or.ke/images/documents/fourth_determinations.pdf), accessed on 19 January 2013.

<sup>373</sup> Lordrick Mayabi 'Judges Ibrahim, Nambuye get second chance' *Capital News* 21 September 2012, available at <http://www.capitalfm.co.ke/news/2012/09/judges-ibrahim-nambuye-get-second-chance/2/>, accessed on 19 January 2013.

Ombija and Murugi Mugo), were determined as unsuitable to continue in office.<sup>374</sup>

In the Sixth determination made on the 15<sup>th</sup> of January 2013, the Board cleared both Justice Mohammed Ibrahim and Justice Roselyn Naliaka Nambuye (both of whom the Board had declared unsuitable in the second determination and they had requested a review) as suitable after they both underwent a fresh vetting.<sup>375</sup> However, Judges Muga Apondi and Abida Ali Aroni were declared as unfit.

#### 4.9 OPPOSITION TO THE DECISIONS MADE BY THE VETTING BOARD

There have been distinct challenges to the process and actual authority of the Board to make such decisions concerning the bench's composition. Should a party contest the Board's decision on the suitability of a judge to serve office, they would seek relief in the courts to be granted a review of the board's decision. This presents a direct conflict of interests, as judges would make rulings on the final decision of a body that will ultimately vet those judges themselves. Attempts were made to prevent such a conflict. For instance, Section 22 (3) of the Vetting Act (which deals with the rights of judges declared unfit by the Board to seek a review of that decision) provides that 'the decision [after determination has been reviewed] by the Board under this section shall be final'. More specifically Section 23 (2) of

---

<sup>374</sup> Pamela Chepkemei 'Five judges sent home, 23 cleared as Rao turns to magistrates' *The Sunday Nation* 22 December 2012, available at <http://www.nation.co.ke/News/Judges-Angawa-Ombija-unfit-to-serve-Judiciary/-/1056/1648928/-/ufbeqgz/-/index.html>, accessed on 19 January 2013.

<sup>375</sup> Lucas Barasa 'Board clears judges Ibrahim and Nambuye' *Business Daily* 15 January 2013, available at <http://www.businessdailyafrica.com/-/539546/1666242/-/q536fv/-/index.html>, accessed on 20 January 2013.

the Sixth Schedule to the 2010 Kenyan Constitution provides that removal of a judge from office by the Vetting Act or any related processes, would not be subject to the review of any court.

Despite this ouster clause, legal challenges to the Board's decisions have still occurred within the courts.

In July 2012, Judge Jeanne Gacheche made an application to the Kenyan High Court to stop the proceedings of the Vetting Board. The application sought to prevent the Board from commencing or continuing with the Applicant's vetting.<sup>376</sup>

On 13 August 2012, an Eldoret Petition (no. 11 of 2012) was filed by the Centre for Human Rights and Democracy, Richard Etyan'ga Omanyala and Bishop Francis Ranogwa Ozioya. Judges Mohammed Ibrahim and Roslyne Nambuye were joined as interested parties to the petition.<sup>377</sup> This petition argued that the Vetting of Judges and Magistrates Act contravened certain provisions of the 2010 Constitution, that the proceedings and decisions made by the Vetting Board between the 23<sup>rd</sup> of May 2012 and the 12<sup>th</sup> of July 2012 were unconstitutional, invalid and illegal.

On the 26<sup>th</sup> of September 2012 two petitions were filed by Judges Riaga Omolo and Samuel Bosire. These petitions sought to have the vetting processes made by the Vetting Board in terms of the initial vetting and

---

<sup>376</sup> *Jeanne W. Gacheche v The Judges and Magistrate's Vetting Board* [2012] eKLR at 5.

<sup>377</sup> *Ibid.*

review process, declared as having violated each judge's fundamental rights and freedoms.<sup>378</sup>

The last petition was filed by Judge Joseph Nyamu on the 27<sup>th</sup> of September 2012 which sought, pending the hearing of all the petitions, to have a conservatory order declaring that all actions, decisions, processes and events consequential upon the findings of the Vetting Board dated the 25<sup>th</sup> of April 2012 and the 20<sup>th</sup> of July 2012 be stayed.<sup>379</sup>

On the 25<sup>th</sup> of September 2012 a three-judge bench of the High Court ruled on the application filed by the Centre for Human Rights and Democracy, Richard Etyan'ga Omanyala and Bishop Francis Ranogwa Ozioya.<sup>380</sup> After considering all the issues raised by the petition, the court held that these issues required further inquiry. An interim order was issued which ordered that the vetting of all Judges and Magistrates must cease for fourteen days.<sup>381</sup> The Vetting Board announced that it was going to ignore the court order to stop the vetting process.<sup>382</sup> The Kenyan Attorney-General and the Minister of Justice both supported the Board's decision to ignore the court order, as they wanted to have the decision reviewed.<sup>383</sup>

---

<sup>378</sup> Ibid.

<sup>379</sup> *Gacheche* supra note 376 at 6.

<sup>380</sup> Sam Kiplagat 'Kenya: Judges stop Vetting Board proceedings' *The Star* 26 September 2012, available at <http://allafrica.com/stories/201209270165.html>, accessed on 20 January 2013.

<sup>381</sup> Ibid.

<sup>382</sup> Judie Kaberia 'Kenya: Judges Board ignores court order' *Capital News* 1 October 2012, available at <http://allafrica.com/stories/201210020025.html>, accessed on 20 January 2013.

<sup>383</sup> Olive Burrows 'Government backs Vetting Board on court ruling' *Capital News* 2 October 2012, available at <http://www.capitalfm.co.ke/news/2012/10/govt-backs-vetting-board-on-court-ruling/>, accessed on 20 January 2013.

In the case of *Jeanne W. Gacheche v The Judges and Magistrate's Vetting Board*,<sup>384</sup> in which judgement was delivered on the 30<sup>th</sup> of October 2012, all the applications (as cited above) against the Vetting Board were heard together.<sup>385</sup>

The Kenyan High Court held that it would have jurisdiction to intervene and review processes and decisions of the Vetting Board, to the extent where the Board's actions were shown to have exceeded the Board's statutory and constitutional mandate.<sup>386</sup> The High Court would have jurisdiction to consider and adjudicate upon alleged breaches of fundamental rights and freedoms arising from the Vetting Board's mandates under the Constitution and the Vetting Act.<sup>387</sup> It would have further jurisdiction to determine any questions ancillary to or consequential upon the vetting process.

The results of the judgment were that the removal or de-gazetting by President Kibaki of any of the four judges who had made an application to the High Court (Gacheche, Omolo, Bosire and Nyamu) were stayed.<sup>388</sup> The order to stay their removal would remain in force, pending the hearing and determination of the applications made by the affected judges which would all be heard separately.<sup>389</sup> Yet the order made by the previous court which suspended the vetting processes by of the Vetting Board was set aside. The

---

<sup>384</sup> [2012] eKLR.

<sup>385</sup> *Gacheche* supra note 376 at 7.

<sup>386</sup> *Gacheche* supra note 376 at 45.

<sup>387</sup> *Ibid.*

<sup>388</sup> Rob Jillo 'Kenya: Court block removal of four judges by Vetting Board' *Capital News* 30 October 2012, available at <http://allafrica.com/stories/201210301324.html>, accessed on 20 January 2013.

<sup>389</sup> *Ibid.*

Board was permitted to continue its work as per its mandate by the Constitution and Vetting Act.<sup>390</sup>

Both the Law Society of Kenya (which was an interested party in the initial case) and the Vetting Board were outraged by this decision, and the Law Society of Kenya appealed the High Court's decision to the Court of Appeal.<sup>391</sup>

On a judgement dated approximately the 26<sup>th</sup> November 2012 it was reported that the Court of Appeal suspended all other challenges against the vetting of Judges and Magistrates, pending the determination of the Law Society of Kenya's appeal of the recent High Court decision.<sup>392</sup> They also declined to stop the operations of the Vetting Board until the determination of the Law Society's appeal was finalised.

The Court of Appeal also extended the High Court's orders to prevent the removal or de-gazetting of the aforementioned four judges until the appeal was finalised.<sup>393</sup> The Court of Appeal also directed that the appeals to the High Court's decision be re-directed and heard on a priority basis.

---

<sup>390</sup> Ibid.

<sup>391</sup> Njeri Rugene 'Judges vetting cases stopped' *The Sunday Nation* 26 November 2012, available at <http://www.nation.co.ke/News/Judges-vetting-cases-stopped/-/1056/1629828/-/1xuceh/-/index.html>, accessed on 20 January 2013.

<sup>392</sup> Ibid.

<sup>393</sup> Ibid.

Eventually, led by members of the Constitution Implementation Oversight Committee, Parliament amended the Act.<sup>394</sup> Section 22 of the Vetting Act was amended by inserting the two provisions after subsection (2). The new provisions provided that: (1) '[any] judge or magistrate who requests for review shall, pending the decision of the Board under this section, be suspended from office'; and (2) 'removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court'. This Amendment Act commenced on the 14 December 2012 and provided that it was the Vetting Board who had the final determination on the validity of any of its decisions.

As discussed above, the Vetting Board continued the vetting processes by making determinations in both December 2012 and January of 2013. The Chairman of the Board announced that from February 2013 vetting of the Magistrates would commence.<sup>395</sup>

Despite the many interruptions and challenges, the Vetting Board had seemingly succeeded in vetting the majority of Kenya's judges on their suitability to continue in office or not.

#### 4.9 CRITICISM OF THE VETTING PROCEDURE

In June of 2012 Professor Migai Akech (an Associate Professor at the University of Nairobi), published an article entitled 'Is the vetting process

---

<sup>394</sup> Business Daily 'Vetting board rules on fate of judges' *Business Daily* 21 December 2012, available at <http://www.businessdailyafrica.com/Vetting-board-rules-on-fate-of-judges/-/539546/1649048/-/7xjta2/-/index.html>, accessed on 20 January 2013.

<sup>395</sup> Maureen Waruinge 'Kenya: Magistrates now to feel the heat' *The Star* 14 January 2013, available at <http://allafrica.com/stories/201301141336.html>, accessed on 20 January 2013.

really fair to judges?'.<sup>396</sup> This opinion was based on six reasons, the most important of which will be discussed below.

His first reason was that the criteria the Vetting Board was using to determine the suitability of a candidate to continue in office could not be applied objectively.<sup>397</sup> This was because the guidelines did not provide the appropriate weight that the Board must afford to each individual criterion. Nor were any guidelines provided as to what was the relevant threshold or as to how much each of these criteria should be applicable to each candidate for them to be deemed 'suitable'.<sup>398</sup> The second reason was that these criteria could be applied selectively depending on the candidate, therefore making it unfair as each candidate did not have to meet the same criteria as others.<sup>399</sup> Akech also felt that the Board failed to take into account Kenya's previous political situation when they evaluated certain conduct of members of the judiciary.<sup>400</sup> Therefore, unrealistically high standards had been applied to the conduct of the judiciary during those times. In some circumstances it was noted that a minority of the members of the Board felt that some conduct had to be assessed 'in the context of the repression of the times'.<sup>401</sup> His last reason draws parallels with one of the main reasons why some South African judges felt that the judiciary should not have had to account to the TRC, this reason being that judicial independence would be undermined if previous rulings were effectively 're-tried' during such proceedings. Akech's comments that it was evident in the Board's previously released

---

<sup>396</sup> Migai Akech 'Is the Vetting process really fair to judges?' *The Star* 25 June 2013, available <http://www.the-star.co.ke/news/article-13134/vetting-process-really-fair-judges>, accessed on 5 September 2013.

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

determinations, that the Board had in fact made findings on the merits or correctness of previous decisions of the judges who were vetted.<sup>402</sup> Judicial independence had been undermined, as in other countries, he explained, judges were not often disciplined on the merits or correctness of decisions they had made.<sup>403</sup> In these countries judges were only disciplined if flagrant errors existed in their decisions, if their decisions were motivated by bad faith, or showed continuous patterns of legal inaccuracy.

Despite these criticisms, pre-election polls showed that Kenyans' confidence in the judiciary had increased from twenty-seven percent after the 2007 elections to sixty-seven percent in a survey conducted between July and August of 2012.<sup>404</sup>

#### 4.11 THE 2013 KENYAN ELECTIONS

Kenya held her next presidential elections in March 2013.<sup>405</sup> Many political observers made dire predictions that this election would be a repeat of the 2007 election violence. Despite these predictions, the March 2013 elections were relatively successful and held in a free and peaceful atmosphere.<sup>406</sup> When the twelve million voters took to the election polls, there were no eruptions of violence as there had been in previous years.

---

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

<sup>404</sup> Bob Tortora 'Kenya Votes 2013: Attitudes towards the Election, Judicial System and Security', Gallup Survey, available at [www.gallup.com/file/poll/157898/Gallup\\_Kenya\\_Presentation\\_5thOct.pdf](http://www.gallup.com/file/poll/157898/Gallup_Kenya_Presentation_5thOct.pdf), accessed on 6 September 2013.

<sup>405</sup> All Africa 'Kenya: How Kenya delivered its peaceful general elections' *All Africa* 20 March 2013, available at <http://allafrica.com/stories/201303201196.comhtml/page=3>, accessed on 6<sup>th</sup> May 2013.

<sup>406</sup> Ibid.

The election results announced on 9<sup>th</sup> March 2013 revealed Uhuru Kenyatta of the Jubilee Alliance as the winner of the presidential election, with an estimated fifty percent of the vote.<sup>407</sup> Raila Odinga of CORD (Coalition for Reform and Democracy) had followed closely with an approximate forty-three percent of the vote.<sup>408</sup>

Whilst the election had been peaceful, it had not been perfect. Problems were recorded as follows:

A new biometric voter identification system failed, and then, after the polls closed, the electronic system to transmit results directly from the polling places to election headquarters crashed. Mr. Odinga's side said it was a conspiracy [against them]. The election commission said it was an accident. Election officials then had to tally the results manually, which took days and opened up more possibilities for fraud.<sup>409</sup>

However, unlike in previous years, Odinga's party decided on this occasion to choose the courts as the medium in which to declare their unhappiness and solve their issues. On the 16<sup>th</sup> of March 2013 Odinga's side filed an application with the Supreme Court to have the election results and associated processes declared null and void.<sup>410</sup> Previously, several civil society groups had sought an injunction from the Kenyan High Court to stop the processing and renouncing of results.<sup>411</sup>

---

<sup>407</sup> Yuhniwo Ngenge 'Kenya 2013 Elections: reflections on the Supreme Court ruling and the role of the judiciary in democratisation' 18 April 2013, available at <http://www.opendemocracy.net/yuhniwo-ngenge/kenya-2013-elections-reflections-on-supreme-court-ruling-and-role-of-judiciary-in-dem>, accessed on 6th May 2013.

<sup>408</sup> Jeffrey Gettleman 'Kenyan Court upholds election of candidate facing charges in the Hague' *New York Times* 31 March 2013, available at [http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?\\_r=0](http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?_r=0), accessed on 12 May 2013.

<sup>409</sup> Ibid.

<sup>410</sup> All Africa 'Kenya: How Kenya delivered its peaceful general elections' *All Africa* 20 March 2013, available at <http://allafrica.com/stories/201303201196.comhtml/page=3>, accessed on 6<sup>th</sup> May 2013.

<sup>411</sup> Ibid.

Whilst contesting the validity of the election results was not a good indicator for the ultimate success of a free and fair election, the very important fact remains that Odinga's side chose the courts as their medium for trying to achieve justice.

Odinga said of the matter:

We have a newly independent judiciary in which we in CORD and most Kenyans have faith. It will uphold the Rule of Law, and we will abide by its decisions.<sup>412</sup>

On the 30<sup>th</sup> of March 2013 the Kenyan Supreme Court ruled that the elections had been conducted in compliance with the Kenyan Constitution and the law, and that Kenyatta and the Jubilee Alliance had been validly elected as the winners of the 2013 elections.<sup>413</sup>

Mr Odinga graciously, and in a dignified manner accepted the court's decision and announced that he would abide by it. He also announced that, as the Supreme Court had spoken, the election was now over.<sup>414</sup>

The fact that the elections were peaceful and free and that Odinga and CORD chose to voice and solve their grievances in the Kenyan courts rather than via violence in the streets, demonstrates that the reforms implemented

---

<sup>412</sup> Ibid.

<sup>413</sup> All Africa 'Kenya: Text of Supreme Court decision upholding election results' *All Africa* 30 March 2013, available at <http://allafrica.com/stories/201303300415.html?page=2>, accessed on 12<sup>th</sup> May 2013.

<sup>414</sup> Jeffrey Gettleman 'Kenyan Court upholds election of candidate facing charges in the Hague' *New York Times* 31 March 2013, available at [http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?\\_r=0](http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?_r=0), accessed on 12 May 2013.

by the 2010 Constitution are working.<sup>415</sup> These reforms have clearly laid the foundation for cleaner elections and an independent judiciary.

As discussed previously, the de-centralisation of power (especially the circumvention of the Chief Justice's powers) has clearly contributed to the increased trust in the courts. A 'culture of Rule of Law, democracy and constitutionalism' also finally seems to be taking root in Kenya.<sup>416</sup>

The vetting process has achieved some success in getting the public and political parties to believe that due to this process, the courts are independent arbiters of justice that can be trusted to adjudicate upon an election issue. The fact that CORD sought relief within the court system and resolved to abide by the Supreme Court's decision, demonstrates an emerging faith in new institutions of the 2010 Kenyan Constitution.<sup>417</sup>

The bittersweet fact of the matter was that in January 2012 the ICC confirmed charges against Uhuru Kenyatta of Crimes against Humanity, for which he would be summoned to face at The Hague.<sup>418</sup>

Whilst the outcome of the election was perhaps not the most favourable, at least it appears that the transitional justice mechanism of vetting has

---

<sup>415</sup> All Africa 'Kenya: How Kenya delivered its peaceful general elections' *All Africa* 20 March 2013, available at <http://allafrica.com/stories/201303201196.comhtml/page=3>, accessed on 6<sup>th</sup> May 2013.

<sup>416</sup> Yuhniwo Ngenge 'Kenya 2013 Elections: reflections on the Supreme Court ruling and the role of the judiciary in democratisation' 18 April 2013, available at <http://www.opendemocracy.net/yuhniwo-ngenge/kenya-2013-elections-reflections-on-supreme-court-ruling-and-role-of-judiciary-in-dem>, accessed on 6th May 2013.

<sup>417</sup> Ibid.

<sup>418</sup> Jeffrey Gettleman 'Kenyan Court upholds election of candidate facing charges in the Hague' *New York Times* 31 March 2013, available at [http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?\\_r=0](http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?_r=0), accessed on 12 May 2013.

contributed to creating an independent Kenyan judiciary which the public trusts.

#### 4.12 CONCLUSION

In the aftermath of the 2007 election crisis, different types of transitional justice mechanisms have been used to achieve justice for the atrocities that occurred. These mechanisms included the vetting of the judges, a truth commission, and the forthcoming ICC hearings.<sup>419</sup>

The TJRC (Truth, Justice and Reconciliation Commission) of Kenya held hearings for victims of injustices during the 2007 election crisis, but this truth commission did not hold institutional hearings for sectors that may have contributed to the violence in the manner that South Africa's did. The TJRC found that one of the factors that encouraged the perpetuation of the gross violation of human rights in Kenya up until the 2010 Constitution was:

[the] consolidation of immense powers in the person of the President, coupled with the deliberate erosion of the independence of both the Judiciary and the Legislature.<sup>420</sup>

Hence the TJRC also recommended that:

[The] judiciary apologise to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the

---

<sup>419</sup> Kenya Transitional Justice Network 'Transitional Justice Approaches in the context of the implementation of Agenda Item Number 4' available at, <http://www.icj-kenya.org/dmdocuments/books/transitional%20justice%20approaches%20in%20the%20context%20of%20the%20implementation%20of%20agenda%20item%20number%204.pdf>

<sup>420</sup> Ibid.

perpetration of gross human rights violations, during the period between 12 December 1963 and 28 February 2008.<sup>421</sup>

So far there has been no formal statement or apology issued by the Kenyan judiciary addressing the TJRC's recommendations. The hearings held and the report compiled by the TJRC have shed more light on how the Rule of Law deteriorated in Kenya in the first place, and how systematic corruption in the judiciary contributed to this. Yet, it is unlikely that this process has had much effect on improving the public opinion of the judiciary.

The vetting of the Kenyan judiciary received many challenges from within the judiciary itself, and was the object of criticism as to the objectivity of the vetting process. Despite these challenges, it appears that the vetting process has made a successful contribution to achieving the objectives of judicial reform in Kenya. It re-established the legitimacy of the judiciary, improved the public confidence in the judiciary, and established the judiciary as an independent institution free from bias in favour of a particular political affiliation. This is demonstrated by the fact that Odinga and his party, CORD, chose to place their trust in the courts as the means to decide if the 2013 election results were valid or not.

The concept of taking a 'justice-sensitive' approach to institutional reform is clearly illustrated in the example of the vetting of the Kenyan judiciary. The process has provided accountability for past injustices of the judiciary, by removing members not deemed 'suitable' from office. Such a removal means that the judicial officers responsible for certain injustices are no

---

<sup>421</sup> Report of the Truth, Justice and Reconciliation Commission (Volume 4) *Findings and Recommendations* (2013) at 9.

longer employed. Informal corrupt structures or networks associated with past abuse have also been dismantled, thereby strengthening the accountability and independence of the Kenyan judiciary for the present and future.

The vetting process also helped re-establish and strengthen the Rule of Law in Kenya in two ways. The fact that each judicial officer had to account to the Vetting Board for their past conduct and that the results of these determinations were published helped deepen the understanding of how the Rule of Law had deteriorated. The vetting process, unlike that of the ‘radical surgery’, was conducted according to the principles of due process, which also contributed to the re-establishment of the Rule of Law. In summary, the vetting process contributed substantially to achieving certain objectives of judicial reform in Kenya.

It is submitted that the extent of the vetting process’s contribution to achieving the objectives of judicial reform in Kenya was equal to that of the 2010 Constitution’s. However, the contribution of the vetting process held more significance, and was the real catalyst for the reform of Kenya’s judiciary in the aftermath of the 2007 electoral violence.

## CHAPTER 5

### CONCLUSION

This dissertation sought to determine whether it is important for the future development of the legal systems in post-authoritarian and post-conflict states to confront the unjust past legacy of their judiciaries. The method used was to assess the extent to which dealing with the unjust past records of such judiciaries, by means of transitional justice mechanisms, had contributed to achieving the objectives of judicial reform in South Africa and Kenya.

At the points in time selected for analysis, both countries had emerged from their respective circumstances due to negotiated political compromises. Once these political compromises were reached, both countries had adopted new Constitutions. In both South Africa and Kenya, the dilemma then arose of what would become of the judges currently in office, once these new Constitutions came into force.

The independence and legitimacy of their respective judiciaries had been severely compromised during South Africa's authoritarian regime and Kenya's election conflict. It was important that the past record of each country's judiciary was understood and addressed.

Important differences did exist in South Africa's and Kenya's political situations. These are reflected by the different transitional justice mechanisms chosen to reform their respective judiciaries, and the extent to which these mechanisms contributed to achieving the objectives of judicial reform.

South Africa was emerging from years of oppressive rule under the Apartheid government. Judicial vetting had not been a viable option due to the nature of the political compromise reached. Thus, the TRC Legal Hearing dealt with the past record of the Apartheid judiciary. This hearing made a small but significant contribution to achieving the objectives of judicial reform. The main catalysts for judicial reform in South Africa were the Interim and Final Constitutions and the creation of the CC.

Kenya's judicial reform process occurred in the aftermath of the 2007 election crisis. During the drafting of the 2010 Kenyan Constitution, Kenya's Committee of Constitutional Experts opted to vet the members of the Kenyan judiciary remaining in office. Both the 2010 Constitution and judicial vetting made significant contributions to achieving the objectives of judicial reform in Kenya. However, it is submitted that the judicial vetting was the main catalyst for judicial reform in Kenya.

Therefore, judicial vetting in Kenya made a greater overall contribution to achieving the objectives of judicial reform than the TRC Legal Hearing did in South Africa. Earlier in this dissertation, a theoretical analysis was provided of how both these transitional justice mechanisms could contribute to achieving the objectives of judicial reform in post-authoritarian and post-conflict states. In this discussion it was concluded that truth commission processes could, for various reasons, greatly contribute to achieving certain objectives of judicial reform in such contexts. However, this theoretical discussion translated differently in the practical example of the South African case.

On this precedent it is submitted that as a transitional justice mechanism, the vetting process is more suited to addressing the unjust past record of a judiciary than the truth commission process. The nature of the vetting process compared with that of the truth commission process is responsible for this. Legal systems foster environments that are formal, strict and unemotional. Consequently, a forum which is similar in nature would be more appropriate to address the conduct of judicial officers who adjudicate in such systems.

In contrast truth commissions are emotive forums with a psychological focus. In the South African case, participation in the truth commission process was voluntary for the judges, and no system of punitive sanctions existed.

If one analyses how the vetting procedure took place in Kenya, it was similar to a procedure of how a JSC would ordinarily deal with misconduct committed by judicial officers. The vetting process was compulsory if the incumbent members of the judiciary wanted to remain in office. There was also the punitive sanction that these judges might have not been considered suitable by the Vetting Board to continue in office.

On this reasoning, it is recommended that the vetting process is the more appropriate transitional justice mechanism to use for the purposes of judicial reform.

However what is demonstrated by both cases (irrespective of the extent of the contribution), is that merit does lie in confronting the unjust past legacy of a judiciary. It demonstrates that it is not wise to ignore the past legacy, and simply start from a clean slate in a new constitutional era or under a new governmental regime. It has proved better (as shown in these cases) to use the unjust past record as a tool for reforming a judiciary. This dissertation has determined that it is important for the future development of legal systems in post-authoritarian and post-conflict states to confront the unjust past record of their judiciaries.

## WORKS CITED

## BOOKS AND JOURNALS

1. Yvonne Burns and Margaret Beukes *Administrative Law under the 1996 Constitution* 3ed (2006) LexisNexis, Durban
2. Edwin Cameron 'Submission on the role of the judiciary under Apartheid' (1998) 115 *SALJ* 436
3. Audrey R. Chapman and Hugo van der Merwe (eds) *Truth and Reconciliation in South Africa: Did the Truth Deliver* (2008) University of Philadelphia Press, Philadelphia
4. Hugh Corder 'Judicial Authority in a changing South Africa' (2004) 24 *Legal Studies* 253
5. Hugh Corder 'Towards a South African Constitution' (1994) 57 *The Modern Law Review* 491
6. Ian Currie and Johan de Waal *The New Constitutional and Administrative Law* (2001) Juta & Co., Cape Town
7. Pablo De Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (2009) Social Science Research Council, United States of America
8. John Dugard *Human Rights and the South African legal order* (1978) Princeton University Press, Princeton
9. David Dyzenhaus *Judging the Judges, Judging Ourselves* (1998) Hart Publishing, Oxford
10. Stephen P. Elliot *et al.* (eds) *Webster's New World Encyclopaedia* (1992) Wiley Publishing, United States of America

11. Murray Faure and Jan-Erik Lane (eds) *South Africa: Designing new political institutions* (1996) Sage Publications, London
12. NRL Haysom 'A Constitutional Court for South Africa' (1991) 14 *CALS Occasional Paper 2*
13. Jonathan Klaaren 'The truth and reconciliation commission, the South African judiciary, and constitutionalism' 57 (1998) *African Studies* 198
14. Duard Kleyn and Frans Viljoen *Beginner's guide for law students* 3 ed (2002) Juta & Co., Cape Town
15. Heinz Klug *Constituting democracy: Law, Globalism, and South Africa's political reconstruction* (2000) 137 Cambridge University Press, Cambridge
16. Pius Langa and Edwin Cameron 'The Constitutional Court and Supreme Court of Appeal after 1994' (2010) 23(1) *Advocate* 28
17. Rama Mani 'Balancing Peace with Justice in the Aftermath of Violent Conflict' (2005) 48 *Palgrave Macmillan Journals Thematic Section Development* 25
18. Rama Mani *Beyond Retribution: Seeking justice in the shadows of war* (2002) Blackwell Publishers, Oxford
19. Rama Mani 'Conflict Resolution, Justice and Law; Rebuilding the Rule of law in the Aftermath of Complex Political Emergencies' (1998) 5 *International Peacekeeping* 14
20. Anthony S. Mathews *Freedom, State Security and the Rule of Law; Dilemmas of the Apartheid Society* (1986) Juta & Co., Cape Town
21. Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as prevention: Vetting Public Employees in Transitional Societies* (2007) ) Social Science Research Council, United States of America

22. Eirin Mobikk 'Transitional Justice and Security Sector Reform: Enabling Sustainable Peace' (2006) 13 *Geneva Centre for the democratic control of armed forces (DCAF) Occasional Paper* 1
23. MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *SALJ* 708
24. J Montville 'The healing function in political conflict resolution' in J Sandole and H van der Merwe (eds) *Conflict Resolution and Practice: Integration and Application* (1993) 112
25. L Muthoni Wanyeki 'The International Criminal Court's cases in Kenya: origin and impact' 2012 *Institute for Security Studies* 1 237
26. David Pottie and Shireen Hassim 'The politics of institutional design in the South African transition' in Sunil Bastion and Robin Luckham *Can democracy be designed? The politics of institutional choice in conflict-torn societies* (2003) Zed Books, London
27. Richard Spitz and Mathew Chaskalson *The Politics of Transition* (2000) Hart Publishing, Oxford
28. J Sykes (ed) *The Concise Oxford Dictionary* 6ed (1976) Oxford University Press, Oxford
29. Michael J. Trebilcock and Ronald J. Daniels *Rule of Law reform and development: Charting the fragile path of progress* (2008) Edward Elgar Publishing Limited, United States of America
30. Truth and Reconciliation Commission 'The Truth and Reconciliation Commission, and the bench, legal practitioners and legal academics: written presentations' (1998) 115 *SALJ* 15
31. Malcom Wallis 'Judges: Servants or Civil Servants?' (2012) *SALJ* 652

## PAPERS AND REPORTS

1. Report of the Truth, Justice and Reconciliation Commission (Volume 4) *Findings and Recommendations* (2013)
2. Truth and Reconciliation Commission of South Africa Report (Volume 4) *Institutional and Special Hearings* (1998)
3. Jan van Zyl - Smit *Reforming the Kenyan Judiciary 2003-2012: A Comparative Perspective* (Unpublished paper presented at the African Network of Constitutional Lawyers annual conference in Lagos, Nigeria, Oxford-Brookes University, 2012) 2
4. Jan van Zyl – Smit *Vetting Judges after a Constitutional Transition: Comparative Experiences from East Germany, Bosnia and Herzegovina and South Africa* (Unpublished paper presented at the International Commission of Jurists (Kenya branch) conference, in Mombasa, Kenya, Oxford-Brookes University 2010) 6

## INTERNET SOURCES

1. Ahmednasir Abdullahi ‘Restoring Public Confidence in Kenya’s discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission’s agenda for reform’, available at <http://www.kenyalaw.org/klr/index.php./fileadmin/pdfdownloads/bills/2011/index.php?id=894>, accessed on 19 January 2013
2. Edwin Odhiambo Abuya ‘The Role of the Judiciary in promotion of free and fair elections’, available at <http://www.juridicas.unam.mx/wccl/ponencias/1/1.pdf7>, accessed on 5 January 2013
3. All Africa ‘Kenya: How Kenya delivered its peaceful general elections’ *All Africa* 20 March 2013, available at <http://allafrica.com/stories/201303201196.comhtml/page=3>, accessed on 6<sup>th</sup> May 2013

4. Migai Akech 'Institutional Reform in the New Constitution of Kenya' *International Centre for Transitional Justice* October 2010, available at <http://ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>, accessed on 4 January 2013
5. Migai Akech 'Is the Vetting process really fair to judges?' *The Star* 25 June 2013, available <http://www.the-star.co.ke/news/article-13134/vetting-process-really-fair-judges>, accessed on 5 September 2013
6. Lucas Barasa 'Board clears judges Ibrahim and Nambuye' *Business Daily* 15 January 2013, available at <http://www.businessdailyafrica.com/-/539546/1666242/-/q536fv/-/index.html>, accessed on 20 January 2013
7. BBC News 'Kenyan rivals agree to share power' available at <http://news.bbc.co.uk/2/hi/africa/7268903.stm>, accessed on 5 January 2013
8. Olive Burrows 'Government backs Vetting Board on court ruling' *Capital News* 2 October 2012, available at <http://www.capitalfm.co.ke/news/2012/10/govt-backs-vetting-board-on-court-ruling/>, accessed on 20 January 2013
9. Business Daily 'Vetting board rules on fate of judges' *Business Daily* 21 December 2012, available at <http://www.businessdailyafrica.com/Vetting-board-rules-on-fate-of-judges/-/539546/1649048/-/7xjta2/-/index.html>, accessed on 20 January 2013
10. Pamela Chepkemei 'Five judges sent home, 23 cleared as Rao turns to magistrates' *The Sunday Nation* 22 December 2012, available at <http://www.nation.co.ke/News/Judges-Angawa-Ombija-unfit-to-serve-Judiciary/-/1056/1648928/-/ufbeqgz/-/index.html>, accessed on 19 January 2013
11. Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review 11<sup>th</sup> October 2010' *Multi-level Government Initiative* at 75 available at <http://www.mlgi.org.za/resources/local-government-database/by->

- country/kenya/commission-reports/CoE\_final\_report.pdf*, accessed on 4<sup>th</sup> September 2013
12. Lauren Davis ‘Justice-sensitive Security sector reform in the Democratic Republic of the Congo’, available at [http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice\\_Sensitive\\_Security\\_System\\_reform\\_in\\_the\\_DRC-2.pdf](http://ancien.operationspaix.net/sites/operationspaix.net/IMG/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC-2.pdf), accessed 1 October 2012
  13. Jeffrey Gettleman ‘Kenyan Court upholds election of candidate facing charges in the Hague’ *New York Times* 31 March 2013, available at [http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?\\_r=0\\_](http://www.nytimes.com/2013/03/31/world/africa/in-tense-kenya-court-upholds-election-results.html?_r=0_), accessed on 12 May 2013
  14. Government of Kenya Department of Justice ‘National Legal Awareness Program’ available at, <http://www.justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap>, accessed on 13<sup>th</sup> September 2013
  15. International Coalition for the Responsibility to Protect ‘Crisis in Kenya’ available <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>, accessed on 4 January 2013
  16. International Commission of Jurists ‘Kenya: Judicial Independence, Corruption and Reform’ April 2005 *International Commission of Jurists* at 15, available at <http://old.icj.org/IMG/pdf/kenyareport.pdf>, accessed on 4 January 2012
  17. Judges and Magistrates Vetting Board ‘First Report’ *Judges and Magistrates Vetting Board* 30 March 2012 at 4 available at <http://www.jmvb.or.ke/reports/finish/3-jmvb-reports/11-first-jmvb-report/0.html>, accessed on 14 January 2013
  18. Judges and Magistrates Vetting Board ‘Second Determination’ *Judges and Magistrates Vetting Board* 20 July 2012 at 17, available at [http://www.jmvb.or.ke/images/documents/second\\_determination.pdf](http://www.jmvb.or.ke/images/documents/second_determination.pdf), accessed on 18 January 2013

19. Judges and Magistrates Vetting Board ‘Fourth Determination’ *Judges and Magistrates Vetting Board* 21 September 2012 at 33, available at [http://www.jmvb.or.ke/images/documents/fourth\\_determinations.pdf](http://www.jmvb.or.ke/images/documents/fourth_determinations.pdf), accessed on 19 January 2013
20. Jillo Kadida ‘Kenya: Four Appeal judges sacked’ *The Star* 25 April 2012, available at <http://allafrica.com/stories/201204261253.html>, accessed on 18 January 2013
21. Kenyan Judiciary ‘‘Judiciary Transformation Framework 2012-2016’’ available at, <http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf>, accessed on 13 September 2013
22. Kenya Transitional Justice Network ‘Transitional Justice Approaches in the context of the implementation of Agenda Item Number 4’ available at, <http://www.icj-kenya.org/dmdocuments/books/transitional%20justice%20approaches%20in%20the%20context%20of%20the%20implementation%20of%200agenda%20item%20number%204.pdf>, accessed on 10 September 2013
23. LAWASIA ‘Beijing Principles’, available at <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf>, accessed on 31 May 2012
24. Mikateko Joyce Maluleke and Thuli Madonsela ‘Gender equality jurisprudence in landmark court decisions’ Department of Justice and Constitutional Development, available at <http://www.info.gov.za/view/DownloadFileAction?id=131948>, accessed on 12 September 2013
25. Lordrick Mayabi ‘Justice Jeanne Gacheche declared unfit for office’ *Capital News* 3 August 2012, available at <http://www.capitalfm.co.ke/news/2012/08/justice-gacheche-declared-unfit-for-office/>, accessed on 19 January 2013

26. Lordrick Mayabi ‘Judges Ibrahim, Nambuye get second chance’ *Capital News* 21 September 2012, available at, <http://www.capitalfm.co.ke/news/2012/09/judges-ibrahim-nambuye-get-second-chance/2/>, accessed on 19 January 2013
27. Aggrey Mutambo ‘Ethnicity, gender division rife at Judiciary, Chief Justice Willy Mutunga says’ *The Dailey Nation* 11 September 2013, available at <http://mobile.nation.co.ke/News/Ethnicity+gender+division+rife+at+Judiciary+willy+mutunga/-/1950946/1988286/-/format/xhtml/-/r50y4i/-/index.html>, accessed on 13 September 2013
28. John Ndeta ‘Supreme court’s ruling on gender rule a case justice delayed for womenfolk’ *The Dailey Nation* 13 December 2012, available at <http://www.nation.co.ke/oped/Opinion/-/440808/1643184/-/kmlsuez/-/index.html>, accessed on 13 September 2013
29. Yuhniwo Ngege ‘Kenya 2013 Elections: reflections on the Supreme Court ruling and the role of the judiciary in democratisation’ 18 April 2013, available at <http://www.opendemocracy.net/yuhniwo-ngege/kenya-2013-elections-reflections-on-supreme-court-ruling-and-role-of-judiciary-in-dem>, accessed on 6th May 2013
30. Office of the United Nations High Commissioner for Human Rights ‘The Rule of law and transitional justice in conflict and post-conflict societies’, available at <http://daccessddsny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>, accessed on 16 May 2012
31. Oxford University ‘Dr. Rama Mani’ available at <http://www.politics.ox.ac.uk/index.php/profile/rama-mani.html>, accessed 03 October 2012
32. Relief Web ‘The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya - Background Note’ available at <http://reliefweb.int/report/kenya/kenya-national-dialogue-and-reconciliation-building-progressive-kenya-background-note>, accessed on 5 January 2013

33. Republic of Kenya: The Judiciary ‘The Judicial Services Commission’ available at <http://www.judiciary.go.ke/portal/the-judicial-service-commission.html>, accessed on 0 January 2013
34. The Sunday Nation ‘Supreme Court Judge Ibrahim ‘unfit to serve’  
*The Sunday Nation* on 20 July 2012, available at <http://www.nation.co.ke/News/politics/-/1064/1458952/-/9ereni-/index.html>, accessed on 18 January 2013
35. Bob Tortora ‘Kenya Votes 2013: Attitudes towards the Election, Judicial System and Security’, Gallup Survey, available at [www.gallup.com/file/poll/157898/Gallup\\_Kenya\\_Presentation\\_5thOct.pdf](http://www.gallup.com/file/poll/157898/Gallup_Kenya_Presentation_5thOct.pdf), accessed on 6 September 2013
36. United Nations Office of the High Commissioner for Human Rights ‘Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008’ *United Nations Office of the High Commissioner for Human Rights* 28 February 2008 at 6, available at <http://www.ohchr.org/Documents/Press/OHCHRKenyaReport.pdf>, accessed on 4 January 2013
37. Maureen Waruinge ‘Kenya: Magistrates now to feel the heat’ *The Star* 14 January 2013, available at <http://allafrica.com/stories/201301141336.html>, accessed on 20 January 2013