



Strathmore
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**Mitigating Corruption in the Kenyan judiciary: A Case study of the Legal
and Administrative Anti- Corruption Framework.**

Submitted in partial fulfillment of the Bachelor of Laws Degree,

Strathmore University Law School

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January, 2017.

TABLE OF CONTENTS

DEDICATION	iii
ACKNOWLEDGMENTS	iv
DECLARATION.....	v
ABSTRACT	vi
LIST OF ABBREVIATIONS	vii
LIST OF CASES	viii
CHAPTER ONE: INTRODUCTION	1
1.0. Background	1
1.2. Statement of the Problem	3
1.3. Statement of Objectives.....	4
1.4. Research questions	4
1.5. Justification and Scope of study	4
1.6. Hypothesis	5
1.7. Theoretical Framework	5
1.8. Literature review	7
1.9. Research Design & Methodology	9
1.10. Limitations.....	9
1.11. Chapter Breakdown	9
1.12. Timeline/Duration	10
CHAPTER TWO: HISTORY OF JUDICIAL CORRUPTION AND REFORMS BEFORE THE COK 2010.....	10
2.1. Introduction	10
2.2. History of Judicial Corruption until 2010.....	10
2.3. Reforms before the COK 2010.....	14
2.3.1. Kwach Judicial Reform Committee	15
2.3.2. Report of the Advisory Panel of Eminent Commonwealth Judicial Experts	16
2.3.3. Report of the Integrity and Anti-Corruption Committee of the judiciary (Ringera Committee).....	18
2.3.4. Subcommittee on Ethics and Governance	19
2.3.5. The Final Report of the Task Force on Judicial Reforms.....	20

2.4. Conclusion.....	21
CHAPTER THREE: REFORMS UNDER THE NEW 2010 CONSTITUTION OF KENYA AND THE JUDICIARY TRANSFORMATION FRAMEWORK	21
3.1. The 2010 Constitution of Kenya	21
3.2. The Judiciary Transformation Framework.....	24
3.2.1. Implementation.....	24
3.3. Conclusion.....	26
CHAPTER FOUR: COMPARATIVE STUDY OF JUDICIAL ANTI-CORRUPTION FRAMEWORKS.....	27
1.1. Introduction	27
1.2. Singapore.....	28
1.3. China	29
1.4. Hong Kong	30
1.5. Lessons from the Comparative Study.....	31
1.6. Conclusion.....	32
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS.....	32
5.1. Introduction	32
5.2. Findings.....	32
5.2.1. Existence of actual judicial corruption in Kenya.....	32
5.2.2. Causes of judicial corruption in Kenya	33
5.2.3. Successes of judicial reforms over the years in mitigating corruption.....	33
5.2.4. Failures of judicial reforms over the years in mitigating corruption.....	33
5.3. Recommendations	33
5.4. Conclusion.....	35
BIBLIOGRAPHY	36
a) Books.....	36
b) Articles, Journals and Conference Papers	36
c) Reports.....	38
d) Legislation and International Instruments.	39
e) Websites cited.....	39

DEDICATION

To my Mum for her prayers and constant encouragement.

ACKNOWLEDGMENTS

I would like to thank my supervisor Mr. Martin Mbaya for his encouragement and guidance throughout this project. His keen eye to detail has pushed me to strive for perfection.

I would also like to thank my family, friends, classmates and colleagues who have supported me and encouraged me throughout this study.

DECLARATION

I, **LYNN MWITHI KIMANTHI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

ABSTRACT

Corruption has been the downfall of the Kenyan Government since independence. Corrupt public officials, ranking from the President to the simple civil servant, have stolen public property worth billions of shillings in form of land, money, buildings among others. In the early post-independence years, corruption scandals mostly plagued the Executive branches and Legislative branches. However, in the 1980s, corruption spread to the judiciary as the Executive and Legislative branches started exerting undue political influence over judges to gain favorable judgements. From then onwards, corruption became the only means through which the ordinary citizen would gain access to the justice system.

This study was primarily based on a qualitative analysis of literature concerning judicial corruption in Kenya. The study investigated the history, nature, scale and main factors promoting corruption in the Kenyan judiciary. It examined the anti-corruption reforms before and after the promulgation of the Constitution of Kenya 2010. Through various case studies of judicial corruption in other jurisdictions, the study reviewed several individual and institutional reforms that are suitable for mitigating judicial corruption in Kenya.

This study concluded that the current reforms aren't sufficient in mitigating corruption in the judiciary. This study recommends that certain political, socio-economic, cultural and individual incentives be introduced within the legal and administrative framework of the judiciary. These incentives include punitive individual punishment, leniency, whistleblowing mechanisms, asymmetric punishment and public awareness and education. These measures will serve as means of deterrence and education to supplement the existing anticorruption framework of the judiciary and mitigate judicial corruption.

LIST OF ABBREVIATIONS

ACHR	African Charter on Human and Peoples' Rights
COK	Constitution of Kenya
CKRC	Commission of Kenya Review Commission
DFID-EA	Department for International Development in East Africa
EABITA	East African Bribery Index Trends Analysis
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
JSC	Judicial Service Commission
JMVB	Judges and Magistrates Vetting Board
JTF	judiciary Transformation Framework
KANU	Kenyan African National Union
SODNET	Social Development Network
TI	Transparency International
UDHR	Universal Declaration of Human Rights
WJPRLI	World Justice Project Rule of Law Index

LIST OF CASES

Charles Koigi Wamwere & 2 others v Republic [1992] eKLR

James Kefa Wagara & Rumba Kinuthia v John Anguka & Ngaruro Gitahi, Civil Case No. 724 of 1988

Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & Attorney General [2014] eKLR

CHAPTER ONE: INTRODUCTION

1.0. Background

“Why hire a lawyer when you can buy a judge?”

-A popular saying in Kenya.¹

An independent and impartial judiciary is one of the key pillars of governance in an ideal democratic society. It protects basic human rights and fundamental freedoms, safeguards the rule of law and ensures societal order and integrity.

However, in reality, judiciaries worldwide have become a den of greedy judges and judicial officers selling justice. For example, a documentary released in September 2015 by a Ghanaian journalist implicated 34 Ghanaian judges of accepting bribes in exchange for passing lower sentences.² Despite this observation, there is a scarcity of recent statistical and academic literature on corruption in judicial systems worldwide especially in developing countries.

A basic definition of corruption is the use of public authority for personal gain.³ In the case of judicial corruption, it involves both the abuse of public office for personal gain and any inappropriate influence that results in an improper delivery of judicial services and legal protection for citizens.⁴ This can be through bribery, political and societal pressures, fear of reprisal, pressure within the justice system and ineffective enforcement of judgements.⁵

A common misconception is that judicial corruption involves judges and magistrates or other court officials only. However, it is widespread and systemic and pervades the entire justice system. It begins with the commencement of a criminal investigation or the filing of a

¹ Gainer M, ‘Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015, Innovations for Successful Societies’, Princeton University, November 2015, 2 available at <http://successfultsocieties.princeton.edu>.

² Ghana's top undercover journalist masters disguise to expose corruption, as seen on <https://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption> accessed on 3 January 2017

³ OECD Glossaries, [2008], “Corruption”, A Glossary of International Standards in Criminal Law, OECD Publishing

⁴ Noel MP, ‘Corruption and the Justice Sector’ (2003), 2.

⁵ Noel MP, ‘Corruption and the Justice Sector’, 2.

civil lawsuit throughout the judicial process, essentially culminating in the enforcement of the court's decision.⁶ It affects both institutions and individuals including, among others: the police service, prosecutors, lawyers, the judiciary and the prison service.

The judiciary in Kenya has been progressively viewed as subservient to the Executive, an upholder of state power and a poor protector of citizens' rights.⁷ From 1963 to 2002, the Executive arm and the political class maintained a frightening grip over the judiciary⁸. For example, when news of the Goldenberg scandal broke out in 1993, the Attorney General used his *nolle prosequi* powers to discontinue two suits against suspected high ranking officials in a bid to protect them.⁹ Similarly, in 1998, Justice Akiwumi rejected an application by a KANU member who claimed that the party's nomination process had denied him his constitutional rights on the grounds that the High Court lacked jurisdiction due to political pressure. However, the High Court has original and unlimited jurisdiction.¹⁰

The regime change in 2002, after the election of President Mwai Kibaki, was driven by the citizens' wrath on corruption as a national pandemic and more so, in the judiciary.¹¹ In the same year, the newly appointed Chief Justice appointed the Integrity and Anti-Corruption Committee of the judiciary to investigate corruption in the judiciary. The investigations showed that out of 3,234 officers as at 30th August 2003, consisting of 11 Judges of Appeal, 44 Judges of the High Court, 254 Magistrates, 15 Kadhis and 2,910 paralegals, 152 judicial officers were implicated in corruption.¹²

These measures mitigated the historical malaise that afflicted the judiciary but failed to address the deep-rooted institutional and statutory shortcomings of the judiciary. This was later solved by the promulgation of the COK 2010 which elevated the judiciary to be at par with the other arms of government, created the JSC to deal with all matters of the judiciary

⁶ Noel MP, 'Corruption and the Justice Sector', 2.

⁷ Ouma JO, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for reform' Unpublished PhD Thesis, University of Leicester, November 2011, i.

⁸ Abdullahi A, 'Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over-burdened judiciary' (2011).

⁹ Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' *Human Rights Quarterly*, (2001), 117.

¹⁰ *James Kefa Wagara and Rumba Kinuthia v John Anguka and Ngaruro Gitahi*, Civil Case No. 724 of 1988 as seen from Mutua M, 'Justice under Siege', 114.

¹¹ Ringera A, "Corruption in the judiciary" The World Bank, Washington DC, 25th April 2007.

¹² Sitinei J, "Corruption in the Kenyan judiciary" University of Passau, October 2010.

and a Vetting Board to vet the suitability of judges and magistrates appointed to the judiciary.¹³

Despite these measures, the East African Bribery Index Trends Analysis (2010 - 2014) report by TI Kenya ranked the judiciary as one of the most corrupt institutions in Kenya. The JSC is currently embroiled in graft cases involving Kshs 310 million allegedly stolen by top judicial officers.¹⁴ Due to this, according to the study published by the Ipsos Synovate group in 2015, public confidence in the Supreme Court fell by 12 per cent from November of 2012, while confidence in the High Court and local and magistrate courts across the country fell by 7 per cent.¹⁵

1.2. Statement of the Problem

The right to an independent and impartial judiciary is vested in Article 159 and 160 of COK 2010. Article 159 provides that justice should be exercised in a fair and equal manner regardless of status¹⁶ while Article 160 protects independence of judges by ensuring that they have security of tenure, financial security and judicial immunity.¹⁷

The right to a competent, independent, and impartial judiciary is also articulated in Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Convention on Civil and Political Rights, Article 7 of the African Charter of Human Rights and the UN Basic Principles on the Independence of the judiciary.¹⁸

In spite of the above, the Kenyan judiciary has for a long time been a puppet of the Executive as evidenced by the reports of the Kwach Committee, Ringera Committee and the Panel of the Eminent Commonwealth Judicial Experts (See Section 2.3 of this paper). This

¹³ Abdullahi A, 'Restoring Public Confidence', (2011).

¹⁴ Kenya: Judiciary officials charged over purchase of Chief Justice Willy Mutunga's house as seen on <https://www.standardmedia.co.ke/article/2000171810/kenya-judiciary-officials-charged-over-purchase-of-chief-justice-willy-mutunga-s-house> accessed on 3 January 2017.

¹⁵ Osaleh L, "Tackling Corruption in Kenyan judiciary," International Governance Institute -Annual General Meeting, Nairobi, 2015.

¹⁶ Article 159, COK (2010).

¹⁷ Article 160, COK (2010).

¹⁸ United Nations Office on Drugs and Crime , *Criminal Justice Assessment Toolkit* ,November 2006, 2.

systemic corruption of the Kenyan justice system denies every innocent Kenyan the fundamental human right to be governed by the rule of law.¹⁹

Former Chief Justice Willy Mutunga stated that “You are taking these people into a corrupt investigating system, through a corrupt anti-corruption system, and a corrupt judiciary”.²⁰This does not reflect the judicial reforms that the COK 2010 have brought about such as the Judiciary Transformation Framework(See Section 3.2 of this paper), vetting of judges and the case management system to try and curb corruption.

The above reasons have therefore led to this study which analyses corruption within the judiciary to identify loopholes within the existing legal and administrative framework of the judiciary and propose possible solutions.

1.3. Statement of Objectives

1. To identify the causes of judicial corruption over the years.
2. To analyse the judicial reforms recommended and their implementation.
3. To identify loopholes in the anti-corruption reforms recommended and implemented.
4. To make recommendations on how to improve the legal and administrative anti-corruption framework.

1.4. Research questions

1. What are the obstacles hindering the efficiency of the current anti-corruption framework?
2. What is the feasibility and practicality of creation of an anti-corruption framework that can mitigate corruption despite the historical malaise and political influence entrenched in the judiciary?

1.5. Justification and Scope of study

A significant knowledge gap exists in the area of judicial corruption. In 2015, the International Bar Association highlighted that there is a significant gap in knowledge regarding the nature, scope and drivers of corrupt practices in the Judiciary and in order to

¹⁹ Anukansai K, ‘Corruption: The Catalyst for Violation of Human Rights’ *National Anti-Corruption Journal*, 8.

²⁰ Lindijer K, Kenya has become a “bandit economy”, as seen on <<http://africanarguments.org/2016/01/11/kenya-has-become-a-bandit-economy-says-chief-justice-willy-mutunga>> accessed on 20 November 2016.

address this gap, it is necessary to understand the specific manners in which corruption occurs in different judicial systems around the world.²¹

The East African Bribery Index Trends Analysis report by TI Kenya states that the Kenyan judiciary is prone to corrupt practices at both grand and petty levels.²² It registered the highest average size of bribes paid among similar institutions with an average size of a bribe as Kshs 7,885.²³ In 2015, the JSC was embroiled in graft cases worth Kshs 310 million. Lastly, on 3rd August 2015, Kenya's Chief Justice Willy Mutunga sounded the alarm that corruption was creeping back into the judiciary as well – the first time the highly respected official has made such a claim publicly.²⁴

This study will analyse corruption within the judiciary specifically involving court officials such as judges, magistrates and court clerks among others. Furthermore, the study will focus on the historical and cultural background of corruption in Kenya and analyze the feasibility of existing and recommended anti-corruption reforms against this background.

This study will benefit academic scholars, researchers as well as the common 'mwananchi' on the way to tackle corruption in the judiciary. It will provide insight from a legal perspective on how to tackle corruption.

1.6. Hypothesis

Judicial corruption in Kenya can be mitigated through a myriad of political, social, economic, individual and cultural incentives.

1.7. Theoretical Framework

Studies have shown that corruption in many countries is a deeply ingrained cultural issue. Authors Raymond Fisman and Edward Miguel evaluated the role of social norms in corruption by studying parking violations of international diplomats living in New York City.²⁵ Prior to 2002, all consular personnel and their families had diplomatic immunity

²¹ Judicial Integrity Initiative Launch: Judicial Systems and Corruption 9 December 2015: London, UK

²² Transparency International, *The East African Bribery Index Trends Analysis(EABITA)*, 2015.

²³ Transparency International, EABITA, 2015.

²⁴Githongo J, Kenya's rampant corruption is eating away at the very fabric of democracy as seen on <<https://www.theguardian.com/global-development/2015/aug/06/kenya-barack-obama-visit-anti-corruption-plan-democracy>> accessed on 20 November 2016.

²⁵ Fisman R, Miguel E, 'Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets' *Journal of Political Economy*, 115 (2007), 1020.

which shielded them from paying parking fines.²⁶ The illegal parking fit into the standard definition of corruption of ‘abuse of public office for private gain’ which served as a measure of corruption culture in different societies.²⁷ Prior to 2002, international diplomats had no incentives to pay their parking fines. Therefore, they were free to do what they wanted. The study showed that the culture of corruption was illustrated through the various diplomats as those who had the most tickets were from countries with a high level of corruption. In 2002, authorities enforced the right to confiscate the diplomatic license plates of violators which led to a sharp drop in unpaid parking violations illustrating the correlation between cultural norms and legal enforcement to corruption.²⁸

In Kenya, corruption is deemed to be a social and cultural issue which occurs in all walks of life and is inculcated into children in their early stages of life. Kenyans pay bribes to access public services such as obtaining an identification card which is supposed to be a free public service. A proper analysis of mitigation of corruption requires a holistic approach of analysing economic, social, political and cultural considerations.

The political analysis involves the role of the state in judicial corruption. Several theories exist on this the role of the state in corruption particularly in Africa. The main political theory that this study will use is the political theory of separation of powers. Separation of powers entails the independence of the three arms of the government (Legislature, Executive and judiciary).²⁹ The independence ensures that each arm can carry out a proper checks and balances of the other arms of the government.³⁰ However, without the independence of each arm, for example, political influence is entrenched in the judiciary and the rule of law, the judiciary is supposed to protect, is undermined.

The social perspective analyses the characteristics of society that perpetuates judicial corruption namely human attitudes, values and actions. A good sociological theory is the structural functionalist theory, as championed by Emile Durkheim. This theory views society

²⁶ Fisman R, Miguel E, Corruption, Norms, and Legal Enforcement, 1020.

²⁷ Fisman R, Miguel E, Corruption, Norms, and Legal Enforcement, 1021.

²⁸ Fisman R, Miguel E, Corruption, Norms, and Legal Enforcement, 1022.

²⁹ Waldron J, Separation of Powers in Thought and Practice, *Boston College Law Review*, Vol 54:433, 433.

³⁰ Waldron J, Separation of Powers in Thought and Practice, 433.

as a system of different parts which work and depend on each other.³¹ The society influences each other in both positive and negative ways for example through corruption. The relationships between different parts of society are maintained through shared societal values and attitudes.³²

The economic perspective examines economic factors such as income inequality, rent-seeking and incentives which perpetuate or reduce corruption. The most important economic theory in the context of corruption is the rational choice theory as championed by William Stanley Jevons. The rational choice theory states that social behavior is determined by the behaviour of individual actors.³³ Each individual actor is assumed to be a rational agent who takes into account available information, probabilities of events, and potential costs and benefits in determining preferences before choosing the best choice of an action.³⁴ In this context, the different probabilities consist of whether or not to engage in corruption which depends on the outcome of the cost benefit analysis.

Lastly, organisational cultural theories talk about the causal path from a certain culture – a certain group culture – leads to a mental state, which leads to corrupt behaviour.³⁵

In conclusion, this study will focus on how to examine which factors have not been included in the mitigation of corruption within the administrative and legal framework of the judiciary.

1.8. Literature review

This study seeks to systematically identify political, economic, social and cultural norms that promote corruption and regulate them within the legal and administrative

³¹ Individual meaning cannot be understood independently of a wider system of collective practices and beliefs within which it is embedded. These collective practices, in turn, are to be explained by the functions they serve for the system of social life as a whole. See Holmwood J, Historical Developments and Theoretical Approaches in Sociology, *Encyclopedia of Life Support Systems*, Vol II, 2.

³² This is what is referred to by Durkheim as mechanical solidarity. See Durkheim, E. (1997). *The Division of Labor in Society*. New York, NY: Free Press.

³³ Egharevba S, Police Brutality, racial profiling and discrimination in the criminal justice system, IGI Global, (2017), 92.

³⁴ Egharevba S, Police Brutality, racial profiling and discrimination in the criminal justice system, IGI Global, (2017), 92.

³⁵ Gjalit GD, 'Causes of corruption: Towards a contextual theory of corruption' *Public Administration Quarterly Spring*, 31 (2007), 45.

framework of the judiciary. It is important to note though that there is very little literature discussing judicial corruption.

First, this study will analyze the history of corruption in the Kenyan judiciary and the reports on judicial corruption prior to COK 2010 and identify the social and cultural norms that were reported to promote corruption. For example, the 1998 Report of the Committee on the Administration of Justice, the 2002 Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, the 2004 Draft COK and the 2003 Ringera Report and a 2005 report by the International Commission of Jurists discussing the judicial independence, corruption and reform of the Kenyan judiciary.

The second step will be to analyze the legal and administrative framework of the judiciary since the promulgation of COK 2010. This will include a critical analysis of the COK 2010, Vision 2030, Report of the Task Force on Judicial reforms 2010 (See Section 2.3) and the Judiciary Transformation Framework of 2012-2016 (See Section 3.2).

Lastly, this study will undertake a comparative study of judicial corruption and reforms all over the world, focusing on developing or developed countries which have had or have a socio-economic and cultural problem of corruption. A cultural analysis is essential because as stated in a Transparency International report:

“In many countries social interactions are governed less by law than customary or familial codes of conduct. To regard as corrupt judges who support the interests of their relatives, overlooks the notion that it may be more dishonorable for a judge to ignore the wishes of a family member than to abide strictly by the law. Nor is the rule of law as important in such countries as individual relationships. The strength of personal relationships is so great in some countries that all judicial decisions are suspected of being a product of influence. In some countries, paying a bribe is considered an essential prerequisite for judicial services and, indeed, the only avenue for accomplishing results for example in Kenya, the saying ‘Why hire a lawyer, if you can buy a judge?’ is common”.³⁶

³⁶Noel MP, ‘Corruption within the judiciary: causes and remedies’ *Global Corruption Report*, Transparency International, 2007, 4.

In conclusion, corruption can be mitigated if political, economic, cultural and social norms promoting corruption are identified and regulated within the legal and administrative framework of the judiciary.

1.9. Research Design & Methodology

Research on this dissertation will take the form of qualitative research through literature review. The study will use primary resources such as the COK 2010, The Kenya Gazette and various statues and policies which provide an in-depth understanding of the legal framework of the judiciary as well as secondary resources such as journals, books, articles and the internet which highlight various opinions of various authors as well as comparative assessment of other judiciaries worldwide.

No quantitative research will be carried out due to lack of time and unwillingness of court officials to discuss the sensitive issue of corruption.

1.10. Limitations

This research is limited by lack of recent literature on the issue of judicial corruption. This research is also limited by the time restrictions of the Law School to complete the study. Lastly, the research is limited by lack of quantitative analysis whereby questionnaires and interviews would have been used to collect data on the perceptions and reality of the prevalence of corruption in the judiciary. It is difficult to know the level of actual corruption versus perceived corruption in the judiciary as it is deemed as a sensitive matter to discuss.

1.11. Chapter Breakdown

a) Chapter one: This chapter will serve as the introduction to the proposal. It will provide a detailed background of the study, the statement, the purpose of the study and the hypothesis. It will also highlight the justification of the study, the limitations, definition of terms and provide a chapter summary.

b) Chapter Two: This chapter will give an in-depth look into the history of corruption in the judiciary in Kenya and the evolution of the anti-corruption framework prior to the promulgation of the COK 2010. It will also highlight recommended reforms and their implementation.

c) Chapter Three: This chapter will analyse judicial reforms related to the mitigation of corruption after the promulgation of the COK 2010. It will also highlight the loopholes within the current anti-corruption framework.

d) Chapter Four: This chapter will conduct a comparative assessment of other jurisdictions facing judicial corruption and the reforms they have successfully implemented. The countries discussed are Singapore, Hong Kong and China.

d) Chapter Five: This chapter will briefly discuss the findings from all chapters and recommend measures to mitigate judicial corruption based on those findings and provide a conclusion.

1.12. Timeline/Duration

The project was carried out and completed within a period of six months.

CHAPTER TWO: HISTORY OF JUDICIAL CORRUPTION AND REFORMS BEFORE THE COK 2010

2.1. Introduction

This chapter will provide a detailed history of judicial corruption over the years and the reforms that were recommended and/or implemented to curb corruption before the promulgation of the COK 2010.

2.2. History of Judicial Corruption until 2010

“We found an institution so frail in its structures; so thin on 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. We found a judiciary that was designed to fail³⁷.”

The history of corruption in the judiciary can be traced to the colonial era. The judiciary was built on a foundation of inequality and on a racial basis.³⁸ Initially, when Kenya was declared a British Protectorate in 1890, the only courts which existed were those

³⁷ Dr Willy Mutunga, “Speech on the Progress Report on the Transformation of the judiciary: The First Hundred And Twenty Days”, Nairobi, 19th October 2011.

³⁸ Kiwinda MM, Osogo JA, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Claripress Ltd, Nairobi, 2012, 130.

which served foreigners. The indigenous people, Indians, Muslims and Arabs were left to practice their own communal and religious law.³⁹

The indigenous people had no legal right to sue as there were no courts which served them. They were only served by the Native tribunals run by village elders.. If they had a dispute with a foreigner, they could not sue them using indigenous judicial systems as they were denied recognition on the pretext that they were repugnant to justice and morality.⁴⁰This system segregated the indigenous people and subordinated indigenous laws.

After Kenya's independence in 1963, the dual system was abolished and a common law system was adopted which further subjugated the indigenous people. Furthermore, the judiciary was still dominated by foreigners.⁴¹ However, the foreign judges were on contract and were susceptible to manipulation⁴² as the renewal of their contract depended on the government.⁴³

However, the most significant reason why judicial corruption went on the rise was the amount of power the Executive wielded over the judiciary. From 1981 to 2002, Kenya became a one-party state with no separation of powers. The judiciary was treated as a government department and not as a separate arm of the government.⁴⁴

Furthermore, the provisions of the 1963 COK further undermined the independence and impartiality of the judiciary. Subsequent constitutional amendments left the judiciary under the complete control of the Executive. The first amendment was the **COK (Amendment) (No 2) Act No 38 of 1964** which transferred all appointing authority of judges to the Office of the President.⁴⁵The second amendment was the **COK (Amendment) Act No. 14 of 1986** which removed the security of tenure of the offices Attorney General, Controller,

³⁹ Republic of Kenya, Judiciary Transformation Framework 2012-2016, 8.

⁴⁰ Republic of Kenya, Judiciary Transformation Framework 2012-2016, 8.

⁴¹ Republic of Kenya, Judiciary Transformation Framework 2012-2016, 8.

⁴² Adar GK, Munyae MI, 'Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001' *African Studies Quarterly*, 5(2001), 4.

⁴³ Adar GK, Munyae MI, 'Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001', 4.

⁴⁴ Adar GK, Munyae MI, 'Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001', 4.

⁴⁵ Washington M, Kenyan constitutional amendments through time as seen on <https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-thru-time> accessed on 10 December 2016.

and Auditor General, thus eroding the independence of the two offices.⁴⁶ Furthermore, there was another amendment of the **COK Act No. 4 of 1988** which removed security of tenure for the office of the Public Service Commission, High Court judges and Court of Appeal judges.⁴⁷ However due to pressure from foreign donors, **The COK (Amendment) Act No. 2 of 1990** restored security of tenure of the office of the Public Service Commission, High Court judges and Court of Appeal judges.⁴⁸

In addition to these laws, there were no provisions for a judiciary fund which would allow the judiciary to control how much they received from the National Assembly. The judiciary was dependent on the Executive and other agencies which provided funds.⁴⁹

Moreover, in the late 1990s, the Executive continued interfering with court cases, especially those that were political as reiterated by Judges Bena Lata and William Mbuya in April 1995.⁵⁰ The *'Koigi Four'* case is a prime example of this. In this case, Koigi wa Wamwere, a leading opponent of Moi, and three others, Geoffrey Njuguna Ngengi, Charles Koigi wa Wamwere and James Maigua Ndumo were arrested April 1994 on charges of raiding a police station in Bahati, in Moi's home province of the Rift Valley.⁵¹ They were sentenced to 24 years for a simple robbery which was an extremely punitive punishment. Upon investigation, it was discovered that the presiding judge, Justice Tuiyot, was promoted to the highest magistrate post during the proceedings and that the police officers who found the incriminating evidence were given state awards.⁵²

⁴⁶ Washington M, Kenyan constitutional amendments through time as seen on <https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-thru-time> accessed on 10 December 2016.

⁴⁷ Washington M, Kenyan constitutional amendments through time as seen on <https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-thru-time> accessed on 10 December 2016.

⁴⁸ Washington M, Kenyan constitutional amendments through time as seen on <https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-thru-time> accessed on 10 December 2016.

⁴⁹ Separation of powers and independence of the judiciary in the Kenyan context, as seen on <http://www.ckadvocates.co.ke/2014/11/separation-of-powers-and-independence-of-the-judiciary-in-the-kenyan-context> accessed on 10 December 2016.

⁵⁰ Carver R, WRITENET, 'Kenya: Update to End July 1995', 1 August 1995 available at: <http://www.refworld.org/docid/3ae6a6b78.html> accessed on 10 December 2016.

⁵¹ *Charles Koigi Wamwere & 2 others v Republic* [1992]Eklr

⁵² Wachira C, Kenya-human rights: Government back under fire over dissidents, as seen on <http://www.ipsnews.net/1996/01/kenya-human-rights-government-back-under-fire-over-dissidents> accessed on 10 December 2016.

In 1998, a survey conducted by SODNET indicated that 40% of Kenyans had problems accessing justice with 48% stating that it was mainly because of corruption.⁵³ Sixty-eight point one percent (68.1%) of the respondents were asked to bribe a judicial officer and 66.8% agreed to bribe but only 57.6% of those who were bribed actually performed the needed service.⁵⁴ In 2000, a survey by DFID-EA stated that 81% of 336 respondents stated that the judiciary was corrupt.⁵⁵ In February 2002, TI published a report stating that the Kenyan judiciary ranked as the sixth most corrupt institution in Kenya in its bribery index and the police, crucial to the justice system, ranked as the most corrupt institution.⁵⁶

In 2002, the regime change led by President Kibaki promised to eradicate corruption within the judiciary in what was deemed as the “radical surgery”.⁵⁷ However, the process which will be highlighted below was procedurally unfair, highly politicised and left the judiciary grossly understaffed with a big backlog of cases and in the hands of the Executive.⁵⁸

By 2007, Kenyans had lost total confidence in the judiciary. Therefore, when President Mwai Kibaki appointed new judges and IEBC commissioners just days away from the election and the election results were seen to have been tampered with, it instigated anger and suspicion that led to the post-election violence which killed many and left even more internally displaced.⁵⁹

⁵³ E Oyugi, ‘Corruption: A Survey of the Extent and Attitudes Towards Corruption in Service Delivery in Kenya Covering the Areas of Education, Health, Land, Judicial Services and the Police Force’, 55. See also Letizia WM, ‘Corruption in the Kenyan judiciary, Will the vetting of judges and magistrates solve this problem’ Unpublished LLM Thesis, University of Nairobi, November 2013, 33.

⁵⁴ E Oyugi, ‘Corruption’, 55. See also Letizia WM, ‘Corruption in the Kenyan judiciary’, November 2013, 33.

⁵⁵ ICJ Kenya, ‘Strengthening Judicial Reforms in Kenya-Performance indicators: Public Perceptions of the Court Divisions, Children’s Court and the Anti - Corruption Court’ 35.

⁵⁶ Transparency International, ‘The Kenyan Urban Bribery Index Report’ (2001).

⁵⁷ Letizia WM, ‘Corruption in the Kenyan judiciary’, November 2013, 6.

⁵⁸ Letizia WM, ‘Corruption in the Kenyan judiciary’, November 2013, 7-9.

⁵⁹ Gainer M, ‘Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015, Innovations for Successful Societies, Princeton University, November 2015, 3 available at <http://successfulsocieties.princeton.edu>.

After an international mediation process was carried out by Kofi Annan, Kenya formed a coalition government and an independent commission was appointed to draft a new constitution that would address among other things: the weakness of the judiciary.⁶⁰

2.3. Reforms before the COK 2010

From 1992 to the promulgation of the new constitution in 2010, there were efforts to reform the judiciary by several committees which identified the problems in the judiciary among them corruption and recommended solutions.⁶¹ However, most of the recommendations were not implemented as we will see below.

The first efforts towards fighting corruption began in 1956 when the Prevention of Corruption Ordinance was enacted.⁶² In 1992, it was amended to create the Anti-Corruption Squad within the police but the squad was disbanded in 1995.⁶³ In 1997, the act was amended to create the Kenya Anti-Corruption Authority with investigative and prosecutorial powers. However, it was declared unconstitutional in 2000 and then dissolved.⁶⁴

In 1998, the Legislature constituted the Kwach Committee to investigate the corruption in Kenya. The committee produced a report which among other recommendations, proposed the Anti-Corruption and Economic Crimes Bill (2000) to replace the Prevention of Corruption Act.⁶⁵

The enactment of the Anti-Corruption and Economic Crimes Act 2003, the Public Officers Ethics Act 2003, and the establishment of the Kenya Anti-Corruption Commission in May 2003 further highlighted the government's efforts to fight corruption.⁶⁶ Moreover, in September 2003, a judicial integrity committee was created to carry out what was known as the "radical surgery" of the judiciary. Lastly, in 2004, a National Anti-Corruption Steering

⁶⁰ Gainer M, How Kenya cleaned up its courts, as seen on <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts> accessed on 15 December 2016.

⁶¹ Gainer M, 'Transforming the Courts: Judicial Sector Reforms in Kenya', 2011-2015, 3 available at <http://successfulsocieties.princeton.edu>.

⁶² "The Current Challenges in enforcing the Anti Corruption and Economic Crimes Act(ACECA)", Institute of Certified Public Accountants in Kenya.

⁶³ "The Current Challenges in enforcing the Anti Corruption and Economic Crimes Act(ACECA)", Institute of Certified Public Accountants in Kenya

⁶⁴ "The Current Challenges in enforcing the Anti Corruption and Economic Crimes Act(ACECA)", Institute of Certified Public Accountants in Kenya

⁶⁵ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

⁶⁶ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

Committee was launched to create a nation-wide campaign to create awareness on how to prevent and fight corruption.⁶⁷

This study will discuss the reports of various committees that mainly focused on corruption in the judiciary:

2.3.1. Kwach Judicial Reform Committee

In 1998, the late Chief Justice Chesoni, appointed a six man committee headed by Justice Richard Kwach to assess the image and performance of the judiciary. In their report, the committee stated that corruption was rampant within the judiciary and existed in two forms: petty or grand corruption. ‘Petty’ corruption was primarily among the junior staff and was caused by poor remuneration and poor terms of service while grand corruption involved high ranking judicial officers.⁶⁸

The report highlighted the various ways corruption can take place and the factors causing corruption within the judiciary⁶⁹ as well as providing recommendations of judicial reforms.⁷⁰

⁶⁷ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

⁶⁸ ICJ Kenya, ‘Strengthening Judicial Reforms In Kenya-Performance indicators’, 4 (2007),34.

⁶⁹ The report highlighted the various ways corruption can take place such as intentional misplacement of files; delay of trials, judgements and rulings; fraud; bribery; using public funds for private gain; intentional loss of court records; intentional alteration of court records; overstaying in one station by judicial officers; inadequate remuneration; poor terms of service and lack of proper vetting especially in the appointment of judges.⁶⁹ Furthermore, the report highlighted the factors causing corruption within the judiciary as interaction with litigants or their relatives; visitors in chambers; business deals; undue familiarity with the Bar and the local populace; lack of transparency in discharge of judicial function and lack of a transparent and merit based judicial appointment system. See ICJ Kenya, ‘Strengthening Judicial Reforms In Kenya-Performance indicators: Public Perceptions of the Court Divisions, Children’s Court and the Anti - Corruption Court’ 4 (2007),34.

⁷⁰ The recommendations of the Kwach Report included creation of a code of conduct for all judicial officers; creation and adoption of a transfer policy to reduce familiarity of judicial staff; all matters should be heard in open court to prevent litigants from accessing the Magistrate’s chambers; vetting of all judicial appointments⁷⁰; a declaration of wealth by all judicial officers; increased remuneration for all judicial officers; improved regulations and processes of appointment; promotion and performance appraisal of judicial officers and court staff; reorganisation of the courts including the High Court to create the Commercial Court, Family Court, Criminal Court and Civil Court and creation of more magistrates’ courts in areas outside Nairobi and enhancement of pecuniary jurisdiction. See ICJ Kenya, ‘Strengthening Judicial Reforms In Kenya-Performance indicators: Public Perceptions of the Court Divisions, Children’s Court and the Anti - Corruption Court’ 4 (2007),34.

2.3.1.1. Implementation

Only two of the reforms were implemented. First, the reorganisation of the courts, creation of more magistrates' courts and enhancement of pecuniary jurisdiction was successful. It reduced the backlog of cases and the need to travel to Nairobi to attend court.⁷¹ Secondly, there was creation of better terms of service resulted in better job satisfaction.⁷² However, there was a clear lack of enforcement and implementation of the reforms of the committee. Significant failures included lack of implementation of a 1999 code of conduct drafted by the Implementation Committee, lack of an amendment for public hearing of all cases except special matters;⁷³ the vetting procedures were not created or legislated and there was no implementation of the proposed declaration of assets.

2.3.2. Report of the Advisory Panel of Eminent Commonwealth Judicial Experts

In 2002, the Commission of Kenya Review Commission established the Advisory Panel of Eminent Commonwealth Judicial Experts in conjunction with the ICJ to advise it on reforms within the Kenyan judiciary. Section 17(v) of the CKRC Act gives the CKRC the specific mandate "to examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary".⁷⁴

The Panel stated that there were legitimate and widespread allegations of corruption in courts which mainly took the form of bribery and exertion of political influence. The public had lost confidence in the judiciary. It gave recommendations based on two principles: Judicial independence and accountability. On the matter of judicial independence, the panel cited Article 1 of the U.N. Basic Principles of the Independence of the judiciary (1985) which requires states to guarantee judicial independence in their Constitution or their

⁷¹ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

⁷² Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

⁷³ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

⁷⁴ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

laws.⁷⁵ Furthermore, Article 2 provides that the judiciary shall decide matters before them in an impartial manner, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.⁷⁶

On the second issue of accountability, judicial officers must be accountable for their actions. Accountability goes hand in hand with judicial independence and can be achieved through various reforms. They recommended various reforms which included but not limited to vesting of judicial authority, appeals, appointment of judges, the conduct and removal of judges and the restructuring of Judicial Service Commission.⁷⁷

2.3.2.1. Implementation

The report's recommendations⁷⁸ were not implemented by the judiciary but formed the major basis for the provisions regarding the judiciary in the 2004 Draft Constitution.⁷⁹

⁷⁵ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

⁷⁶ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

⁷⁷ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

⁷⁸ Several recommendations were made by the panel of commonwealth judges. First, it was recommended that judicial authority should be vested in the judiciary alongside the Executive and Legislature to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya. The 1963 COK did not vest any judicial authority in the judiciary yet it vested Executive power in the President in Article 23(1) and vested Legislative power in Legislature in Article 30 of the 1963 COK. This created a perception of a weak judiciary which was subordinate to the other two arms of the government. Another recommendation was for the Chief Justice shall have general supervisory powers over the judiciary and have direct administrative responsibility for the Supreme Court. Additionally, it was recommended that there should be a President of the Court of Appeal and President of the High Court to preside over and have direct responsibility for the administration of those courts. Another important recommendation was that a Supreme Court of Kenya should be established in addition to the existing courts and it shall be the final court of appeal in all matters. It was also recommended that a comprehensive code of conduct for all judicial officers should be adopted which required them to disclose financial assets upon appointment and every year thereafter as well as to report to the Judicial Service Commission any forms of corruption. Lastly, the Panel recommended that there should be and establishment of an office of the Director of Public Prosecutions who shall have the powers of the Attorney General and the establishment of a Committee to receive and assess the merits of any complaints against a judge before referral to a tribunal appointed by the President. See Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

⁷⁹ Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

2.3.3. Report of the Integrity and Anti-Corruption Committee of the judiciary (Ringera Committee)

In 2003, the Chief Justice revived the Committee on Reform and Development of the judiciary and established a sub-committee in March headed by Justice Aaron Ringera called the Integrity and Anti-Corruption Committee.⁸⁰ This sub-committee was to investigate and report on the level of corruption within the judiciary, its nature and causes and to identify corrupt judicial officials.⁸¹

The committee's findings were that firstly, there was an existence of perceived and actual corruption, the latter taking the form of petty or grand corruption. The committee also noted that corruption may be through different means: Land, fish, goats and other livestock; 'harambee' contributions; personal entertainment and hospitality and sexual favors. Cash was the most prevalent form and sexual favors were the least prevalent.⁸²

The committee's investigations showed that out of 3234 officers, comprising 11 Judges of Appeal, 44 Judges of the High Court, 254 Magistrates, 15 Kadhis and 2910 paralegals, 152 judicial officers were implicated in corruption of which: 6 judges were from the Court of Appeal, 18 judges were from the High Court, 82 magistrates and 43 were paralegal officers.⁸³

2.3.3.1. Implementation

Several of the recommendations⁸⁴ were implemented. First, a new Registrar and Chief Justice were appointed⁸⁵ and 42 judicial officers were dismissed.⁸⁶ The rules governing the conduct and dispensation of constitutional applications were also promulgated.⁸⁷

⁸⁰Republic of Kenya, Report of the Sub-Committee on Ethics and Governance in the judiciary, November 2005, 63.

⁸¹ Republic of Kenya, Report of the Sub-Committee, November 2005, 63.

⁸² Ringera A, "Corruption in the judiciary" The World Bank, Washington DC, 25th April 2007.

⁸³ Ringera A, "Corruption in the judiciary" The World Bank, Washington DC, 25th April 2007.

⁸⁴ The committee recommended several reforms. First, they recommended the establishment of a Supreme Court with appellate jurisdiction over the Court of Appeal.⁸⁴ They also recommended a fast track procedure for dispensing with Constitutional references on constitutional Interpretation and protection of fundamental rights and freedoms.⁸⁴ Another recommendation was that magistrates' courts should be manned by a Senior Resident Magistrate with jurisdiction to deal with all criminal cases in remote and geographically expansive areas of Northern Kenya and the Coast Province. Additionally, they recommended that all judicial units should have financial and operational autonomy that is not linked with the district treasuries and should be in charge of their own finances and with their own physical infrastructure and motor vehicles. Lastly, they recommended

Additionally, provisions for judicial independence, appointment of judges as well as removal from office and the powers of the JSC were included in the draft Constitution.⁸⁸ Lastly, the Kenya Bribery Index 2004 survey (Transparency International) indicated a very significant decrease in petty corruption as compared to 2002⁸⁹ as there was a significant reduction of cost of bribery to citizens and the judiciary ranked as the most improved organisations in 2002.⁹⁰

2.3.4. Subcommittee on Ethics and Governance

In 2005, a Sub-committee was established by the Chief Justice to investigate judicial integrity as part of a biennial review and a follow-up to the Ringera Committee.⁹¹ The committee noted that there was a marked improvement in judicial integrity since 2003.

However, the Committee received specific complaints against some judges, magistrates, Kadhis and paralegal staff.⁹² The committee prepared a report on its findings⁹³ together with its recommendations in respect to each officer but did not disseminate to the public.⁹⁴

improved remuneration and better terms of service for the lower judiciary; formulation and implementation of a transparent transfer policy; a system of wealth declarations by judicial staff effected for all public officers through the Public Officer Ethics Act 2003 and better personnel recruitment, deployment and disciplinary systems and practices. See Ringera A, "Corruption in the judiciary" The World Bank, Washington DC, 25th April 2007.

⁸⁵ United Nations Office of the High Commissioner for Human Rights and the United Nations Development Programme, 'Combating corruption in the Public and Private sectors' Seminar on Good Governance practices for the promotion of human rights, Seoul, 15-16 September 2004, HR/SEL/GG/SEM/2004/B.P.8 (hereafter referred to as UNDP & OHCHR CCPPS 2004) para. 8.

⁸⁶ UNDP & OHCHR, CCPPS (2004), para. 8.

⁸⁷ Ringera A, "Corruption in the judiciary" The World Bank, Washington DC, 25th April 2007.

⁸⁸ UNDP & OHCHR, CCPPS (2004), para. 9.

⁸⁹ UNDP & OHCHR, CCPPS (2004), para. 10.

⁹⁰ UNDP & OHCHR, CCPPS (2004), para. 10.

⁹¹ Republic of Kenya, Report of the Sub-Committee, November 2005, 3.

⁹² Republic of Kenya, Report of the Sub-Committee, November 2005, 4.

⁹³ The principal causes of corruption were said to be poor terms and conditions of service; bad deployment and transfer policies and practices; delays in hearing and determination of cases; human greed; non-meritocratic recruitment and promotion practices; ignorance of the public on their legal rights; entitlements; procedures and processes of the court; existence of wide discretion of judicial officers in civil and criminal matters; an entrenched culture; excessive judicial workload due to insufficient personnel; ineffective action against identified corrupt judicial officers; inadequate supervision of judicial officers; protection of corrupt officers; misplacement of court files; interference by the Executive; retention of judicial officers after the retirement age; conflict of interest; phobia of the legal process and poor conditions in prisons and remand homes. See Republic of Kenya, Report of the Sub-Committee on Ethics and Governance in the judiciary, November 2005, 63.

⁹⁴ Republic of Kenya, Report of the Sub-Committee, November 2005, 4.

2.3.4.1. Implementation

None of the recommendations⁹⁵ were implemented until the promulgation of the COK 2010.

2.3.5. The Final Report of the Task Force on Judicial Reforms

In 2009, the Task force on Judicial Reforms was appointed to, among other objectives, consider and advise on ways of dealing with corruption or perceived corruption in the judiciary. It identified four forms of corruption in the judiciary: bribery, fraud, abuse of judicial office and receiving favors.⁹⁶ It also noted that judicial corruption was related to corruption within the bar, collusion of advocates with judicial officers; and undue familiarity between judicial officers and staff.⁹⁷

2.3.5.1. Implementation

The recommendations⁹⁸ were included and implemented within the Judiciary Transformation Framework which will be discussed in the next chapter.

⁹⁵ It stressed several recommendations in an effort to curb corruption such as amendment of the Constitution to vest judicial power in the judiciary; enhancement of the security of tenure for magistrates and Kadhis as judicial officers; amendment of the Constitution to provide that expenses of judiciary will be a direct charge on the Consolidated Fund; establishment of the Disciplinary Committee of the Judicial Service Commission for various cadres of judicial staff; establishment of a Judicial Complaints and Disciplinary Committee (JCDC) to investigate complaints against judges before the disciplinary cases are referred to the constitutional tribunals and the establishment of a Litigant's Charter to provide basic information on the process of the court in order to enhance accessibility and effectiveness of the court services. See Republic of Kenya, Report of the Sub-Committee on Ethics and Governance in the judiciary, November 2005, 4-5.

⁹⁶ Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, 74-76.

⁹⁷ Republic of Kenya, Final Report of the Task Force, July 2010, 77.

⁹⁸ The recommendations of the committee included the development of a corruption prevention policy within the judiciary to guide anti-corruption initiatives in the institution; a mapping exercise to identify and take remedial measures on the main areas prone to corruption; the development of mechanisms for regular monitoring of the exercise of discretion by judicial officers; the rotation of duty judges after one term; public awareness on the content of the Judicial Service Codes of Conduct and Ethics; regular inspection of judicial systems through the Inspectorate unit to assess and mitigate systems or procedures that encourage corruption; provision of accessible facilities for direct banking of court fees, charges and fines by the public, litigants or advocates to avoid fraud; development of a manual to guide judicial officers on the award of damages in civil cases and other matters; recommendations of previous integrity committees on procurement and financial management in the judiciary to be implemented without further delay; removal of judicial officers found liable for corruption from the judicial service by the JSC; development of a case management and statistical system that tracks the productivity of all judicial officers against performance standards to minimise opportunities for delay of cases and corruption and identification of all judicial officers and staff with badges, name tags and court uniforms within the court precincts. See Republic of Kenya, Final Report of the Task Force on Judicial Reforms, July 2010, 77-79.

2.4. Conclusion

Prior to the promulgation of the COK 2010, there was a clear lack of enforcement and implementation of the recommendations of the various reports made by committees over the years. Although there were no major changes in the judiciary, these reports proved to be the foundation of the reforms included in the draft COK 2010 and the judiciary Transformation Framework.

CHAPTER THREE: REFORMS UNDER THE NEW 2010 CONSTITUTION OF KENYA AND THE JUDICIARY TRANSFORMATION FRAMEWORK

In the peace accord that brought an end to the 2007-2008 post-election conflict, President Kibaki's party and the opposition led by Raila Odinga agreed to share power in a grand coalition government for a period of five years.⁹⁹The parties also committed themselves to a programme on a long-term programme of institutional reforms which involved Kenya's constitution-making process, and pursuing reform of the judiciary. In the event, the two strands became intertwined through the promulgation of the COK 2010 and the establishment of the judiciary Transformation Framework.¹⁰⁰

3.1. The 2010 Constitution of Kenya

In the 2010 TI Global Corruption Barometer, 43% of Kenyans who sought services from the judiciary reported paying bribes.¹⁰¹

The promulgation of the COK 2010 heralded a new era for judicial reforms in Kenya. The new constitution was passed through a national referendum in August 2010 with 68% of

⁹⁹ Zyl JVS, 'Restoring Confidence in the judiciary: Kenya's judicial vetting process, constitutional implementation and the rule of law', 7.

¹⁰⁰ Zyl JVS, 'Restoring Confidence in the judiciary', 7.

¹⁰¹ Transparency International, 'Global Corruption Barometer 2010' available at <https://www.transparency.org/gcb201011/>.

the vote.¹⁰²The new constitution introduced new provisions which protected judicial authority and security of tenure. Article 159 of the COK of 2010 states that judicial authority is derived from the people and is vested and exercised by the courts and tribunals. It also provides principles that judicial officers should be guided by such as justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) and justice shall be administered without undue regard to procedural technicalities.¹⁰³Additionally, Article 160 of the COK of 2010 protects the judiciary by stating that it shall be subject only to this constitution and the law and not any other authority. It also states that the remuneration and benefits of judges shall come from a Consolidated Fund.¹⁰⁴Another provision is Article 163 of the COK of 2010 which establishes the Supreme Court and provides for its exclusive original jurisdiction to hear and determine disputes regarding elections to the Office of the President and appellate jurisdiction to hear appeals from the Court of Appeal regarding the application of the constitution and any matter of general public importance.¹⁰⁵Another important provision is Article 173 which establishes the judiciary Fund which shall be administered by the Chief Registrar of the judiciary and shall be used for administrative expenses and shall be a charge on the Consolidated Fund and shall be paid directly into the judiciary Fund.¹⁰⁶Lastly, Section 23 of the Sixth Schedule provides that Legislature shall enact legislation within one year establishing mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office on the effective date.¹⁰⁷

All these provisions were implemented in the following years. I will now discuss in detail the vetting process as an example to the new constitutional reforms.

The Vetting of Judges and magistrates Act was enacted in 2011. It establishes mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule to the COK of 2010. This applied to judges

¹⁰² Electoral Institute for Sustainable Democracy in Africa, “Kenya: 2010 Constitutional Referendum Results,” August 2010; October 12, 2015, available at <https://eisa.org.za/wep/ken2010referendum.htm>

¹⁰³ Article 159, *COK*(2010).

¹⁰⁴ Article 160, *COK* (2010).

¹⁰⁵ Article 163, *COK* (2010).

¹⁰⁶ Article 173, *COK* (2010).

¹⁰⁷ Section 23 of the Sixth Schedule, *COK* (2010).

or magistrates who were in office before the effective date. It established the Judges and Magistrates Vetting Board which would carry out the vetting process. In determining the suitability of a judge or magistrate, it considers among others pending complaints from the Ethics and Anti-Corruption Commission and any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission.¹⁰⁸

The Board also considers elements of integrity such as a demonstrable consistent history of honesty and high moral character in professional and personal life, respect for professional duties, arising under the codes of professional and judicial conduct and the ability to understand the need to maintain propriety and the appearance of propriety.¹⁰⁹

3.1.1.1 Implementation

Throughout the vetting exercise, a number of judges and magistrates were removed from office on allegations of corruption. However, the vetting exercise was greatly undermined by the case of *Kenya Magistrates & Judges Association v JMVB [2014] eKLR*. The Kenya Magistrates and Judges Association challenged the timeline of vetting in court stating that the mandate of the JMVB is limited to determining the suitability of judges and magistrates on the basis of complaints arising or pending before the promulgation of the Constitution and that any complaints arising after the promulgation of the Constitution are the exclusive province of the JSC established by Article 171 of the Constitution.¹¹⁰ The court held that the vetting of judges and magistrates would be confined between the date of appointment and the promulgation of the Constitution and any judicial officers vetted in respect to allegations were subjected to unlawful and unfair treatment contrary to Article 27 of the Constitution.¹¹¹

The proper interpretation should have been that judges and magistrates appointed after 2010 were not subject to vetting and those appointed before were subject to vetting for all their

¹⁰⁸ Section 18(1), The Vetting of Judges and Magistrates Act (Act No. 2 of 2011)

¹⁰⁹ Section 18(2)(c), The Vetting of Judges and Magistrates Act (Act No. 2 of 2011)

¹¹⁰ *Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & Attorney General* [2014] eKLR

¹¹¹ *Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & Attorney General* [2014] eKLR

activities up to the day of vetting so to as to vet all judges and magistrates in office on the effective date.¹¹²

3.2. The Judiciary Transformation Framework

The JTF is an outline of the repositioning of the judiciary and the entire governance, justice, law and order sector to be more responsive to the needs of the people according to the Constitution.¹¹³ Its formulation was through a multi-stakeholder process involving judges, magistrates, judicial staff and other stakeholders in the justice sectors that was launched by the former Chief Justice Willy Mutunga. It highlighted the various areas which would be reformed from 2012 to 2016.

It is premised on four key pillars and ten overlapping key areas: People focused delivery of service; Transformative leadership, organisational culture and professional, motivated staff; Adequate financial resources and physical infrastructure and Harnessing Technology as an enabler of justice.¹¹⁴

The ten key areas that would be tackled are: Access to and expeditious delivery of Justice; People-Centeredness and Public Engagement; Stakeholder Engagement; Philosophy and Culture; Leadership and Management; Organisational Structure; Growth of Jurisprudence and Judicial Practice; Physical Infrastructure; Resourcing and Value for Money and Harnessing Technology as an enabler for Justice.¹¹⁵

3.2.1. Implementation

The JTF brought about several reforms. There was the establishment of the Office of the Ombudsperson to receive and deal with public complaints. During its four years in operation, the Office of the judiciary Ombudsperson handled more than 21,000 complaints and

¹¹² Maina W, Kenya's Flawed vetting system and the Supreme court are to blame for graft in Judiciary, as seen on <http://allafrica.com/stories/201602070039.html> accessed on 4 January 2017

¹¹³ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13.

¹¹⁴ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13-14.

¹¹⁵ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13.

suggestions.¹¹⁶ Another reform was the introduction of the online case allocation and management system. Moreover, there was the establishment of Court Users' Committees, customer care desks and a service charter to distribute information about court processes and handle local-level problems. The customer care desks let litigants ask procedural questions and gave them help in navigating the system.¹¹⁷ Additionally, 200 new judges and magistrates were hired and 25 new courts were established.¹¹⁸ Other reforms included improved salaries and benefits for all judicial officers; establishment of an Inspectorate Unit by the JSC headed by professional investigators and set up an Internal Risk and Audit Directorate, which has audited 30 per cent of the court stations which has initiated some disciplinary processes and shuffling of judicial staff that have been in registries for 10 to 20 years which has dismantled corruption cartels.¹¹⁹

However, the judiciary's credibility has been reduced in the public eye due to several corruption scandals. For instance, in August 2013, the Chief Registrar was alleged to have made improper payments totaling an estimated KSh2.2 billion.¹²⁰ The Chief Registrar was further implicated in another case involving misappropriation of 310 million.¹²¹ Additionally, in January 2016, a Supreme Court Judge Justice Tunoi is alleged to have received two million dollars (Sh200 million) in order to influence an election petition against Nairobi Governor Evans Kidero, filed by election challenger Ferdinand Waititu.¹²² The Special Committee of the judiciary Service Commission found Justice Tunoi culpable in the Sh200

¹¹⁶ Gainer M, 'Transforming the Courts', Princeton University, November 2015, 16.

¹¹⁷ Gainer M, 'Transforming the Courts', Princeton University, November 2015, 16.

¹¹⁸ Gainer M, 'Transforming the Courts', Princeton University, November 2015, 17.

¹¹⁹ Githongo J, I came in with a mission to fight corruption and the Judiciary has made strides in fighting the vice, as seen on <http://allafrica.com/stories/201510150354.html> accessed on 5 January 2017.

¹²⁰ Wanzala O & Ngirachu J, JSC sends Gladys Shollei packing over Sh2 billion scandal, as seen on <http://www.nation.co.ke/news/JSC-sends-Gladys-Shollei-packing/1056-2038778-1tgorrz/index.html> accessed on 5 January 2017.

¹²¹ Makana F, 'Former Judiciary staff back in court as Gladys Shollei denies breaking the law, as seen on <http://www.standardmedia.co.ke/article/2000174063/former-Judiciarystaff-back-in-court-as-gladys-shollei-denies-breaking-the-law> on 5 January 2017.

¹²² Muthoni K, Justice Philip Tunoi bribery claims jolt Judiciary as seen on <https://www.standardmedia.co.ke/article/2000189409/justice-philip-tunoi-bribery-claims-jolt-judiciary> accessed on 5 January 2017.

million bribery claims.¹²³ There has also been a notable lack of accessibility to case audit and service charter by judicial staff; limited access to information by the public; gaps in the implementation of financial policies and standards; lack of transparency in expenditure; and understaffing, case backlog and lack of ICT which lends to corruption.¹²⁴

3.3. Conclusion

A study by the Ethics and Anti-Corruption Commission on Corruption and Ethics in the Judicial Sector in 2014 showed that judicial officers acknowledged the practice of payment of bribes to hide files (35%), abuse of office (24%), bribing the judges, prosecutors and clerks for favorable judgement (19%) as forms of corruption encountered in the sector.¹²⁵ On the other hand, 41% of the court users cited absenteeism as a form of corruption encountered followed by bribery in order to hide files (36%) and favoritism (34%).¹²⁶

The report stated that judicial officers stated that some reforms greatly reduced corruption such as open days, creation of court user's committees, training, promulgation of the new Constitution, peer review committees, suspension of corrupt officials, the ICT system, the establishment of the office of the Ombudsperson, the new payment system of court fees, mobile courts and public vetting of top judicial officers.¹²⁷ However, some reforms failed to reduce corruption such as improvement of remuneration of judicial officers, mass transfer of magistrates and staff and police reforms as corruption is deemed to be a personal choice and habit.¹²⁸ The open office system encouraged familiarity and vetting of judicial officers was used to settle scores.¹²⁹

¹²³ Kulundu M, JSC delivers verdict on Judge Tunoi's Sh200 million scandal, as seen on <https://www.kenyans.co.ke/news/jsc-delivers-verdict-judge-tunoi-sh200-million-scandal> accessed on 5th January 2017.

¹²⁴ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 59.

¹²⁵ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, xix.

¹²⁶ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, xix.

¹²⁷ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 53.

¹²⁸ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 53.

¹²⁹ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 53.

This study shows that major strides in institutional reforms have been taken which have mitigated corruption to an extent by creating a transparent judicial process. Although they have not been entirely successful, the reforms are well-reasoned and only fail for a lack of proper implementation and enforcement. However, the reforms have failed to account for reforms incentivising individuals to not engage in corruption taking into account various political factors such as political aspirations, instability or democratic insecurity, socio-cultural factors such as nepotism and tribalism and economic factors such as human greed.

This study therefore looks to other countries in the next chapter to assist in creating a framework to mitigate institutional and personal incentives to engage in corruption bearing in mind all influencing factors.

CHAPTER FOUR: COMPARATIVE STUDY OF JUDICIAL ANTI-CORRUPTION FRAMEWORKS

1.1. Introduction

The World Justice Project Rule of Law Index (WJPRLI) is a study which measures the performance of the rule of law in various countries. The measure of the rule of law is based on seven factors: informal justice, constraints in government powers, open government, fundamental rights, order and security, regulatory enforcement, absence of corruption, civil justice system and the criminal justice system.

In 2016, Kenya was ranked at the bottom of the index scoring 0.43, with the highest score being 1.0. Kenya was placed 100th out of 113 countries. Additionally, the index categorised countries regionally and according to the income group.¹³⁰ Below is a table detailing the findings of the WJPRLI study based on three main factors:

¹³⁰ World Justice Project Rule of Law Index 2016

	Overall score of all sectors	Absence of corruption within the judiciary	Regional rank (Sub-saharan)	Income rank (Low middle income)	Global rank
Absence of corruption	0.26	0.34	16/18	26/28	108/113

Table 1: WJPRLI indicators of the level of corruption in the Kenyan Judiciary¹³¹

This study, however, will not undertake an analysis based on similar categories used in the WJPRLI study, that is, the income rank, regional rank and global rank. This is due to the fact that a study based on the top global ranking country, Denmark, would result in unrealistic recommendations as they lack a historical background of a culture of corruption. Similarly, a study based on the top low middle income country, Morocco, would be unsuccessful due to lack of literature and lastly, a study based on the top regional ranking country, Botswana, would prove futile as it lacks a history of corruption and consequently, any incentives that would mitigate corruption.

Instead, this study will discuss the following countries: Singapore, Hong Kong and China. This is due to the presence of the following factors:

1. History of a culture of corruption
2. Creation of incentives for individuals/corporations to disengage in corrupt acts

It is important to note that some of the reforms in the countries discussed may not influence or affect the judiciary in Kenya but may be useful if extrapolated.

1.2. Singapore

Since 1997, Singapore has been rated as one of the least corrupt countries in the world. Today, the courts practice a code of conduct which they call the “Ten Commandments”. These commandments are transparency in the selection and promotion of judges based on merit, competency in legal knowledge and experience; adequate remuneration to judges and court staff; an independent yet accountable judiciary; a coherent system of case management

¹³¹ World Justice Project Rule of Law Index 2016

which eliminates backlog and shortens waiting time; a Justices' Scorecard for the judiciary and the Judges which rigorously tracks performance measured through time-based, volume-based and disposal-based indicators; a consistent and objective criteria in the administration of justice, including the establishment of a centralised sentencing court, standardised composition fees and fines and the application of tariffs in sentencing; clear ethical markers and guidelines for the Judges, comprising the Judges' Oath of Office, Judicial Ethics Reference Committee Report, Code of judiciary Ethics and the Government's Instruction Manual; a common vision for the judiciary and leadership by example by the Chief Justice provides unity of vision and purpose; all court proceedings are open, public hearings and the forging of strategic partnership with forward looking, progressive judiciaries and justice-related institutions.¹³²

The legal framework for anti-corruption consists of the Penal Code and the Prevention of Corruption Act. The Prevention of Corruption Act provides for various provisions key to the fight against corruption such as the vesting of authority in the investigative agency to investigate corruption in both the public and private sectors and prosecution of both the bribe giver and the receiver; the presumption of corruption when a public officer is found to have received bribes; presumption of guilt of the bribe taker even if he or she, in fact, had no power, right or opportunity to return a favour to the bribe giver; forbidding the use of customary practices, for example, giving/accepting of 'red packets' in Chinese New Year as an excuse for giving/accepting bribes; empowerment of the Court to order bribe receivers to pay a penalty equal to the amount of bribe received apart from punishment in the form of fines and/or imprisonment terms; provision for the Principal to recover the amount of the bribe as a civil debt and the rendering of Singapore citizens liable for punishment for corrupt offences committed outside Singapore and to be dealt with as if the offences had been committed in Singapore.¹³³

1.3. China

There are two major statutes in Chinese anti-bribery legislation: Criminal Law of the People's Republic of China and the Anti-Unfair Competition Law of the People's Republic

¹³² Teck KH, 'Corruption Control in Singapore' *The 13th International Training Course on The Criminal Justice Response to Corruption Visiting Experts' Papers*, 124-125.

¹³³ Teck KH, 'Corruption Control in Singapore', 124-125.

of China (AUCL).¹³⁴ The AUCL covers bribery within the private sector but the Criminal Law covers bribery within the private sector, the electoral sector and the judicial sector.¹³⁵

In 1988, the Standing Committee of the National People's Congress released an official document called *Supplementary Provisions of the Standing Committee of the National People's Congress concerning the Punishment of the Crimes of Embezzlement and Bribery*.¹³⁶ This document introduced the concepts of leniency and asymmetric punishment in the fight against corruption in China.

The leniency provisions state that those who confess voluntarily before being investigated would be granted leniency. There would be an asymmetry in the eligibility to leniency in that bribe takers are only eligible if the size of the bribe is below a given threshold, while there is no limitation for the bribe giver.¹³⁷

Asymmetric punishment for harassment bribery was also introduced. The crime of giving a bribe is further described as anything associated with the intent to secure improper benefits where the briber seeks benefits that are in violation of law, regulations, rules, or state policies; or seeks benefits that are themselves legitimate, but are to be obtained by means of violating laws, regulations, rules, state policies, or industrial norms.¹³⁸ This differentiation was useful in distinguishing harassment bribes from bribes that secure improper benefits. A harassment bribe involves something which the bribe giver had right to and the bribe giver would not be considered guilty.¹³⁹

1.4. Hong Kong

The Independent Commission against Corruption (ICAC) was established in 1974 at the time when corruption was widespread, and Hong Kong, as a British Colony, was probably one of the most corrupt cities in the world.¹⁴⁰ Within three years, the ICAC dismantled all

¹³⁴ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption' SITE, University of Rome, CEPR, October 2015, 4.

¹³⁵ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', 5.

¹³⁶ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', 5.

¹³⁷ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', 5.

¹³⁸ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', 5.

¹³⁹ Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', 5.

¹⁴⁰ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', *Resource Material Series No.69*, 196.

corruption syndicates in the Government and prosecuted 247 government officials, including 143 police officers.¹⁴¹In thirty years, the ICAC eradicated all overt corruption in the government, enforced private sector corruption and changed the public attitude to toleration of corruption.¹⁴²

The ICAC uses the three pronged strategy: deterrence, prevention and education. The ICAC strategy as to deterrence involves various things such as a zero-tolerance policy which investigates all reports of corruption as long as there is reasonable suspicion; a review system to ensure all investigations are properly investigated; an effective public complaint system and 24 hour report centre; publicity of successful enforcement and a quick response system to deal with complaints.¹⁴³

The ICAC has a very wide range of education strategies as well such as a school ethics education programme from kindergarten up to the universities; media education; media publicity for example documentaries on successful cases; formation of an ICAC club for volunteers who would like to educate the community and corruption prevention talks and ethics development seminars.¹⁴⁴

Lastly, the ICAC employs an efficient preventions strategy involving enhancement of system control; enhancement of staff integrity; streamlining of procedures; ensuring proper supervisory checks and control; ensuring efficiency, transparency and accountability and promotion of a staff code of ethics.¹⁴⁵

1.5. Lessons from the Comparative Study

These case studies illustrate that judicial corruption require both a good legal framework as well as proper enforcement by the relevant authority.

Hong Kong's experience shows that given political will at the top, a dedicated anti-corruption agency and a correct strategy, even the most corrupt place like Hong Kong can be

¹⁴¹ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', 196.

¹⁴² Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', 196.

¹⁴³ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', 199

¹⁴⁴ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', 199.

¹⁴⁵ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', 199.

transformed into a clean society.¹⁴⁶ Although China has a relatively good legal anti-corruption framework, the judiciary lacks independence and impartiality as it is prone to political influence. Lastly, Singapore shows that punitive measures and government support could effectively curb corruption.

1.6. Conclusion

These case studies show that corruption can indeed be mitigated through proper legal and administrative measures. However, it is necessary to establish a comprehensive strategy in tackling judicial corruption involving 4 steps:¹⁴⁷

1. Examine the external environmental i.e. the political environment, economic environment, social environment and legal environment.
2. Examine the internal environment i.e. using the SWOT analysis to examine the system, staff, skill, structure, shared values and organisational style and strategy.
3. Identify the major problems.
4. Formulation of strategy and strategic plans.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This chapter outlines the findings, recommendations and conclusions of the study. The main objective of this dissertation was to study corruption in the judiciary.

5.2. Findings

5.2.1. Existence of actual judicial corruption in Kenya

Chapter one studies the existence and prevalence of corruption within the judiciary. The findings show that both petty and grand corruption exists within the judiciary. The judicial

¹⁴⁶ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', *Resource Material Series No.69*, 201.

¹⁴⁷ Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', *Resource Material Series No.69*, 196-198.

reforms enacted over the years have not effectively mitigated corruption in the judiciary which has been on the rise in recent years involving high ranking officials of the judiciary.

5.2.2. Causes of judicial corruption in Kenya

Chapter 2 shows that before the promulgation of the 2010 Constitution, the main causes of corruption within the judiciary were political interference, cultural and social tolerance, lack of a proper administrative and legal framework and lack of proper enforcement mechanisms. The COK 2010 brought with it new reforms as illustrated in Chapter 3 which overhauled the structure, legal and administrative framework of the judiciary. However, judicial corruption still exists to date due to cultural and social tolerance, individual behavior and lack of proper enforcement of reforms.

5.2.3. Successes of judicial reforms over the years in mitigating corruption

Before the promulgation of the COK 2010, the most successful judicial reforms in mitigating corruption involved the dismissal of judges, magistrates and judicial officers found guilty of corruption as envisaged in Chapter 2. Chapter 3 illustrates that after the promulgation of the COK 2010, more judicial reforms were implemented and succeeded such as vetting of judges and magistrates, creation of a judicial code of conduct, creation of the office of the ombudsperson, use of ICT in case management and payment of court fees, hiring of more judicial staff, increased salaries, public awareness and creation of court users committees and peer review committees which have greatly assisted in the prevention of corruption.

5.2.4. Failures of judicial reforms over the years in mitigating corruption

Prior to the COK of 2010, most, if not all of the judicial reforms failed due to a proper legal and administrative framework, lack of implementation, lack of government support and a proper enforcement mechanism. With the COK of 2010, several judicial reforms have been successfully implemented but many have failed due to lack of a proper enforcement mechanism to ensure deterrence of individual corrupt behavior, lack of government support and insufficient public awareness and education.

5.3. Recommendations

In line with the holistic approach discussed in the theoretical framework, this study makes four recommendations.

Firstly, punitive measures should be enacted to deter individual behavior. In line with Singapore's laws, both the bribe giver and the receiver should be charged with corruption charges. If convicted, the bribe receiver should pay a penalty of the amount of the bribe and receive punishment through imprisonment. Additionally, there should be a mandatory punitive penalty of imprisonment for the crime of corruption. For example, if any judicial staff is found guilty of engaging in corruption by the Judicial Service Commission, he or she will be liable for imprisonment for not less than five years.

Additionally, leniency, whistleblowing and asymmetric punishment provisions should be enacted to deter social/ cartel behavior. In line with China's laws, leniency and whistleblowing provisions should be enacted to break the informal bond and understanding between the bribe giver and bribe taker. Leniency ensures that the first involved party who confesses to the corrupt act is completely immune from prosecution while the other party will be held liable. Whistleblowing provisions protect the party who confesses from any danger. Asymmetric punishment provisions differentiate between (i) bribes which impose improper benefits from (ii) harassment bribes which the bribe giver is forced to give in order to gain access to a service or good which he has a right to and ensure the bribe giver is safe from prosecution due to harassment bribes.

Another recommendation is that there should be public education and awareness to change cultural and social tolerance. A litigants' charter should be readily available for anyone who would wish to institute a suit in court detailing the procedure and payment for transparency and accountability purposes. Additionally, the judiciary should include a judicial program within a general anti-corruption program to be taught from kindergarten to universities. The judiciary should initiate workshops, conferences and meetings for the development of better ideas on how to tackle corruption within the judiciary. Successful corruption cases should be highly publicised in the media.

Lastly, the government should actively support the judiciary and promote its independence and impartiality by severing any link between the Executive and legislature

with the judiciary, non-interference with the budget of the judiciary and legalise the mandatory punishment of imprisonment for the crime of corruption.

5.4. Conclusion

In conclusion, this study has achieved all the objectives it set out to do in Chapter 1. This study has identified the causes of judicial corruption over the years, analyzed the judicial reforms recommended and their implementation, identified loopholes in the anti-corruption reforms recommended and/or implemented and made recommendations on how to improve the legal and administrative anti-corruption framework.

This study has also confirmed its hypothesis that judicial corruption in Kenya can be mitigated through a myriad of political, social, economic, individual and cultural incentives. Through a historical analysis of judicial corruption in Chapter 2 and Chapter 3, this study clearly illustrates that judicial corruption is caused by political, social, economic, individual and cultural factors. The study then recommends various reforms based on a political, socio-economic, individual and cultural basis.

BIBLIOGRAPHY

a) Books

Durkheim E, *The Division of Labor in Society*. New York, NY: Free Press.

Egharevba S, *Police Brutality, racial profiling and discrimination in the criminal justice system*, IGI Global.

Kiwinda MM, Osogo JA, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Claripress Ltd, Nairobi.

b) Articles, Journals and Conference Papers

Abdullahi A, 'Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over-burdened judiciary' (2011).

Adar GK, Munyae MI, Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001, *African Studies Quarterly*, 5(2001).

Anukansai K, 'Corruption: The Catalyst for Violation of Human Rights', *National Anti-Corruption Journal*.

Cher CY, 'Singapore's three-pronged program to combat corruption: enforcement, legislation and adjudication'.

E Oyugi, 'Corruption: A Survey of the Extent and Attitudes Towards Corruption in Service Delivery in Kenya Covering the Areas of Education, Health, Land, Judicial Services and the Police Force'.

Fisman, Raymond, and Edward Miguel, 'Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets', *Journal of Political Economy* (2007).

Gainer M, 'Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015, Innovations for Successful Societies', Princeton University, 2015.

Gjalt GD, 'Causes of corruption: Towards a contextual theory of corruption' *Public Administration Quarterly Spring* (2007).

Holmwood J, Historical Developments and Theoretical Approaches in Sociology, Encyclopedia of Life Support Systems, Vol II, 2.

ICJ Kenya, 'Strengthening Judicial Reforms In Kenya-Performance indicators: Public Perceptions of the Court Divisions, Children's Court and the Anti - Corruption Court' (2007).

Judicial Integrity Initiative Launch: Judicial Systems and Corruption 9 December 2015: London, UK

Kwok TM, 'Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC', *Resource Material Series No.69*.

Letizia WM, 'Corruption in the Kenyan judiciary, Will the vetting of judges and magistrates solve this problem' Unpublished LLM Thesis, University of Nairobi, November 2013.

Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya', *Human Rights Quarterly* (2001).

Ngali SM, 'An Assessment of Strategic Change Management Processes: A Case Study of the Kenyan judiciary' Unpublished MBA Thesis, University of Nairobi, October 2004.

Noel MP, 'Corruption and the Justice Sector', (2003).

Noel MP, 'Corruption within the judiciary: causes and remedies', *Global Corruption Report*, Transparency International (2007).

Osaleh L, 'Tackling Corruption in Kenyan judiciary', *IGI AGM*, Nairobi, 2015.

Ouma JO, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for reform' Unpublished PHD Thesis, University of Leicester, November 2011.

Perotta MB, Spangolo G, 'Leniency, Asymmetric Punishment and Corruption', SITE, University of Rome, *CEPR*, October 2015.

Ringera A, 'Corruption in the judiciary', The World Bank, Washington DC, 25th April 2007.

Sitinei J, 'Corruption in the Kenyan judiciary', University of Passau, October 2010.

Teck KH, 'Corruption Control in Singapore', *The 13th International Training Course on The Criminal Justice Response to Corruption Visiting Experts' Papers*.

"The Current Challenges in enforcing the Anti Corruption and Economic Crimes Act(ACECA)", Institute of Certified Public Accountants in Kenya.

United Nations Office of the High Commissioner for Human Rights and the United Nations Development Programme, *Combating corruption in the Public and Private sectors*, Seminar on Good Governance practices for the promotion of human rights, Seoul, 15-16 September 2004, HR/SEL/GG/SEM/2004/B.P.8.

Urinboyev R & Svensson M, 'Living Law, Legal Pluralism, and Corruption in Post-Soviet Uzbekistan, *Journal of Legal Pluralism and Unofficial Law*', (2013).

Zyl JVS, 'Restoring Confidence in the judiciary: Kenya's judicial vetting process, constitutional implementation and the rule of law.'

c) Reports

Ethics and Anti-Corruption Commission, *A study on the Corruption and Ethics in the Judicial Sector*, October 2014.

OECD Glossaries, [2008], "Corruption", A Glossary of International Standards in Criminal Law, OECD Publishing

Republic of Kenya, *judiciary Transformation Framework*, 2012-2016.

Republic of Kenya, *Final Report of the Task Force on Judicial Reforms*, July 2010.

Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance in the judiciary*, November 2005.

Transparency International, *Global Corruption Sector*, 2007.

Transparency International, *The East African Bribery Index Trends Analysis*, 2015.

Transparency International, *The Kenyan Urban Bribery Index Report*, 2001.

Transparency International, *Global Corruption Barometer*, 2010.

United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, 2006.

World Justice Project, *Rule of Law Index*, 2016.

d) Legislation and International Instruments.

The Vetting of Judges and Magistrates Act, Act No. 2 of 2011.

COK, 2010.

e) Websites cited

Carver R, WRITENET, 'Kenya: Update to End July 1995', 1 August 1995 available at: <http://www.refworld.org/docid/3ae6a6b78.html> accessed on 10 December 2016.

Gainer M, How Kenya cleaned up its courts, as seen on <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts> accessed on 15 December 2016.

Ghana's top undercover journalist masters disguise to expose corruption, as seen on <https://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption> accessed on 3 January 2017

Githongo J, I came in with a mission to fight corruption and the Judiciary has made strides in fighting the vice, as seen on <http://allafrica.com/stories/201510150354.html> accessed on 5 January 2017.

Kenya: Judiciary officials charged over purchase of Chief Justice Willy Mutunga's house as seen on <https://www.standardmedia.co.ke/article/2000171810/kenya-judiciary-officials-charged-over-purchase-of-chief-justice-willy-mutunga-s-house> accessed on 3 January 2017.

Kulundu M, JSC delivers verdict on Judge Tunoi's Sh200 million scandal, as seen on <https://www.kenyans.co.ke/news/jsc-delivers-verdict-judge-tunois-sh200-million-scandal> accessed on 5th January 2017.

Lindijer K, Kenya has become a "bandit economy", as seen on <http://africanarguments.org/2016/01/11/kenya-has-become-a-bandit-economy-says-chief-justice-willy-mutunga> accessed on 20 November 2016.

Ogendi P, Anti corruption review, as seen on <https://ogendi.wordpress.com> accessed on 2 January 2017.

Maina W, Kenya's Flawed vetting system and the Supreme court are to blame for graft in Judiciary, as seen on <http://allafrica.com/stories/201602070039.html> accessed on 4 January 2017

Makana F, 'Former Judiciary staff back in court as Gladys Shollei denies breaking the law, as seen on <http://www.standardmedia.co.ke/article/2000174063/former-Judiciarystaff-back-in-court-as-gladys-shollei-denies-breaking-the-law> on 5 January 2017.

Muthoni K, Justice Philip Tunoi bribery claims jolt Judiciary as seen on <https://www.standardmedia.co.ke/article/2000189409/justice-philip-tunoi-bribery-claims-jolt-judiciary> accessed on 5 January 2017.

Report of the Advisory Panel of Eminent Commonwealth Judicial Experts as seen on <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed on 2 January 2017.

Separation of powers and independence of the judiciary in the Kenyan context, as seen on <http://www.ckadvocates.co.ke/2014/11/separation-of-powers-and-independence-of-the-judiciary-in-the-kenyan-context> accessed on 10 December 2016.

Wachira C, Kenya-human rights: Government back under fire over dissidents, as seen on <http://www.ipsnews.net/1996/01/kenya-human-rights-government-back-under-fire-over-dissidents> accessed on 10 December 2016.

Wanzala O & Ngirachu J, JSC sends Gladys Shollei packing over Sh2 billion scandal, as seen on <http://www.nation.co.ke/news/JSC-sends-Gladys-Shollei-packing/1056-2038778-1tgorrz/index.html> accessed on 5 January 2017.

Washington M, Kenyan constitutional amendments through time as seen on <https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-through-time> accessed on 10 December 2016.