



International Center for Policy and Conflict

REQUIREMENTS FOR THE VETTING AND LUSTRATION LEGAL FRAMEWORK IN ACCORDANCE WITH THE CONSTITUTION

1. INTRODUCTION

Countries emerging from armed conflict or authoritarian rule face difficult questions about what to do with public employees who perpetrated past human rights abuses and the institutional structures that allowed such abuses to happen.

Vetting as part of the institutional reforms and breaking with legacy of past refers to the process by which abusive or corrupt employees are excluded from public office¹. More than a means of punishing individuals, vetting represents an important transitional justice measure aimed at reforming institutions and preventing the recurrence of abuses.

Kenya is a society in transition. This is because it is a country that has had to endure with a ruthless authoritarian rule and deep entrenched impunity. The 2007/8 post election violence was culmination of this dictatorial state. It also offered a pivotal juncture for re-defining the country's socio-political and economic sphere and confront the legacy of the past.

The eruption of violence after the announcement of the 2007 presidential election results was seen as a result of continued impunity against the perpetrators of human rights abuse and economic crimes and destruction of the state institutions and abuse of governance processes. Kenya has a history of impunity.

Since independence there have been over fifteen Commissions of Inquiry to investigate human rights abuses and economic crimes but no one has ever been prosecuted.

¹ See Vetting Public Employees in Post-Conflict *Settings, Operational Guidelines* (United Nations Development Programme) 2006 and *Justice as Prevention: Vetting Public Employees in Transitional Societies* (International Center for Transitional Justice)

Despite recommendations of prosecutions, the Attorney General and the investigation arm of the government has frustrated these efforts by refusal to conduct proper investigations and prosecute the perpetrators.

Upon the signing of the Peace Accord ²by President Mwai Kibaki and Hon Raila Odinga on the 28th of February 2010, the two principles promised to institute reforms in the country. The promulgation of the new constitution on the 27th of August 2010 after an overwhelming approval ³by citizens on the 4th of August 2010 referendum is a step in the right direction.

A new constitution without transforming the institutions and the people who work in them will prove the new constitutional order futile. This is because this new constitution ushers a ground breaking new value and culture system and sets up radical framework for good governance and accountability.

Vigilance will be extremely necessary to ensure that the Bills being drafted and enacted to bring into effect certain sections (or Articles) ⁴of the new constitution are constitutional and respect all provisions and articles of the Constitution. Such Acts of Parliament can be the avenue to introduce unconstitutional ⁵claw-backs to the progressive constitutional principles.

The People of Kenya should expect resistance from the state making it necessary for vigorous social mobilization, empowerment and sustained civic education. Also active participation of the citizenry in the proceedings of the legislation, establishment of new institutions and appointment of the personnel to those institutions is very crucial. ⁶

² The Kenya National and Reconciliation Framework was set to facilitate mediation process under the African union Panel of Eminent Persons chaired by the former United Nations Secretary General Kofi Annan. The National Accord was signed and enacted into law on February 28, 2008.

³ Final gazetted results indicate that 6,092,593 Kenyans voted for the Proposed Constitution. This represents 66.9 per cent of the votes cast. On the other hand, other 2,795,059 people, representing 30.6 per cent voted to reject the new law.

⁴ See schedule of the Acts of Parliament to be enacted, Article 261(1)

⁵ Article 2(1)(4)

⁶ The Constitution has set key benchmarks and conditions to be followed on each of these processes

One such measure is the provision of a chapter on leadership and integrity which lays out how any person holding a state office should do and should not do⁷. The constitution has also provided for vetting of all judicial officers⁸ and operationalization of the Chapter Six on criteria and procedures to be adhered to all public officials while assessing their probity and integrity to hold public office and or state office⁹.

However, for Kenya to be able to achieve the fruits of the new constitution, it has to clearly deal with its past history of impunity and restore confidence in leaders and institutions. This can only be done by ensuring that those who are guilty of human rights abuses and economic crimes and who have enjoyed living in impunity are eliminated from holding public offices. It is also important to ensure that confidence is restored in public institutions by ensuring they have competent staff and offer quality services.

This is going to pose a challenge because impunity is deeply rooted in the country and those who enjoy the fruits of immunity hold powerful government and political offices. We can achieve good governance and accountability by ensuring that we are able to sieve these people away. This can be achieved through vetting.

Vetting is the process of assessing integrity to determine the suitability for public employment. Integrity in this area refers to person's adherence to standards of human rights, ethics and professional conduct¹⁰. The constitution has only provided a framework but there is need to have a law that will entrench vetting in our country.

2. THE BEDROCK OF SUCH VETTING LAW

The new constitution sets up stringent measures of ensuring good governance and accountability.

⁷ Chapter Six of the new constitution

⁸ Article 262(23) of the new constitution

⁹ Article 80

¹⁰ United Nation vetting procedures and guidelines on vetting public employees

Chapter six which provides for leadership and integration has among other provisions that anyone appointed in a state office should be a person of integrity and competence. He/she should practice honesty in the execution of public duties and should not compromise the interest of the public for his own interest.

Article 262(23) provides for vetting of all judicial officers within the first year of the passage of the constitution. The constitution further provides for recalling of members of parliament who do not perform (see article 104), for parliament to conduct its matters in an open manner and to involve the public (see article 119). The constitution further provides for approval of all presidential appointments by the National assembly and the impeachment of the president for among other things gross misconduct and violation of the constitution (See Chapter Nine of the New Constitution).

The constitution also provides for right to access information. Such information can be used to deal with vetting of public officials (see article 35). The definitions of those who are subjected to standards provided in Chapter Six are well outlined in Article 260 and they include all who hold constitutional offices as well as governors among others.

For certain aspects of the Chapter Six of the Constitution to become effective there is need to pass legislation on vetting and lustration in Kenya. The procedures to be followed by Parliament and or any other body while vetting public officials shall be in accordance with in the Constitution. It is expected to be transparent and open to public participation unlike in the past¹¹. Kenya as a transiting society will only be able to deal with the ghosts of the past through partly vetting of the public officials.

What should such a law contain? This document provides a framework of a vetting law as follows:

3. OBJECTIVE OF THE LAW

1. To uproot impunity and entrench accountable and open governance

¹¹ See Articles 124 and 125 of the Constitution. Parliament is not the appointing authority. It confirms the appointment through proceedings which should allow members of the public to raise any matters arising on the appointee, then finally approval by the whole house. If the House rejects an appointment, the appointing authority then has to submit another name.

2. To ensure the realization core national values and principle enshrined in Chapters Two, Six and Thirteen of the constitution.
3. To ensure that institutions restore integrity and public confidence and uphold the rule of law and human rights.
4. To ensure that there are mechanisms to ensure that individuals adhere to relevant standards of professional conducts.
5. Promote, protect and enhance popular participation in governance and public policy

4. SUBJECT OF THE LAW

Vetting law should seek to regulate/determine:

1. Types or aspects of violations that will form the bedrock of vetting.
2. Definitions of target groups.
3. The criteria to be used in vetting.
4. The scope of vetting.
5. Principles and rules of procedures for investigations on vetting.
6. Composition, competence and proceedings of a competent vetting body.
7. What to deal with those affected by the vetting procedure.

5. TARGET GROUP

Who should be targeted for investigations and accountability? Which individuals or institutions? While individuals are targeted to ensure that those who occupy public office meet the standards of integrity and professional conduct, institutions are vetted to ensure they are able to meet the requirements of the public they serve and provide quality service.

While the Constitution emphasizes on the executive appointees being vetted¹², it would be necessary to enact a law that empowers the Independent Boundary and Electoral Commission¹³ to demand and require all those standing for elective posts make available

¹² Including disallowing them from holding political party position, see Article 77(2) of the Constitution

¹³ Article 18 of the Constitution

information regarding their background history¹⁴. This is to ensure the enforcement of the national values and principles of governance.¹⁵

Definitions of target groups should be clear to avoid ambiguity and complains of witch hunting.

Ideally vetting is subjected to the following classes of people:

1. The president and members of the executive.
2. All holders of constitutional offices
3. Head of government departments and administrative units.
4. Employees selected or nominated by the parliament and the government.
5. University professors.
6. Members of state corporations.
7. Security officers and defense officers.
8. Members of the electoral commissions and other commissions to be established.
9. Journalists and editors of state owned media houses.
10. Senior and other government officials.
11. Public institutions.
12. Managers of state owned banks.

6. ACCOUNTABILITY

The law should be accountable to the people it seeks to serve, who are the general public. Accountability means that the procedure of vetting should be done in a transparent manner and within the framework of the constitution. The public should be able to fully participate in any vetting procedure.

¹⁴ See Article of 19 of the India which is similar to Article 35 of the Constitution of Kenya. In 2000 the High Court of India ruled that candidates standing for elective must disclose and sign affidavit declaring information about their background. People's Union for Civil Liberties (PUCL) has filed Writ Petition No.294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents – (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her; and (c) to frame such guidelines under Article 141 of the Constitution by taking into consideration 170th Report of Law Commission of India.

¹⁵ Articles 10 and 232 of the Constitution

7. VIOLATIONS TO BE CONSIDERED IN TERMS OF LAW

What are the violations that we are trying to fight against? Common violations in Kenya include:-

1. Human rights violations.
2. Economic crimes such as corruption and those included in the Anti-Corruption and Economic Crimes Act and Public Officer's Ethics Act.
3. Domestic and international crimes
4. Electoral crimes.
5. Police brutality and extra judicial killings.
6. Politically motivated judicial and extra judicial procedures.
7. Crimes within the Kenyan and international jurisdiction.

These crimes should be defined within the laws of the land and international conventions that are part of the Kenyan public¹⁶.

8. TIME OF APPLICATION OF THIS LAW

It is important for the legal framework to work around constitutional challenges that may arise. These constitutional challenges would include the issue of retrospectivity and what time frame will be covered by the law. Is this law operational for a period of time or is it operational at all time.

9. SCOPE

Who will be covered by this law? Will it be everyone who would want to occupy a public office or those who have been named as suspects in various commissions of inquiries investigating human rights violations and economic crimes?

10. INCLUSION AND EXCLUSION OF VETTING ISSUES

What scope of issues will be targeted for vetting? This should provide for what vetting will target and what will be excluded. For example, if we are going to include human rights violations within the scope of vetting, what violations will those be? Will they include social and economic rights or civil rights only, will they include rights violated by state operatives or

¹⁶ Article 2(3)(4)(5)(6)

non state operatives. It is important to broaden this so as to be able to capture a wider net of violations.

The law should be clear on whether those already holding offices that require to be vetted should be subjected to vetting or only the new appointees will be subject to vetting.

11. PARTICIPATION IN THE PROCEEDINGS

A party to a vetting proceeding is the person who is being subjected to the vetting process. The provisions of the law applying should ensure that there are clear procedures on whom to be vetted and how such a person is to participate in the proceedings.¹⁷ It is also important to include issues like who bears the responsibility of burden of proof, what evidential procedure to be used.

12. RESPECT OF DIGNITY OF THE PERSON UNDERGOING VETTING PROCEEDINGS

Such a person is a human being and deserves to be treated with respect and dignity. This includes the right to defend him/her. The right to privacy and other rights bestowed on the person by the constitution and the bill of rights. However, this must respect Articles 33, 34, and 35 of the Constitution. The person is also entitled to proper investigations.

13. WHO TO CONDUCT PROCEEDINGS

Any vetting law should provide who will conduct the proceedings. It can either be a commission whose commissioners have also to be vetted or a human rights body or even an institution like the National assembly. This should include how they will conduct themselves, the limitation of time they are supposed to serve and the qualifications. Such an organization given such a responsibility should conduct itself with the highest levels of integrity, good governance and accountability.

14. FUNDS

Any vetting process is an expensive process. However, anybody conducting vetting procedures need not only be well funded but independent.

¹⁷ Article 262(23), the vetting envisioned here has to resonance with the rest of the vetting procedures of public officials as well

How will such a body be funded is an issue that require consideration.

15. RULES OF PROCEDURE

The body that is empowered to deal with vetting should come up with rules of procedures to guide it. Such procedures must meet the threshold and requirements of the Constitution. These includes issues like how to conduct hearings, what evidence to accept and what evidence not to accept, who bears the burden of proof, who conducts investigations and how is that evidence stored.

These rules should also include how the staff and those heading such bodies should work and relate with themselves and others and how the public can get involved in the proceedings.

16. RIGHT TO APPEAL

Can a person who is not happy with the vetting process appeal the decision of the vetting body? Need for the law to have that provision on how and where to appeal. This is to uphold the due process and respect the fundamental rights of person. It eliminates unnecessary litigations.

17. About International Center for Policy and Conflict

International Center for Policy and Conflict was founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

The International Center for Policy and Conflict reflects and engages in public policy and law making dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice in order to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is meant to establish, promote and build a sustainable human development; and democratic human rights adhering states.

The Center has been an authority and played pivotal role in transitional justice and human security discourse in Kenya and internationally.