
**AN ASSESMENT OF THE KENYAN JUDICIARY ON INTEGRITY
AND ACCOUNTABILITY IN THE POST- 2010 CONSTITUTIONAL ERA**

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ABSTRACT

Purpose: The Kenyan constitution of 2010 regarded far-reaching reforms in terms of state officers' integrity. This was a deviation from the past when legislation concerning integrity was fragmented and poorly anchored in the old constitution. Therefore, several legislative frameworks were put in place after 2010 to emphasize this provision. However, despite these provisions, the judiciary has faced numerous challenges in its pursuit of judicial integrity. Thus, this study attempted to delve into the 12-year journey since the adoption of the new constitution in terms of the gains and losses that have accrued in the judiciary in terms of accountability and integrity.

Research methodology: The study utilized a mixed paradigm approach comprising qualitative and quantitative techniques. Qualitatively, a desktop review was done in which secondary sources were obtained from books, journal articles, court rulings, expert opinions and newspaper articles. Quantitatively, a questionnaire was administered to 100 respondents working in the judiciary. This questionnaire contained responses for the third objective. The data was collated and analyzed under the three main objectives that guided the study.

Findings: It was determined that, even though measures were put in place through a sound policy and legal framework, compliance has yet to meet the expected threshold, particularly in the judiciary.

Recommendations: The study recommends that training, sensitization, goodwill, and collaboration among stakeholders can improve judicial integrity. The study is expected to benefit policymakers, judicial officers, and legal and jurisprudence scholars.

Keywords: *Kenyan Judiciary, Integrity, Accountability, Post- 2010 Constitutional, Era*

INTRODUCTION

Integrity is a moral, qualitative and normative concept. According to Louis (1999), integrity refers to the practice of being honest and showing a consistent and uncompromising adherence to strong and ethical principles and values. From an ethical perspective, it refers to the truthfulness and accuracy of one's actions. Therefore, having integrity is benchmarked to acting by values, beliefs and principles one claims to hold. Bloom (1993) avers that integrity should begin with politicians given the fact that their high position in law-making demands that they exercise a great deal of integrity. The author further posits that for integrity to be said to have been done, it demands knowledge of and compliance to the letter and spirit of the written and unwritten constitution. Bloom (1993) defines judicial integrity as making judicial decisions that will show the court's commitment to lawfulness and justice. From this angle, the court system ought not to be seen to be courting unlawful acts and should act as a symbol of lawful conduct.

In fact, in the US, the Fourth amendment of the constitution, which touched on the court's supervisory powers, was intended to prevent the court officials from having to answer integrity questions regarding how they exercised their discretion. This judicial integrity has also been replicated in Australia and New Zealand. The Bangalore Principles of judicial conduct (2003), which were approved by the United Nations Commission on Human Rights, provide for six values which are of the essence in the judiciary namely: Independence, impartiality, integrity, propriety, equality, competence and diligence. The covenant underscores integrity in value 3 in which it is viewed as a very essential part of the proper discharge of the judicial office'. It states that a judge shall ensure that his/her conduct is above reproach in the view of the reasonable observer (Janet, 2021). Accountability is the principle of being responsible for own actions (Matei & Drumasu, 2015). It entails being ready to explain and justify own actions to members of the public and other

stakeholders. Leaders can use different governance mechanisms to promote accountability including codes of conduct and codes of ethics.

Accountability is also a vital tool for combating corruption. When leaders and their institutions develop mechanisms that make them answerable to stakeholders, they gain an incentive to conduct their business ethically. Transparency is the willingness to allow and facilitate scrutiny of own decisions and actions (Rose-Ackerman, 2017). Good leaders promote transparency by availing information to members of the public. Good leaders also provide information to monitoring and watchdog institutions such as auditors, parliamentary committees, civil society, and judicial officers. In Kenya, the promulgation of the Constitution in 2010 was seen as a saving grace from the perception that had dominated the judiciary for a long time of inertia and ineptitude. Specifically, Chapter Six of the Constitution provided for the leadership and integrity of public officers by outlining what they are expected in law to adhere to. The constitution raised the bar for the judiciary in terms of judicial integrity and accountability by being not only in charge of interpreting laws, but also pace setters in adherence to the same laws.

PROBLEM STATEMENT

Being one of the three arms of government, the judiciary is an active player not only in terms of interpretation of the law but also as far as being exemplary in the execution of its duties in terms of integrity and adherence to chapter six of the constitution. However, there have been several occasions when the judiciary has failed the test of integrity and hence negatively impacted other arms of government. This paper specifically sought to trace the trajectory of judicial integrity in the post-2010 constitutional period. It will highlight the successes and failures in the drive towards judicial integrity before suggesting recommendations for improvement.

OBJECTIVE OF THE STUDY

To assess the Kenyan judiciary on integrity and accountability in the post- 2010 constitutional era

LITERATURE REVIEW

According to Okiri *et.al* (2019), despite near-adequate legislations, Kenya's jurisprudence depicts a state of despair, lack of goodwill and numerous constraints. This view of judicial ineptitude is

not just in Kenya. Ashman (1973) traced judicial apathy in the US was back by stating that the American justice system was choking of judicial pollution. Integrity was put to test because corruption was an established norm; there was a decided pattern of chronic bribery, conflict of interest, abuse of office, loathsome nepotism and pernicious payoffs. Even in England, Sir. Bacon's pronouncement that 'corruption and fraud in the judiciary are prevalent' (Bacon & Motangu, 1859) serves to reinforce the idea that judicial apathy is not new to Kenya. What countries have been doing is to put in place mechanisms through a series of legislations in order to reduce to the very minimal, if any, cases of judicial travesty.

Greed is one of the motivators that lead judicial officers to violate integrity principles. For example, a New York Supreme Court-elect judge was convicted of corruption in 1972. The judge stated unequivocally in his plea (Tolcin & Tolchin, 2015). Therefore, ethical principles play a critical role in reducing judicial transgressions. Some scholars argue that morality cannot be legislated, a viewpoint that Watson (2010) disagrees with. All legislation, in his opinion, is moral. According to Watson (2015), every proposed, passed, and enforced law and regulation contain some notion of good that it seeks to promote or preserve. If one asks, "What is the law for?" the answer lies in what is good for the community and thus morality. However, when viewed in retrospect, morality contains an element of circumstantial ethics or relativity in terms of what is good or bad, making it difficult to enforce. For example, despite the signing of a Code of Conduct and Ethics for the Judiciary in 2017, cases of judicial misconduct have persisted, indicating that moral laws are not the only solutions to judicial integrity issues.

Persson *et al.* (2012) noted that despite the enactment of numerous policy and institutional frameworks aimed at combating corruption, little success has been realized. In fact, in some countries, the policy and institutional framework seem to have entrenched corrupt practices. The author theorized that the main reason behind the failure of anti-corruption policies is that corruption has become a norm or an expected behaviour in the country and many other African nations. When corruption becomes a norm, monitoring devices and punishment regimes become ineffective simply because no actors are willing to implement them. Ishikawa (2019) points out that most of the measures that Kenya has put in place to combat corruption tend to oversimplify

corruption and do not pay attention to the role of networks and partnerships that typify a corrupt environment.

Judicial integrity is also about perception. For example, in 2013, 61% of Kenyans exhibited confidence in the Judiciary in comparison with 2009 when the confidence levels were at 21%. Further, from 2013-2015, the number of Kenyans with confidence in the judiciary again fell from 28-21%. This was a reflection of high-profile controversies regarding corruption and the presidential election decision (Gainer, 2016). Therefore, from the literature, it is apparent that integrity is a concept that goes beyond legislation to encompass morality and public perception. An ideal case scenario is when morality, legislation and public perception of the judiciary coalesce in which case it brings confidence and raises the integrity of the institution.

On the other hand, accountability is a governance principle that demands an explanation and justification of the conduct of public officeholders (Carcaba et al., 2017). It calls for the development of mechanisms that make public officers answerable and liable for their actions. Accountability is an obligation conferred to individuals to whom public resources have been entrusted to justify and explain their decisions and actions (Khotami, 2017). It entails taking deliberate steps to describe and justify conduct as a government official. The principle of accountability is founded on the agency theory, which opines that since government officials are agents that make decisions and act on behalf of members of the public, they ought to be accountable to the public (Panda & Leepsa, 2017). The principle of accountability goes hand-in-hand with transparency. According to Carcaba et al. (2017), the aim of promoting transparency in government operations is to improve accountability. Transparency avails critical information regarding the transaction of public institutions to stakeholders making it possible for them to hold government official accountable for the decisions and actions (Khotami, 2017). Transparency without accountability is meaningless while there cannot be accountability without transparency.

In the public sector, accountability is for two kinds: vertical and horizontal. Vertical accountability entails answering to higher authority in the chain of command while horizontal accountability entails being answerable to the public (Rahim, 2019). According to Khotami (2017), holders of public office are required to show accountability in various areas including the use of funds; process and procedures of carry out activities such recruitment of staff; performance of duties and

responsibility; realization of goals; and policy formulation and implementation. When it comes to public procurement Tambo (2018) opines that accountability has to do with the process of supervising and controlling the procurement transaction of government entities. The oversight and control structures are mainly determined by the legal and regulatory framework of a country. Harnovinsah et al. (2020) points that accountability structures in the public sector are complex and often involve auditors, controller of budgets, the Parliaments, boards, and the general public.

A key component of accountability in public procurement entails developing mechanisms for controlling the expenditure of an institution. In the Kenyan context, this role is fulfilled by legislative bodies (national and county assemblies), the controller of budgets, and boards of parastatals. These bodies control expenditure of public institution by scrutinizing budgets and approving every expenditure item (Tambo, 2018). Another important accountability mechanism is external audit aimed at ensuring money is spent in line with approved budgets. The role of external audit in promoting accountability is documented in the study by Cumbe and Inacio (2018), where it was observed that external audit had a positive impact on the accountability in the management of common fund by the Mozambique National Institute of Statistics. The positive impact of external audit was largely attributed to management's willingness and readiness to implement the recommendations of external auditors.

Another component of accountability in public procurement is an independent grievance redress mechanism (Sen, 2019). This mechanism should be available to all bidders who were not satisfied with process followed to procure a given item. It should be available to any member of the public who feels that the right procedures were not followed when awarding a particular contract. Oversight bodies are also essential components of accountability in public procurements. According to Mukura et al. (2016), the public procurement oversight authority (PPOA) is the main body mandated by the CoK 2010 to play the oversight role when it comes to public procurement. The PPOA has the responsibility to investigate complaints of noncompliance with procurement laws and regulations and recommend actions to the EACC. Another body to which the CoK 2010 has conferred the oversight role is the parliament that includes the national assembly and senate. Mihyo *et al.* (2016) observed that the oversight role of parliament in Kenya has improved with the establishment of budget offices and audit agency, separation of parliament staff from other civil

servants, entrenchment of parliamentary committees, and opening parliamentary debates to members of public. However, the effectiveness of parliamentary oversight is hampered by predominance of informal procedures and rules, control of state power by elite groups separated by ethnicity, formation of predatory alliances within parliament, undemocratic political parties culture, and rules relating to party discipline.

RESEARCH METHODOLOGY

The study combined qualitative and quantitative methods of data collection and analysis. Qualitatively, the study utilized a desktop review in tracing the intricacies facing the judiciary in terms of adherence to chapter 6 of the constitution since 2010. Data were selected from expert opinions, Kenyan Constitutions, related Acts of Parliament, commentaries as well as Reports from commissions such as the Ethics and Anti-Corruption Commission and court findings and tribunal recommendations. On the other hand, the quantitative analysis involved administering questionnaires to 100 respondents whose judicial officers were working in both superior and subordinate courts in Nairobi. Analysis was divided into two, namely qualitative and quantitative. The qualitative analysis involved assessing the constitutional and legal provisions guiding judicial integrity since 2010 and the challenges facing the judiciary in attaining judicial integrity and then giving recommendations for the future. The quantitative analysis, on the other hand, involved presenting the results in form of percentages based on the questions the respondents were asked on accountability and transparency.

FINDINGS AND DISCUSSIONS

Constitutional and Legal provisions on Judicial Integrity

According to Willy Mutunga, Kenya's Chief Justice from 2011 to 2015, at the time he was taking over the judiciary, it was a system that was designed to fail with structures so thin that resources, so low on its confidence, so deficient in integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. This statement leads to the conclusion that judicial transformation had to be undertaken in order to resuscitate the judiciary from serious integrity issues that had bedeviled it. According to Transparency International (2010), 43% of Kenyans who sought services from the judiciary reported paying bribes.

Garnier (2016) argues that the 2010 constitution provided a clear mandate for judicial reform. Okiri (2019) avers that the constitution outlines the national values and principles of governance for all state officials including the judicial officials. It is expected that that the authority vested to these officials is based on public trust and thus should be exercised in a way which brings honor to the nation and dignity to office. These include avoiding conflict of interest, compromising public office for private gain or demeaning the office on holds.

Further, the EACC Act No. 22 of 2011 was another meaningful legislative instrument related to integrity. Its main aim was to legislate integrity to public officials. Under Article 252 and Chapter 6 of the constitution, it was mandated to develop and promote standards and best practices in the fight against corruption and the quest towards attaining integrity. This act, in fact, is a major yardstick which, if well implemented, can enhance compliance to integrity. Another milestone in terms of legislating integrity is the Bribery Act 2016. This act provides for not only for prevention, investigation and punishment of bribery cases, but also connected offences. One of the challenges prior to the act was how to define bribery and how to prove its occurrence. The act unequivocally pronounces scenarios under which bribery can occur leaving no room for gaps. Furthermore, the act stipulates what public and private entities ought to do in order to prevent bribery or corruption; particularly in terms of reporting such cases.

In the same vein, the Leadership and Integrity Act 2015 was also another legal provision that aimed at streamlining public organizations to realize integrity as enshrined in chapter six of the constitution. It establishes the procedures as well as mechanisms that actualized chapter six by enumerating the guiding values of state officers as well as the requirements and expectations enshrined in Articles 99 (1) and 193 (1) (b) and 173. It enumerates honesty, efficiency and transparency of public state officers. At the same time, the act pronounces itself clearly on judicial integrity. The act burrs state officers from using public office for private gain. As such, a state officer must maintain ethical and moral requirements which enhance integrity to the office he/she is holding. In 2011, the Vetting of Magistrates and Judges Act was passed in order to institutionalize the framework for vetting of judges and magistrates. The board was headed by Sharad Rao, an experienced judge. This was a brave move on the part of the judiciary to strengthen not only integrity, but also to gain public confidence. Therefore, the foregoing serves to

demonstrate that there is abundance of legislative framework that guides the judiciary towards integrity. The question that remain unanswered is the extent to which this framework helps in attaining judicial integrity.

Challenges faced by Judiciary in attaining judicial Integrity in the Post-2010 constitutional period

The question as to why judicial integrity in Kenya remains elusive finds answers from different dimensions and contexts. To compact them, the answers can be reduced into four main themes namely: Abuse of Court Process, Incumbency, judiciary-executive wars and the role of the public.

Abuse of Court Process

At the height of the vetting of Judges and Magistrates, there emerged individuals who bulwarked the vetting process using litigation. For example, in the case of Dennios Mon'gare vs. Attorney General (2011) which was aimed at challenging the vetting of judges, the intention was to stop the process, hence give way for those judicial officers who had integrity issues a leeway to continue serving office. However, the petition was dismissed. Similarly, the Center for Human Rights and Democracy (CHRD) also went to court to stop the vetting of Justice Mohammed Ibrahim and Roseline Nambuye. Levis (2021) posits that acts which amount to use the court process to delay or delegitimize an ongoing process, particularly if its intention is for public good amount to abuse of court process and this can deliver a shattering blow to the confidence in the judiciary because once it is lost, it is regained with outmost difficulty. Even Montesquieu, in his work 'The Spirit of Laws' argued that there is no greater tyranny than that which is perpetuated under the shield of the law in the name of justice.

Still, on the issue of abuse of the court process, when courts paint a picture of being lenient and siding with the people facing integrity issues under the guise of judicial principles, it also ends up tainting its image and thus raising integrity issues. Wakienda in 2014 for example, argues that in an attempt to delay or avoid justice, people, especially the high and mighty, use the courts to shield them and this ends up denting the image of the judiciary as pro-rich and anti-poor. Courts have in the past issued orders to the detriment of development and public good hence reducing confidence from the people. For instant, the Governor of Embu Martin Wambora case; even after the senate

impeached him, he used the court to overthrow his impeachment. A similar case was that one that faced former Nairobi Governor Evans Kidero who blocked the nullification of his election by the Court of Appeal pending his appeal to the Supreme Court. Such instances accelerate the reduction in confidence levels in the judiciary.

Incumbency

According to Okiri (2019), Kenya's judiciary had developed a culture of lack of accountability, distance and hierarchy, sometimes driven by a self-serving invocation of the principle of independence. The author further argues that during the 2011 vetting of Judges and Magistrates, some of the judicial officers resisted the reforms basically because they had histories of corruption, bias and unreasonable delays. These judges were so much concerned about the vetting process and their removal. According to Willy Mutunga (2014), 'We were able to do a lot of things because the internal resistance to reforms was already engaged by the vetting board. The judicial officers were fighting for their careers and this fight cast a lot of aspersions with regard to the integrity of the institution.

Tug of Wars between Judiciary and Executive

One of the single most challenges that judicial integrity has been faced with is accusations and counter-accusations between it and the executive. As much as the 2010 constitution has provided an elaborate separation of powers between the government arms, there are also areas in which all the three arms must work interdependently namely in the appointment of Judges, funding of judiciary and removal of judges. These areas have been a bone of contention in Kenya's judiciary.

The constitution bestows the duty of appointment of judges to the Judicial Service Commission and the president. This in itself has been a contention about where the powers of each of the organs start and end. In 2019, JSC recommended to the president the appointment of judges. However, he failed to appoint them, citing serious alleged integrity issues on the judges. This raised issues because, on one hand, there is a perception that the JSC failed in doing due diligence in investigating the integrity of the judges it recommended but on the other hand, it also allowed the executive to point its fingers at the judicial integrity. This has been a challenge as far as enhancing trust in the institution is concerned.

When it comes to finances, Article 173 (I) provides for judicial independence in terms of finances. However, on several occasions, especially when there was bad blood between executive and judiciary, the latter has been denied funds. This also compromises the capacity of the judiciary to execute its mandate appropriately and also makes it vulnerable to compromise of its integrity.

Public Good Will

The successful implementation and drive towards judicial integrity are dependent on the public. This is because apart from serving the public, the judiciary does not exist in a vacuum. Corruption allegations in the judiciary mean that even the public is involved. A report by EACC (2014) on the Judiciary revealed that there were unethical practices in the judicial sector which ranged from bribery (22%) to Laxity (19%) and favoritism (17%). At the same time, 39% of judicial officers exhibited a lack of courtesy. This has been a challenge because the culture of corruption has been perpetuated and accentuated in the public and this makes it hard for the judiciary to transit towards judicial integrity. This, therefore, requires public goodwill in order to collaborate towards helping the judiciary attain integrity.

Leadership Accountability and Levels of Corruption in the Judiciary

The study also sought to analyse leadership accountability in the judiciary. It was assessed quantitatively using a set of seven statements that prompted respondents to indicate whether they are true or false. Table 1 presents the respondents views:

Table 1: Respondents views on Accountability of the Leader

| Statement | True N (%) | False N (%) |
|---|---------------|----------------|
| Our leaders facilitate the participation of members of the public in key procurement decisions | 35 (35.4) | 64 (64.6) |
| Our leaders ensure that all financial expenditures are budgeted for. | 72 (72.7) | 27 (27.3) |
| Our leaders always ensure the departments expenditures are approved by relevant bodies (national assembly, boards, or controller of budget) | 64 (64.6) | 35 (35.6) |
| Our leaders are always keen to answer audit queries from the auditor general's office | 59 (59.6) | 40 (40.4) |
| Our leaders are always ready to speak to the media on queries related to procurement transactions of the institution. | 41 (41.4) | 58 (58.6) |
| Our leaders have put in place platforms through which individuals disgruntled by procurement processes can raise their grievances | 38 (38.4) | 61 (61.6) |
| Our leaders are always ready to address queries raised by the public procurement oversight authority | 40 (40.4) | 59 (59.6) |

Results in Table 1 illustrate that 35.4% of respondents affirmed that their leader facilitates the participation of members of the public in key procurement decisions. On the other hand, 64% indicated the negative suggesting that there is a higher probability of failure to adhere to accountability and transparency. According to Tambo (2018), engaging members of the public in making decisions, involving the expenditure of huge amounts of monies is a central element of accountability. The Public Financial Management Act of 2012 requires public institutions to engage stakeholders when budgeting to capture their priorities (Republic of Kenya, 2012).

As to whether financial expenditures are budgeted for, a majority of the respondents, 72% indicated in the affirmative while 27% differed with the statement. These findings connote that successful leaders are more likely to follow the accountability regulations that require all public institutions to prepare budgets that detail all expenditures. According to Osore (2019) budgeting enables public institutions to manage scarce resources in an efficient and economical manager in

the delivery of desired services and outcomes. The budgeting process also reinforces fiscal discipline leading to a reduction in cases of misappropriation and embezzlement (Osore, 2019).

The study also sought to investigate the level of compliance to the accountability procedures. To this end, the respondents were asked to indicate the extent to which leaders always ensure the departments expenditures are approved by relevant bodies (national assembly, boards, or controller of budget). A majority of the respondents, 64% answered positively with the remaining 35% indicating that their leaders do not adhere to the requirements. This finding implies that adherence to the budgetary approval process is slightly high among the selected government institutions but still there is an extent to which this compliance is still yet to be attained. The finding is congruent with Kibunja (2017) where 50% of the respondents reported that the County Government of Murang'a spends funds on votes approved by the Controller of Budget.

As to whether their leaders are always keen to answer audit queries from the auditor general's office; a slight majority, 59% indicated positively while another 40% answered negatively. Tambo (2018) explained that the auditor general's office is one of the accountability mechanisms established by the CoK 2010. The CoK 2010 mandates the auditor general to conduct an audit on the financial transactions of all government institutions within six months after the end of a financial year. This scrutiny helps to keep public officials accountable for the decisions that they make regarding the utilization of public funds. If the audit process raises queries, the person in charge of an institution is expected to clarify those queries.

Accountability is also relating to the extent to which holders of public office are willing to divulge to the public the happenings in the office. To this end, the respondents were asked to indicate whether their leaders are willing to speak to the media on issues pertaining to procurement transactions. Those who indicated that their leaders were willing to divulge this information were 41.4% while a majority of the respondents, 57.4%, indicated that their leaders were not willing to talk to the media. According to Frank *et al.* (2013), a strong and free press is an important element for promoting accountability in government. The media helps to investigate procurements issues and disseminate information to the public. Therefore, receptiveness of a leader towards the media is a sign of a greater sense of accountability.

At the same time, accountability is also related to allowing people who seek services in public offices have their say on the extent to which they are satisfied or dissatisfied with the services. Therefore, the respondents were asked to indicate whether their leaders have in place mechanisms that ensure the clients voice their disgruntlement on the services they receive. This suggests that the level of relationships between the public and the judiciary is still low. According to Sen (2019), a grievance redress mechanism makes public officials more accountable for the procurement decisions that they make by providing bidders a platform to challenge the decisions made by officials in the procuring entity.

The last query was related to responsiveness of leaders in the judiciary. The respondents were asked to indicate whether the leaders are willing to respond to queries raised by the procurement authority. To this end, 40% of the respondents agreed that their leaders are always ready to respond to the queries while a majority, 53.3% differed with this assertion. This means that the level of transparency and accountability among judicial officers is still low. According to Mukura *et al.* (2016), PPOA is the main body that is mandated by the CoK 2010 to investigate any complaint of noncompliance with the procurement laws and regulations. Willingness to cooperate with this constitutional body show that women leaders are more willing to be held accountable than male leaders.

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