

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**JUSTICIABILITY OF JUSTICE: THE ROLE OF JUDICIAL  
SERVICE COMMISSION IN KENYA IN THE DECISIONAL  
INDEPENDENCE OF JUDICIAL OFFICERS.**

**BY**

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**G62/67996/2011**

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of master in Law (LL.M)**

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## **Declaration**

I AKINYI ROSELINE OGANYO do hereby declare that this is my original work and has not been submitted and/or is currently being submitted for a degree in any other university.

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This research project is submitted for examination with my approval as the University supervisor;

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## Dedication

To My late Mother Phellesiah Atieno Jalang ̃o, My Father Washington Jalang ̃o Owino, My husband John Olima Oganyo, My pentagon children Faith Amondi, Collins Olima, Paul Trevor, Dancun Odongo , Daniel Opiyo my best friends.

## Table of Abbreviations

AG	Attorney General
CA	Court of Appeal
CIC	Constitutional Implementation Commission
CJ	Chief Justice
DC	District Commissioner
GG	Governor General
HC	High Court
ICJ	International Court Of Justice
ICJ	International Commission of Jurists
ICC	International criminal court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International criminal tribunal for the former Yugoslavia
JC	Judicial Council
JSC	Judicial Service Commission
KANU	Kenya African National Union
KNHRC	Kenya National Human Rights Commission
LDP	Liberal Democratic Party
NCAJ	National Council for the Administration of Justice
PM	Prime Minister
PSC	Public Service Commission
SC	Supreme Court
UK	United Kingdom

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Universal Charter of the Judge

Universal Declaration of Human Rights(UDHR)

United Nations Convention on the Law of the Sea,

## Table of Contents

	<b>Page</b>
Declaration ů .....	(i)
Acknowledgements ů .....	(ii)
Dedication ů .....	(iii)
Table of Abbreviations ů .....	(iv)
Table of cases ů .....	(v)
Table of Legislation .....	(vi)
Table of Contents ů .....	(vii)

### CHAPTER ONE

1.1. Introduction ů .....	1
1.1.1. The Value of an Independent Judiciary ů .....	3
1.2. Background ů .....	4
1.3. Statement of Problem ů .....	6
1.4. Objectives ů .....	7
1.5. Research Questions ů .....	7
1.6. Hypothesis ů .....	7
1.7. Literature Review ů .....	8
1.8. Justification ů .....	12
1.9. Significance of the study ů .....	12
1.10. Theoretical Framework ů .....	13
1.10.1. Conceptual Framework ů .....	14
1.11. Research Methodology ů .....	15
1.11.1. Secondary data ů .....	16
1.11.2. Primary data ů .....	16
1.12. Chapter breakdown ů .....	17

### CHAPTER TWO

2.0. Introduction ů .....	18
2.1. Establishment of Formal Legal Systems ů .....	18
2.2. Controlling the Judiciary during the Colonial period ů .....	19



2.3. Independence Constitution ů	20
2.3.1. Removal of Judges ů	21
2.3.2. JSC under the Westminster Constitution ů	21
2.3.3. Evaluation of the Westminster Model Constitution ů	22
2.3.4. Arguments for Repealing the Westminster Model Constitution ů	23
2.4. JSC under the Independent Constitution ů	25
2.4.1. Role of JSC in the Appointment of Judges ů	25
2.4.2. Appointment of Contract and Acting Judges ů	26
2.4.3. Removal of Judges ů	27
2.4.3.1. The Radical Surgery ů	29
2.5. JSC in the Constitution of Kenya 2010 ů	29
2.6. Conclusion ů	31

### **CHAPTER THREE**

3.1. Introduction ů	33
3.2. The Constitutional and Statutory Foundation of the Judicial Service Commission (JSC)	34
3.2.1. Appointment and Promotion of Judges ů	36
3.2.2. Disciplining of Judges ů	38
3.2.3. Management and Oversight of the Judiciary ů	38
3.2.4. Judicial Funding ů	39
3.3. Case Study ů	40
3.3.1. Coletta Case ů	40
3.3.2. The FIDA Case ů	41
3.3.3. Interpreting the FIDA Case ů	42
3.4. Conclusion ů	45

### **CHAPTER FOUR**

4.0. Introduction ů	47
4.1. Composition of the JSC ů	47
4.1.1. International Rules on Establishment of Appointing Body ů	49
4.2. The Function of the JSC ů	50
4.2.1. Appointment of Judges ů	51
4.2.2. International Law on the Appointment of Judges ů	52

4.2.3. Promotion of Judges ů	53
4.2.4. Discipline ů	54
4.3. Judicial Independence in International Law ů	55
4.3.1. Treaty Law on Judicial Independence ů	57
4.3.2. International Standards in Judicial Independence ů	58
4.4. Judicial Independence for Subordinate Courts ů	59
4.5. Qualities of an Independent Judiciary ů	60
4.5.1. Independence and Impartiality ů	60
4.5.2. Impartiality ů	61
4.6. Conclusion ů	62

## CHAPTER FIVE

5.0. Summary ů	63
5.1. Conclusion ů	63
5.2. Recommendations.....	65
5.2.1. Adoption of International best practices ů	65
5.2.2. Commissioners who are Advocates should not practice ů	66
5.2.3. Limit Administrative and Oversight Function of JSC ů	66
5.2.4. Delink Management function from Oversight ů	66
5.2.5. Constitutional Amendment to give Magistrates security of tenure ů	67
Bibliography ů	68
Appendix	
1 ů	72

## CHAPTER ONE

### INTRODUCTION TO THE INDEPENDENCE OF THE JUDICIARY

#### 1.1. Introduction

*The success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power. Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of the government.<sup>1</sup>*

The importance of judicial independence cannot be over emphasized because it is a core value of justice and the rule of law in a democratic state.<sup>2</sup> When judges make decisions in court thinking of the impact it will have on their promotion or dismissal, the outcome is a compliant judiciary that is unlikely to interrogate excesses of human rights violation by the appointing body.<sup>3</sup> This phenomenon is not unique to Kenya; in Japan for example the General Secretariat of the Supreme Court (equivalent of a JSC here) uses its control over the judiciary to either reward or punish judicial officers.<sup>4</sup> This thesis analyses the role of the Judicial Service Commission (JSC) in the achievement of judicial independence. This will be done by analyzing the historical background of the Commission, through the various amendments targeting the JSC in the 1980's till the current constitutional dispensation.

In a true democracy institutional and individual independence is guaranteed by the Constitution. However, in Kenya whereas institutional independence has been guaranteed by Article 160 of the Constitution,<sup>5</sup> decisional independence has been impliedly taken away by Section 18 of the

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<sup>1</sup> R W M Dias, *Jurisprudence 4th ed* (Butterworths: London, 1976) at 129.

<sup>2</sup> Shimon Shetreet, 'Fundamental Values of the Justice System', (2012) 23 *The European Business Law Review* 61.

<sup>3</sup> Hiroshi Takahashi, *Career Patterns of Japanese Judges in Korea and Japan*, in *Judicial Transformation in the Globalizing World 189-190* (Dai-Kwon Choi & Kahei Rokumoto eds., 2007) at 64.

<sup>4</sup> Mark Ramseyer and Eric Rasmusen, 'Managed Courts Under Unstable Political Environments: Recruitment and Resignations in the 1990s Japanese Judiciary', (2006) 4 *Harvard Law and Economic Research Paper Series, Discussion Paper No. 571*.

<sup>5</sup> (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

Judicial Service Commission Act.<sup>6</sup> The thrust of Section 18 is that a practicing advocate and member of the JSC and therefore employer of judges and magistrates will more likely get a favourable judgment from the employee in a matter that involves him/her. This is against the background and general consensus that institutional and personal independence of the judiciary holds key to upholding the rule of law.

The biggest threat to judicial independence has traditionally been the executive. This is not an accident because in a large part it has an interest in the outcome of some of the decisions coming from courts. Moreover, the executive has a lot of power that if it chose to exercise could disable the judiciary,<sup>7</sup> for example by reducing judicial budget.<sup>8</sup> Whereas this is still true, this research focuses on another line of threat arising from the newly constituted Judicial Service Commission (JSC). It has been observed that its twin roles of management and oversight gives it too much leverage on the judiciary that can be misused to the detriment of its independence.<sup>9</sup> The study analyses two decided cases where the JSC was allegedly involved in human rights violation. These cases are: *Federation of Women Lawyers and 5 Others v. the Judicial Service Commission and Another*<sup>10</sup> and *Nancy Makokha Baraza v Judicial Service Commission and 9 Others*.<sup>11</sup> In both cases the judiciary failed to protect the plaintiff's rights against JSC in instances of clear provisions of the law.

Judicial independence is defined as:

*the existence of judges, who are not manipulated for political gain, who are impartial towards the parties to a dispute, who apply the law according to the constitution, and who form a judicial branch which has final authority and power to regulate the legality of government behaviour, and whose independence rests on robust constitutional guarantees, and commands a high degree of public confidence*.<sup>12</sup>

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<sup>6</sup> No. 1 of 2011.

<sup>7</sup> Charles Manga Fombad, 'A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions' [2007] Public Law 234.

<sup>8</sup> Commission for the Implementation of the Constitution (CIC), press statement on threats to the rule of law by various institutions, Monday, 24 February 2014.

<sup>9</sup> Walter Ochieng, 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya', (2013) 3 *The Young African Research Journal* 10.

<sup>10</sup> Petition 102 of 2011, [2011] eKLR.

<sup>11</sup> Petition No. 23 of 2012.

<sup>12</sup> Julie Ouma Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform* (Unpublished PHD Thesis: University of Leicester, 2011) at 65; Fombad, C.M., 'Challenges to

### 1.1.1. The Value of an Independent Judiciary

At the global level, many countries such as china are spending billions of dollars in the promotion of judicial independence.<sup>13</sup> This goes to underscore the value of judicial independence which cannot be over-emphasized. The independence of the judiciary is seen as an essential element in the rule of law, good governance, economic growth, democracy, human rights protection and political stability.<sup>14</sup> Further it helps in maintaining the integrity of the judiciary thereby helping to increase public confidence in the judiciary.<sup>15</sup> This is because the strength of the judiciary is seen as the sum total of those protecting it.<sup>16</sup>

Other than being enshrined in domestic law,<sup>17</sup> judicial independence is a requirement in international legal instruments. International legal treaties envisage the existence of an independent judiciary to discharge justice to litigants.<sup>18</sup> Other instruments such as the United Nations Basic Principles on the Independence of the Judiciary provide in part, that `the

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constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa,` (2007) 55 *American Journal of Comparative Law*, 10.

<sup>13</sup> Randal Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP, Cambridge 2010) 1.

<sup>14</sup> Ibid.

<sup>15</sup> Kwasi Prempeh, `A New Jurisprudence for Africa` (1999) 10 *Journal of Democracy* 135

<sup>16</sup> Carlo Guarneri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP, Oxford 2002) at 2.

<sup>17</sup> Article 160 (1), Constitution of Kenya, 2010: `In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.\_

<sup>18</sup> Article 10, the Universal Declaration of Human Rights (UDHR) (1948), adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) `everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him\_; Article 14 (1), the International Covenant on Civil and Political Rights (ICCPR), (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS (ICCPR) `everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law\_; Article 37(d), the Convention on the Rights of the Child (adopted 20 November 1989) UN Doc. A/44/736; Article 17 (iv) and 40 (2), African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999) `A child suspected of committing a crime should be placed before an independent and impartial authority or judicial body according to law\_; Article 6, the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), (Entered into force on 30 September 1981) UNTS 1249 `provide everyone within their jurisdiction effective protection remedies through competent national tribunals\_.

independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country.<sup>19</sup> Commonwealth countries as a group have declared the necessity of an independent judiciary whether or not independent institutions do so exist.<sup>20</sup> The Bangalore principles on the other hand reiterate the protection of human rights through independent tribunals.<sup>21</sup> International tribunals and courts have made reference to independent judicial organs to guarantee a fair process, for example the ICJ,<sup>22</sup> the statute establishing the United Nations Convention on the Law of the Sea,<sup>23</sup> the International criminal court (ICC),<sup>24</sup> the statute establishing the international criminal tribunal for Rwanda (ICTR)<sup>25</sup> and the statute establishing the international criminal tribunal for the former Yugoslavia (ICTY).<sup>26</sup> The unanimity in these international legal instruments is universal that judges need to be protected from undue influence that is likely to compromise its independence.<sup>27</sup> Thus, the justiciability, of justice from independent minds, as is envisaged in this study.

## 1.2. Background

The phenomenon of a judiciary that lacks independence due to an appointing authority that exercises a lot of control over it is not uniquely Kenyan. Many scholars the world over are of the view that where the appointing body also controls promotions, posting and dismissal, the judiciary that comes out of it is unlikely to be assertive.<sup>28</sup> For instance in Japan generally, the

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<sup>19</sup> Article 60, UN. Doc. A/CONF.121/22/Rev. 1 (1985)

<sup>20</sup> Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (Adopted 19 June 1988 at a meeting of the representatives of the Commonwealth Parliamentary Associations, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association)

<sup>21</sup> The Bangalore Draft Code of Judicial Conduct, 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of the Chief Justices, held at the Peace Palace, the Hague, November, 25 5-26 2002

<sup>22</sup> Article 2, 16-20, the Statute of the International Court of Justice (ICJ).

<sup>23</sup> Article 2(1), 7 (1), 11, the United Nations Convention on the Law of the Sea (entered into force on 16 November 1994) UNTS 1833.

<sup>24</sup> Article 2, Rome Statute of the International Criminal Court, UNTS 2187 1998

<sup>25</sup> Article 3, the International Criminal Tribunal for Rwanda (ICTR) (entered into force on 24 January 1995) UNTS 2420.

<sup>26</sup> Article 21, the international criminal tribunal for the former Yugoslavia (ICTY).

<sup>27</sup> Montesquieu, *The Spirit of the Laws* David Wallace Carrithers (ed) and (tr), (University of California Press, London, 1977) at 236.

<sup>28</sup> Takahashi at 64.

General Secretariat<sup>29</sup> used its control over judicial careers to reward efficient performance, to judges who decided cases expeditiously and predictably. Occasionally, however, it used it to induce judges to implement the political preferences of the ruling Liberal Democratic Party (LDP). In politically charged case, if a judge tried to implement of out-of-power parties the Secretariat sometimes derails his/her career. More generally, it favored the careers of right-leaning judges over the leftist. During the 1960s a large number of jurists associated with the communist affiliated Young Jurist League joined the courts, but subsequently the Secretariat imposed on them significant career penalties.

The JSC in Kenya is an institution that is charged with the mandate of appointing of judicial officers. These duties have however not changed since independence. What has changed however is that whereas in the old Constitution, all commissioners were appointed by the President and their functions strictly controlled by him, in the current one, the JSC is appointed through a competitive and transparent process and its role only subject to the Constitution and not an individual.

The JSC under the old Constitution was appointed under section 68 of the Constitution. There were no criteria for appointment but some scholars have argued that patronage played a large part in their appointment.<sup>30</sup> All commission members for example were Presidential appointees for example the Chief Justice (CJ),<sup>31</sup> the Attorney General (AG),<sup>32</sup> the chairman of the Public Service Commission (PSC)<sup>33</sup> and two persons who were judges of the High Court (HC).<sup>34</sup> Their function was to appoint, promote, discipline and recommend judicial officers to the President for the establishment of a tribunal for purposes of removal.<sup>35</sup> Being public servants they all served at the pleasure of the President.<sup>36</sup> It is therefore safe to conclude that all commission members

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<sup>29</sup> The General Secretariat of the Supreme Court is the body that trains, appoints, promotes and dismisses judges. It is the equivalent of the JSC in Kenya.

<sup>30</sup> Sylvester Odhiambo Obong'o, 'Particularistic Exchanges and Pacts of Domination in Africa: Examining how Patronage Appointments may have Increased Resistance to Public Sector Reforms in Kenya', (2013) 14 (1) *International Public Management Review* 36.

<sup>31</sup> Section 61 (1), Constitution of Kenya, 1963 (amended).

<sup>32</sup> Section 109, Constitution of Kenya, 1963 (amended).

<sup>33</sup> Section 106 (2), Constitution of Kenya, 1963 (amended).

<sup>34</sup> Section 69 (1) (a-d), Constitution of Kenya, 1963 (amended).

<sup>35</sup> Section 69 (1), Constitution of Kenya, 1963 (amended).

<sup>36</sup> Section 25 (1), Constitution of Kenya, 1963 (amended).

being Presidential appointees were ready to do whatever the President wished therefore it was clear that the judiciary could not be independent in this environment.

The promulgation of a new Constitution in 2010 brought renewed hope that the JSC would institute reforms and judicial independence in particular. The JSC is established in Article 171 of the Constitution as an independent institution through an open and transparent process. Other than the appointment, promotion and discipline of judicial officers,<sup>37</sup> the JSC shall in addition train, receive complaints, implement programs and improve the efficiency of the judiciary.<sup>38</sup> It is this broad mandate that makes it difficult for the judiciary to question the JSC when it violates human rights. Moreover an attempt has been made to give financial independence to the judiciary by the establishment of judicial fund that is charged directly on the consolidated fund.<sup>39</sup> Be that as it may, this did not stop Parliament from reducing budgetary allocations to the judiciary in the 20013/20014 period.<sup>40</sup>

### 1.3. Statement of the problem

The JSC is established in Article 171 (1) of the Constitution of Kenya to among other things, promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice, recommend to the President persons for appointment as Judges, review and make recommendations on the conditions of service of, judges and judicial officers, other than on matters of their remuneration.<sup>41</sup> The Commission is composed of the CJ, AG, one Supreme Court Judge, one Court of Appeal Judge, one High Court Judge, and one Magistrate, one person nominated by the PSC, one man and one woman to represent the public, two advocates and the Chief Registrar who is the secretary.<sup>42</sup> The mode of appointing Commission members is set out in Section 15 of the Judicial Commission Service Act.<sup>43</sup>

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<sup>37</sup> Article 172, Constitution of Kenya 2010.

<sup>38</sup> Ibid. Article 172 (1) (e).

<sup>39</sup> Ibid. Article 173 (1).

<sup>40</sup> Francis Mureithi, MPs Slash Judiciary Budget, *The Star*, 26 February 2014

<sup>41</sup> Article 172, Constitution of Kenya, 2010.

<sup>42</sup> Ibid. Article 172 (2) (3).

<sup>43</sup> No. 1 of 2011.



Whereas in Section 18 of the Judicial Commission Service Act an MP, member of local authority and a member of executive committee of a political party is required to relinquish his post as soon as he/she is appointed a commissioner, serving advocates do not have to meet this requirement. The effect is to create a conflict between Section 18 of the Judicial Commission Service Act and Article 172 (1) of the Constitution. The conflict is with respect to JSC as the employer of judges and magistrates where a lawyer sits as a Commissioner while at the same time representing clients on matters of interest to him/her. Under these circumstances, a judge or magistrate cannot deliver an impartial judgment if his employer has an interest in the matter. To that extent, the advocate has a conflict of interest and therefore independence and accountability cannot be achieved if the employer (practicing advocate and Commissioner) has to appear and seek justice from the employee (judge/magistrate).

#### **1.4. Objectives**

The researcher desires to bring out, at the end of the study, the following:

1. To investigate the role of the JSC in the appointment, promotion and discipline of judicial officers in the Judicial Service Act, 2011 and the Constitution
2. To identify forms of encroachment on the independence of the judiciary by the JSC
3. To identify international best practices in judicial independence

#### **1.5. Research Questions**

The research will ask the following questions:

1. What is the role of the JSC in the appointment, promotion and discipline of judicial officers in Kenya?
2. To what extent can the judiciary protect human rights violations committed by the JSC?
3. What are some of the international best practices in judicial independence?

#### **1.6. Hypothesis**

The research will test the following hypothesis:

The JSC is the one institution that should ensure that the judiciary achieves both institutional and individual independence. The reason this has not happened is because of flaws in the law that allow the JSC to exercise arbitrary powers over the judiciary. Although threats to judicial independence could come from other institutions vested with broad powers of financing (Parliament), the mandate of the JSC brings about conflict of interest. Whoever is vested with management/administrative functions should not equally exercise oversight functions. To make a difference and depart from the past, the two roles should be separated.

### 1.7. Literature Review

Whereas a lot of literature has been written on institutional independence of judges, the same cannot be said of personal or decisional independence. The assumption in many jurisdictions is that once institutional independence is constitutionally protected it would translate into personal (decisional) independence existence. This is not necessarily the truth as it will be shown below. A majority of writers in Kenya have taken the view that, the historical foundation of the JSC since the colonial times is to blame for the low standards of judicial independence. A scenario which did not change much after independence as the colonial institutions virtually remained the same.

Thuku<sup>44</sup> has made a comparative analysis of judicial appointment in Kenya and other jurisdictions such as UK, Japan, and Bolivia to mention but a few. By surveying these jurisdictions many scholars are of the view that when judges make decisions thinking of the likely impact of the same on their promotion and where they are likely to be posted the result is a compliant judiciary that is unlikely to question the excesses of the appointing authority.<sup>45</sup> In

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<sup>44</sup> Njeri Thuku, 'Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments Between Kenya and England', (2013) 19 *Annual Survey of International and Comparative Law* 80.

<sup>45</sup> Hiroshi Takahashi, *Career Patterns of Japanese Judges in Korea and Japan*, in judicial transformation in the globalizing world 189-190 (Dai-Kwon Choi and Kahei Rokumoto eds., 2007) at 64.

Japan for example the functions of the General Secretariat of the Supreme Court,<sup>46</sup> other than making appointments, promotions and other administrative duties,<sup>47</sup> the body made up of judges also selects students wishing to become judges for training at the Shihou Kenshuu Sho Training Institute.

According to O'Brien, the Japanese judiciary:

*From beginning to end, Japanese judicial careers are determined by senior judges and judicial peers, not political branches or agencies outside courts. As a result, the Japanese judiciary maintains its institutional independence and integrity, though at the price of conformity and the sacrifice of the independence of individual judges on the bench.*<sup>48</sup>

The system like the Kenyan one influences a judge's decision due to the fact that it has a direct bearing on a judge's promotion and his/her station of work.<sup>49</sup> Consequently giving decisions that are unfavourable may not only delay promotion but ensure that a judge is posted in far flung region away from his/her family.

Ghai and McAuslan,<sup>50</sup> are of the opinion that judicial independence can only be understood through the history behind the formation of the judiciary. They observe that the colonial administration paid lip service to judicial independence, treating the courts as an extension of the administration branch of government. This view is shared by leading scholars of constitutional law in Kenya such as Ojwang, J.B.,<sup>51</sup> Githu Muigai<sup>52</sup> and Okoth Ogendo.<sup>53</sup>

After independence, the Westminster constitution was amended several times to remove the safeguards that were central to the administration of justice. The most important one was the 1986 one which removed the security of tenure of the Attorney General, paving way for his

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<sup>46</sup> A body similar to Kenya's JSC.

<sup>47</sup> Takahashi at 64.

<sup>48</sup> David M. O'Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* (Malleon and Russell eds., 2006) at 360.

<sup>49</sup> Mark Ramseyer and Eric Rasmusen, *Managed Courts Under Unstable Political Environments: Recruitment and Resignations in the 1990s Japanese Judiciary*, (2006) 4 HARV. L. and ECON. RESEARCH PAPER SERIES, Discussion Paper No. 571.

<sup>50</sup> Yash Pal Ghai and J.P.W.B. MacAuslan, *Public Law and Political Change in Kenya. A Study of the Legal Framework of Government from Colonial Times to the Present*, (Oxford: Oxford University Press, 1970) at ii

<sup>51</sup> J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*. (Nairobi: African Centre for Technology and Studies, 1990).

<sup>52</sup> Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, (1964-1977). A Study in the Politics of the Constitution* (Unpublished PHD Thesis: University of Nairobi, 2001).

<sup>53</sup> O Ogendo, *The Politics of Constitutional Changes in Kenya Since Independence*, in O Ogendo, *Constitution Without Constitutionalism*, at 161 to 171.

dismissal by the President. Without security of tenure, the power of the AG to prosecute was seriously impaired as it was now easy to manipulate him to undertake political prosecutions.

Another amendment that had far reaching consequences was in 1988, which removed the security of tenure of judges of the High Court and Court of Appeal thus making them vulnerable to the executive arm of government. As Ghai notes, judges are the final arbiters in the interpretation and enforcement of the law. They act as a buffer between the state and the citizens as well as playing an important role in the maintenance of the rule of law and protection of fundamental rights and freedoms. To be able to perform all these duties, judges need autonomy and insulation from all forms of interference.

The consequences were that the population lost respect for the Constitution and confidence in the judiciary was at an all-time low. The ability of the judiciary to resolve disputes between citizens and political parties was lost, excessive power of the President made institutions of accountability impotent. The economy suffered too since the legal system meant to enforce contractual obligations had been severely compromised.

Justice Ojwang<sup>54</sup> views judicial independence as an important element in constitutional theory and practice and as a governance issue in any democratic state. In his presentation he quotes Dworkin:

*We live in and by law. It makes us what we are; citizens and employees, doctors and spouses and people who own things. It is a sword, shield and menace. We insist on our wage, or refuse to pay our rent. or are forced to forfeit penalties. or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed...We are subjects of law's empire, liegeman to its methods and ideals...*<sup>55</sup>

Ojwang, considers the protection of the citizen's fundamental rights and freedoms as the main reason for judicial independence in a democratic society. This is partly because the citizen cannot challenge the exercise of public power by the executive and the legislature. Citizens look to the judiciary for redress. Although the judiciary cannot compete with the executive with roots

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<sup>54</sup> Jackton Ojwang, *The Independence of the Judiciary in Kenya*. Conference Report, the Independence of the Judiciary in Sub Saharan Africa: Towards an Independent and Effective Judiciary, Held at Imperial Resort Beach Hotel, Entebbe, Uganda, June 24-28, 2008 at 50.

<sup>55</sup> Ronald Dworkin, *Laws Empire* (London;Fontane Press,1986) at vii

in the legislature, oppressed citizens resort to it when their rights have been violated. This is because they trust and have confidence in its impartiality.

In the opinion of Ojwang,<sup>56</sup> the judiciary should be viewed as the custodian of certain powers in the same way the executive and the legislature do so as to facilitate their constitutional role. The judiciary loses credibility when it engages in matters of a political nature that would require a political solution. Other limitations which reduce the scope of the courts to function include the legislature passing laws to diminish the line between general law making and application of statutes to specific situations, the exercise of prerogative of mercy by the President.

Muigai,<sup>57</sup> observes that the current status of the constitution cannot be understood without looking at its historical foundation. He shares the view held by Ghai that the colonial judiciary was considered an appendage to the administrative arm of government. This was demonstrated through the biased nature of interpretation of the law that more or less favored the colonial government.<sup>58</sup> In other words the courts interpreted the Constitution to the disadvantage which he has called judicial amendment of the Constitution.

Throughout the colonial period, the judiciary never played any part in the distribution of power. This scenario changed on Kenya's attainment of independence in 1963. The Constitution which during the colonial period had never been a determinant of power relationship suddenly became the center of all controversies. There was tendency to view all political issues as problems for constitutional settlement.<sup>59</sup>

In 1963 when the Kenya African National Union (KANU), took power from the colonial government, they found the Lancaster Constitution very cumbersome and restrictive. Between 1963 and 1969, they embarked on constitutional amendments that were meant to give even more power to the executive.<sup>60</sup> However as the constitutional presidency was replaced by imperial presidency, the capacity of the judiciary to check the executive were severely impaired.<sup>61</sup> This

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<sup>56</sup> Ojwang *supra* note 42 at 159-171.

<sup>57</sup> Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, (1964-1977). A Study in the Politics of the Constitution* (Unpublished PHD Thesis: University of Nairobi, 2001).

<sup>58</sup> *Ole Njogo and Others v. A.G. of East Africa Protectorate*, 5 East Africa Law Report 70 at 72 (1914).

<sup>59</sup> Y.P. Ghai, *Constitutional and Political Order in East Africa*, at 403.

<sup>60</sup> O Ogendo, *The Politics of Constitutional Changes in Kenya Since Independence* at 9.

<sup>61</sup> O Ogendo, *Constitution Without Constitutionalism*, at 161 to 171.

was made worse by the existence of expatriate Judges who were compliant to the executive with an eye on protecting their positions through the renewal of their contracts.<sup>62</sup>The expatriate judiciary which served after independence made no effort in restructuring the judiciary in terms of substantive law or procedure, thus the colonial system remained intact.

The effect of amendments was that it impaired the capacity of the judiciary to adjudicate on matters touching on the state as judiciary had become subservient to the executive.<sup>63</sup> The court's approach to such issues was conservative, highly technical and rigid. The judiciary thus abdicated its role as defender of the constitution. This it did in five simple ways namely: denial of jurisdiction,<sup>64</sup> refusal to grant *locus standi* in public interest cases on the basis that there was not sufficient public interest in the issue.<sup>65</sup>Thirdly, the courts tended towards the avoidance of the principle of *stare decicis* so as to reach a verdict that was politically correct.<sup>66</sup> Courts also adopted a narrow, technical and literal interpretation, through the interpretation of the Constitution like any other ordinary statute.<sup>67</sup>

### 1.8. Justification

The justification for this study is the dearth in research on judicial independence as an aspect of the separation of powers coupled with the need to introduce a new perspective and remove the apparent distortions in the literature which is mainly foreign. Kenya's record of separation of state functions and especially an autonomous judiciary has been very poor owing to executive interference as an interested party. This study will go a long way in demonstrating that though a lot of progress has been made towards realization of an independent judiciary, a lot still needs to be done. This is especially true because as a country having promulgated a brand new Constitution, which has addressed these concerns.

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<sup>62</sup> Lawrence Shimba, *The Status and Rights of Judges in Commonwealth Africa: Problems and Prospects*. (1987) 3 *Lesotho Law Journal* at 5

<sup>63</sup> *Matiba v. Daniel Arap Moi*. Presidential Election Petition number 1 of 1993 in which the election court in reversing decades of precedent held that an appeal lay to the court of appeal in an interlocutory matters arising from an election petition.

<sup>64</sup> *Kamau Kuria v. A.G.* Misc. Case 550 1988; *Maina Mbacha v. A.G.* Mic. Appeal 356 of 1989.

<sup>65</sup> *Wangari Maathai v. KTMT Ltd*, HCCC 5505 of 1998.

<sup>66</sup> *Matiba v. Daniel Arap Moi*. Presidential Election Petition number 1 of 1993 in which the election court in reversing decades of precedent held that an appeal lay to the court of appeal in an interlocutory matters arising from an election petition.

<sup>67</sup> *Ibid.*

## 1.9. Significance of the study

The significance of judicial independence cannot be under-estimated for it is the bedrock of the administration of justice and governance, upholds the rule of law, constitutional integrity and guarantees that the law can be enforced and applied equally. It is for this reason that an independent judiciary should be the concern not only of the political class, but professional bodies and all persons desirous of nurturing a culture of judicial independence. This can be accomplished in five steps namely: establishment of institutional infrastructure, construction of infrastructure (legislative and constitutional safeguards), the creation adjudicative arrangements, jurisprudence, and maintenance of ethical traditions and a code of judicial conduct.

## 1.10. Theoretical Framework

In constitutional theory and practice the independence of the judiciary is the most important element in the rule of law and closely related to the separation of powers and the rule of law. This view is underscored by the existence of a constitutionally protected judicial organ in modern democracies.<sup>68</sup> An assertion by the political leadership that a country espouses an independent judiciary is normally met by a sense of pride as a confirmation that a state is governed by the rule of law.<sup>69</sup> Ghai,<sup>70</sup> believes that the centrality of judicial independence in cementing the social fabric of society is universally recognized.

*The judiciary must be the one bastion of where citizens may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her rights when they conflict with those of the rich and powerful in society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions.<sup>71</sup>*

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<sup>68</sup> International Commission of Jurists (ICJ) (Kenya Chapter), *State of the Rule of Law in Kenya Report 2006* (ICJ: Nairobi, 2006) at 21.

<sup>69</sup> Ibid.

<sup>70</sup> Yash Pal Ghai, *Constitutions and Governance in Africa: A prolegomenon* in Sammy Adelman et al (ed.) *Law and Struggle for Democracy in East Africa* (Claripress: Nairobi, 1996) at 341-361.

<sup>71</sup> Ibid.

Although Kenya has not been a model and ideal constitutional democracy since attaining its independence, institutional independence of the judiciary has been part and parcel of its body politic. This is notwithstanding the poor performance of the individual judges whose independence has always been wanting. The independent Constitution provided one such structure where the judiciary was one of the organs of government and was tasked with upholding the rule of law and the enforcements and protection of fundamental rights and freedoms. The executive and the legislature arms of government respectively complete the trio of governance organs.

Whereas the independence Constitution provided a semblance of judicial independence on paper, the researcher questions the capacity of such a judiciary that is not independent of discharging its primary mandate of safeguarding the rule of law. In the opinion of Wade,<sup>72</sup> a judiciary that lacks independence is a danger to democracy, constitutionalism and to the social fabric of society in general. This is because disputes that relate to the legality of acts of government are decided by judges who should be independent from the executive and this is done in the ordinary courts of law.<sup>73</sup> Although some disputes are taken to tribunals, such tribunals are subject to control by the High Court. To that extent, the right to have a dispute with the government before an independent judge/magistrate is one of the key principles of the rule of law which all civilized societies aspire to.<sup>74</sup>

### 1.10.1. Conceptual framework

The concept of judicial independence provides that the judiciary should be kept as far as possible from the other branches of government. At a structural level judicial independence has two components: individual independence and institutional independence. Institutional independence refers to the existence of `structures and guarantees to protect courts and judicial officers from interference by other branches of government\_, while individual independence refers to judicial

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<sup>72</sup> H W R Wade, *Administrative Law* (Oxford University Press: London, 1988) at 24.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.



officers acting independently and impartially.<sup>75</sup> Institutional independence is ensured by constitutional guarantees of the separation of powers and non-interference in the judiciary by other branches of government. It requires that the judiciary be the sole jurisdiction over all issues of a judicial nature.<sup>76</sup>

Individual independence involves a variety of factors that help ensure that judges can act free from the influence of any outside sources. For instance, judges must have security of tenure either in the form of life-long appointments, set terms of office or a mandatory retirement age.<sup>77</sup> The judicial appointments process also impacts on individual independence. Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process.<sup>78</sup> The appointments process must also safeguard against judicial appointments for improper motives, and people selected should be individuals of integrity and ability with appropriate training or qualifications in law.<sup>79</sup>

In other words courts should be insulated from improper influence from other branches of government (thus the executive and the legislature). Such protection should extend to private/public interests and the media.<sup>80</sup> Courts must for example be free and detached from political parties and free from parliamentary, administrative and executive interference. Judges should not be pressured, induced or influenced in any way to determine the outcome of a case. Judges and magistrates should be given security of tenure and be paid well to remove the possibility of temptations towards corrupt practices. In addition it would eliminate the possibility of members of the bench suffering pecuniary embarrassment.

The concept of judicial independence envisages that judicial appointments should be done in a transparent and fair process where the principle of integrity would be upheld. Only those who are qualified and meet the ethical demands of Chapter 6 of the Constitution get appointed to judicial

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<sup>75</sup> International Bar Association, April 2006 at 4.

<sup>76</sup> Section 3, 4, Basic Principles on the Independence of the Judiciary (1985) (UN Principles).

<sup>77</sup> Latimer House Principles, section IV[b]; UN Principles, sections 11, 12.

<sup>78</sup> Ibid. section IV[a].

<sup>79</sup> UN Principles, section 10.

<sup>80</sup> Richard Kuloba, *Courts of Justice in Kenya* (Oxford University Press: Nairobi, 1997) at 3.

office. Further, whenever an opportunity to discipline or removal of a judicial officer comes up, the due process encapsulated in national law and international law shall be followed.

The term judicial independence is used broadly to include institutional independence (tenure and salary protection) which gives rise to a separation of powers, law making independence, counter-majoritarian independence (the ability of a judge to override legislative acts) and decisional independence.<sup>81</sup> Judicial independence is therefore the ability of a judge or magistrate to be free from external influence in deciding a case.<sup>82</sup>

### 1.11. Research Methodology

The researcher used two main sources of data namely secondary data and primary data. Secondary data took advantage of the already published and non-published materials readily found in the library and internet. Primary data will comprise data sourced from the field using an interview guide. (See appendix 1).

#### 1.11.1. Secondary Data

The research began by examining secondary data (published and unpublished) for three main reasons. First it is helpful in research design and subsequent primary research and provides a baseline upon which collected primary data will be compared.<sup>83</sup> The second benefit of using this method is that it comprises much of the background information such as literature reviews, case studies that have been carried out, published textbooks that have been used elsewhere. Thirdly with this background it means that secondary data has an established validity and reliability which may not need to be re-examined.<sup>84</sup>

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<sup>81</sup> Martin H. Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives', (1995) 46 *Mercer Law Review* 697 at 698-99; See also Gordon Bermant and Russell R. Wheeler, 'Federal Judges and the Judicial Branch: Their Independence and Accountability', (1995) 46 *Mercer Law Review* 835 at 838, 839, 844-45.

<sup>82</sup> Stephen B Burbank and Barry Friedman ed., *Independence at the Cross Roads: An Interdisciplinary Approach* (Sage Publication: Thomas Oaks, California, 2002) at 48.

<sup>83</sup> C.R Kothari, *Research, Methodology: Methods and Techniques 2<sup>nd</sup>*, Revised Edition (New Delhi: New Age International Publishers, 2004) at 111.

<sup>84</sup> Ibid.

The documentary review as sources of secondary data will mainly focus on library and the internet as the main sources of information. Relevant international treaties that have been ratified by Kenya and South Africa thus domesticated will form an important source of data to show the country's commitment to its international obligations. Policy documents, books, journal articles, research papers, committee reports, newspaper, case law. Supplementary data will be gathered from relevant government agencies such as the Kenya National Human Rights Commission (KNHRC) and civil society resource centers especially the Kenya Human Rights Commission and International Commission of Jurists (ICJ). Several websites and databases with relevant information will also be consulted.

#### **1.11.2. Primary data**

The researcher went to the field to collect data on the views of the public on the independence of the judiciary. The instrument used was an interview guide that was administered to judges, magistrates, litigants, advocates and members of the public. The data was collected orally, through phone, face-to-face and online interviews after which it was analyzed for the purposes of getting any patterns in the judicial independence. Most of the judicial officers interviewed wished to remain anonymous, given the sensitivity of the matters sought from them. That posed a challenge to the researcher during the collection of views on the topic under research.

#### **1.12. Chapter breakdown**

**Chapter One:** Introduction and background

**Chapter Two:** Historical overview of JSC and its role on judicial independence in Kenya and case study

**Chapter Three:** Legal framework for judicial appointment, promotion and discipline

**Chapter Four:** A critical analysis of international instruments in judicial independence

**Chapter Five:** Summary, Conclusion and recommendations on the way forward

## **CHAPTER TWO**

### **HISTORICAL BACKGROUND TO THE JUDICIAL SERVICE COMMISSION**

#### **2.0. Introduction**

The chapter provides a historical background to the Judicial Service Commission (JSC) and its relevance in the attainment of judicial independence. It traces the evolution of the judicial process in Kenya beginning with the traditional legal frameworks that were essentially informal and the introduction of the English Legal system by the British as a formal legal system. A background to the creation of the Judicial Council (JC) which was later transformed into the JSC

was founded. However in between there were persons such as administrators and institutions who performed the functions of the JSC as we know it today.

The independence of the judiciary is not a concept that is restricted to the coming of the British colonial government. Indeed African legal systems appreciated the idea of judicial independence. The attributes of impartiality, faithfulness to the law, open mindedness and freedom from personal bias were highly regarded.<sup>85</sup> However what was lacking in this framework was the aspect of institutionalizing judicial independence. As a consequence, the traditional system was used by the chiefs and elders and later exploited by the colonial government through 'divide and rule' to not only entrench but perpetuate British rule for over sixty years. Efforts to institutionalize judicial independence had to wait the formation of a formal legal system that was established after the declaration of the British protectorate in 1895.

## **2.1. Establishment of Formal Legal Systems**

The historical origins of the JSC can be traced to the creation of a formal legal system after Kenya became a British colony. Kenya's judiciary is a by-product of the Berlin Conference in 1884, when European powers partitioned Africa amongst themselves into spheres of influence. Kenya became part of the British Empire and in 1895, was declared a British protectorate thus beginning the era of official British rule which lasted until 1963.<sup>86</sup> One of the challenges that faced the colonial government was how to establish a legal system that would incorporate natives, Muslims and English laws. The East Africa Order in Council of 1897, and the Queens Regulations, established an embryonic legal system based on a tripartite division of subordinate courts that catered for the needs of the native, the Muslim, and the British settlers that were mainly staffed by administrators and magistrates.<sup>87</sup>

Therefore the colonial government oversaw the rapid transformation of the judicial system from a purely informal one to a formal and essentially alien system. The judiciary that came up was

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<sup>85</sup> Sharman M Jeffrey, 'The Impartial Judge: Detachment or Passion', (1995-1996) 45 *DePaul Law Review*.

<sup>86</sup> Ghai Y P and McAuslan J P W B, *Public Law and Political Change in Kenya* (rev. edn 2001, Oxford University Press, Nairobi 1970) at 3.

<sup>87</sup> Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication', in Philip Kichana (ed), *Constitutional Law Case Digest, II* (Kenya Chapter of the ICJ, Nairobi 2005) 160

organized on racial lines, one for Africans where village elders, headmen and chiefs were empowered to settle disputes alongside the Muslim system as well.<sup>88</sup> The traditional dispute settlement institution that had been created evolved into tribunals and in 1907 was accorded official recognition with the passage of the Native Courts Ordinance to respond to the ethnic groups' needs in Kenya.<sup>89</sup> Appointments to these tribunals were made by the Chief Native Commissioner, whose function was to set up, control and administer the tribunals. At the coast, the Governor appointed a Liwali to settle disputes among members who professed the Muslim faith.<sup>90</sup> The Chief Native Commissioner and the Governor were both members of the executive and planted the first seeds of executive domination of the judiciary.<sup>91</sup>

## 2.2. Controlling the Judiciary during the Colonial Period

During the colonial period, there was a thin line between the judiciary and the executive as the latter could exercise judicial functions such as appointments and dismissals. For example, all appeals that emanated from the native courts were taken to the native court of appeal and on to the District Commissioner (DC) (an administrator) who was a member of the executive. The DC was charged with the responsibility of interpreting the law which could at times be interpreted in favour of the executive.<sup>92</sup> This was done by the colonial government to disguise their true intentions in the pretext that they were preserving the traditional legal setup. Whereas this was a noble idea administratively as it made it easier for the colonial administrators to better understand the natives, it was self-serving as the chiefs, elders and headmen were supervised and controlled not by judicial officers but by the administrators.<sup>93</sup> This was a violation of the principle of separation of powers and did not nurture judicial independence.

The British settlers had a different set of courts for themselves staffed by magistrates and using the English legal system.<sup>94</sup> Appointment of judges was made pursuant to the East Africa Order in

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<sup>88</sup> Ghai at 130.

<sup>89</sup> □ < <http://www.go.ke> > visited in 10 December 2008. This is the official website of the Kenya Judiciary

<sup>90</sup> Ibid.

<sup>91</sup> Julie Ouma Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform* (Unpublished PHD Thesis: University of Leicester, 2011) at 103.

<sup>92</sup> Ibid. at 104.

<sup>93</sup> Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) *Journal of African Law* 42-

61, 43

<sup>94</sup> Ghai at 130.

Council and held office at the pleasure of the crown.<sup>95</sup> Dismissal of judicial officers was done by the Governor without due process if and when directed by the Secretary of State.<sup>96</sup> Provincial Commissioners, District Commissioners and District Officers also had jurisdiction to hear cases.<sup>97</sup> It is therefore evident that the Governor had absolute power in terms of dismissal of judges. The fact that he was not accountable to any person or institution is an indicator that he could as well abuse the powers. This violated not only the doctrine of the rule of law but compromised the independence of the judiciary. According to Ghai, the settlers had a misconceived idea that Africans did not have capacity to understand the concept of separation of powers.<sup>98</sup> This had to wait till the negotiations that ushered in a new independence at the dawn of independence.

### **2.3. Independence Constitution**

When Kenya attained its independence in 1963, the Constitution that was negotiated was the Westminster model. It was an improvement of the colonial Constitution as it provided for the Bill of Rights that protected fundamental rights and freedoms that were actionable on condition that they were violated. The Westminster Constitutional model however had a number of salient features in terms of appointment and removal of judicial officers. The Chief Justice (CJ) was appointed by the Governor General (GG) on the advice of the Prime Minister (PM) and the approval of at least a minimum of four Presidents of the Regional Assemblies.<sup>99</sup> This was significant improvement in the appointment process of judges as both the executive (represented by the PM) and the legislature (represented by Regional Assemblies) took part in the process. The essence of this process was to reduce the control of the judiciary by the executive. In addition it was meant to achieve separation of powers and enhance checks and balances and ultimately the independence of the judiciary.

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<sup>95</sup> Githu Muigai, 'Legal Constitutional Reforms to Facilitate Multi Party Democracy: The Case of Kenya', in J. Oloka Onyango, K. Kibwana and Chris Maina (eds) *Laws & Struggle for Democracy in East Africa* (Claripress, Nairobi, 1996)

<sup>96</sup> Ibid.

<sup>97</sup> Courts Ordinance No. 16 of 1931.

<sup>98</sup> Ghai 137-138.

<sup>99</sup> Kenya Independence Order in Council 1963, s 172(1).

There was also a judicial council (JC) which was created and whose composition other than that of the CJ had to be done through consultation. The GG appointed 2 persons from the Supreme Court (SC) to the council on advice of the CJ as the chairman. Two more members were appointed on the advice of the Public Service Commission (PSC),<sup>100</sup> the Attorney General (AG) was not a member of the JC.

### **2.3.1. Removal of Judges**

The Westminster Constitution began the process of removing the CJ, Judges and Judges of SC could be initiated by the PM, President of Regional Assembly or the CJ in his capacity as the representative of the GG.<sup>101</sup> The process involved setting up of a tribunal whose recommendations would be given to the GG through the JC.<sup>102</sup> It is therefore clear that a judge could only be removed by the executive under very clear circumstances and tacit approval by the JC that such removal was necessary. This helped secure the independence of the judges as well as the institution of the judiciary. It illustrates a system of checks and balances especially on the executive in maintaining separation of powers.

### **2.3.2. JSC under the Westminster Constitution**

The Westminster Constitution established the first JSC in Kenya as an independent institution without the direction or control of any other person or authority.<sup>103</sup> The JSC thus created was self-regulating but subject to checks by the PM and Regional Assemblies.<sup>104</sup> The functions of the JSC were the appointment, discipline and dismissal of judges and magistrates. The executive was not happy comfortable with dismissal powers of the JSC and this function was targeted for amendment in the first constitutional amendment. Membership of the JSC was drawn from and through a process of checks and balances and vetting by Parliament. This removed JSC members from direct influence by members of the executive thus a balance as well as independence was achieved.

### **2.3.3. Evaluation of the Westminster Model Constitution**

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<sup>100</sup> Ibid. Section 184

<sup>101</sup> Ibid. Section 173(4).

<sup>102</sup> Ibid. Section 173 (5)-(7).

<sup>103</sup> Ibid. S 184 (2).

<sup>104</sup> Ibid. S 185 (3).



The Westminster Model Constitution was a great departure from the previous colonial constitutional dispensation in terms of institutionalizing democratic principles. But as it has been pointed out it was an 'essentially theoretical document'.<sup>105</sup> Despite the fact that it contained checks and balances, it represented the views and constitutional thought of the colonial government.

*A constitution has practical meaning and durable life where it is evolved in the context of social reality, but it will be artificial and somewhat brittle, where a slim elite enacts it largely to serve minority interests, where it is planted upon a people by a departing imperial power, or where it is entirely the brainchild of technocrats whose primary concern is to have on the ground a reference document to serve public relations purposes.*<sup>106</sup>

The interesting thing is that it took Kenyans almost 50 years to realize that the Constitution was purely theoretical and based on personal views of a few individuals. It would look like the current Constitution vindicates the framers of the Westminster Model Constitution that provided for some of the current provisions relating to the judiciary. This is much more evident in terms of involving the legislature in the appointment of the CJ<sup>107</sup> and the other judges. Judicial independence is also entrenched and protected from the executive through the introduction of accountability mechanisms in the way they relate with the judiciary.

The Westminster Model Constitution lasted for a very short time, in fact for only one year after Kenya's independence. This was partly due to the fact that the JSC had been granted wide powers to appoint and dismiss judges. It showed how the independent government held judicial independence in very low regard. The promotion and protection of fundamental rights and freedoms was never a priority for the new government. Finally the Westminster Model Constitution was replaced by the independent Constitution in 1964.

#### **2.3.4. Arguments for Repealing the Westminster Model Constitution**

The commonest characteristic of African states after independence was their disdain for the inherited constitutions. Part of the dislike was based on the fact that they were strong on the

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<sup>105</sup> J. B Ojwang, 'Constitutional Trends in Africa: The Kenya Case' (2000) *Journal of Transnational Law and Contemporary Problems* 523.

<sup>106</sup> Ibid.

<sup>107</sup> Article 166, Constitution of Kenya, 2010.

promotion and protection of fundamental rights and freedoms, separation of powers, the rule of law and ultimately judicial independence. However it did not take long before these constitutional guarantees were replaced with weak Constitutions that negated provisions of the independent constitutions.<sup>108</sup> It would appear that there was the urgency to remove the Westminster Model not only as a colonial relic but to amass more power and gain political domination by the elites of the time. The argument then was that Western Constitutional models were unsuitable for Africa and that they were alien and therefore inappropriate for the African setting.<sup>109</sup> The African leadership in general was of the view that: 'western concepts represented a foreign idea which had no place in African history, tradition and society. That the notions of individual rights and separation of powers were incomprehensible to the African masses.'<sup>110</sup> Kenya's experience was not any different as the Constitution that replaced Western models was a replica of the colonial government based on state domination and subjugation of the citizens. This was reflected in the historical evolution of the judiciary in Kenya which was constitutionally under a powerful presidency.

*An entirely new pattern of executive leadership emerged. A president who is both head of state and head of government, combining the formal role of the monarch or governor general with that of the executive prime minister...The constitution document itself designates a particular individual, and this individual is the holder of the totality of constitutional executive authority.*<sup>111</sup>

In the view of Minister, the essence of replacing the independent Constitution was to give the executive total control over the judiciary.<sup>112</sup>

*The goal of most independent political leaders was to create strong national governments...Maintenance of national order was the responsibility of the executive not the judiciary. Legal safeguards could be usurped by the executive and judicial remedies bypassed. Thus, at independence, instead of the judiciary developing its own legitimacy, executive inspired and defined political necessity took precedence.*<sup>113</sup>

One year after the enactment of the Western Constitutional model of 1963, Kenya became a Republic on 12<sup>th</sup> December 1964 and was no longer part of Her Majesty's Dominion.<sup>114</sup> The

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<sup>108</sup> Okon Akiba (ed), *Constitutionalism and Society in Africa* (Ashgate Publishing, Aldershot 2004) 1

<sup>109</sup> Ibid. at 9.

<sup>110</sup> Ibid.

<sup>111</sup> Ojwang at 528.

<sup>112</sup> Karen Mingst, 'Judicial Systems in Sub Saharan Africa: An Analysis of Neglect' (1988) *African Studies Review* 138

<sup>113</sup> Ibid.

<sup>114</sup> Constitution of Kenya (Amendment) Act No. 2 of 1964 (Government Printer, Nairobi 1964)

Constitution was amended to provide for new reality while at the same time eliminating the letter and spirit of the Western Constitutional model. What followed was that the other 2 arms of government (Legislature and Judiciary) lost power and were answerable to the executive. Checks and balances dissipated with the creation of a highly centralized authority just like the colonial state had previously done.<sup>115</sup> Kimondo<sup>116</sup> has described these constitutional reforms in the following terms:

*...largely executive minded...aimed at gaining advantages over political opponents. This was through increased executive power and diminution of the capacity and stature of institutions meant to be checks and balances to that power, such as the judiciary, parliament and political parties. The period was also marked by the insistence by the government of the day that...public law generally should not impede governmental action.*<sup>117</sup>

It cannot be argued that the African leadership (executive) just like the colonial government before it was ignorant of the concepts of separation of power, rule of law and judicial independence.<sup>118</sup> They knew the essence of judicial independence and the role it could play in the governance structure. The deliberate concentration of power in the executive in disregard of values, ethics of longstanding constitutionally tested practices was done for purely personal reasons. Moreover, they were out to consolidate power and dominate or control citizens and not to serve the public interest.<sup>119</sup>

The two experiences of the colonial imperial power and post independent consolidation of personal power buttresses the idea that a formal provision for judicial independence through an independent appointment system for judges is perhaps the utmost guarantor for protection of fundamental rights and freedoms. The absence of such guarantees would act as a defense for executive interference in independence of judiciary. The colonial and independent governments

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<sup>115</sup> Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya' (2001) 23 *Human Rights Quarterly* 98. Jomo Kenyatta was the first President of the Republic of Kenya

<sup>116</sup> G. Kanyi Kimondo, 'Constitutional Amendments Between 1964-1990' in K Kibwana *et al* (eds) *The Citizen and the Constitution* (Claripress, Nairobi 1996) 39-40

<sup>117</sup> *Ibid.*

<sup>118</sup> The Westminster Model Constitution provides clear demarcation of functions to the three arms of government and equally provides a much more robust guarantee for judicial independence complete with very effective checks and balances from other branches in their involvement in judicial functions. The British also never used this kind of constitutional framework during the colonial rule, however it was very close to their culture and practice in Britain, save that they do not have a written constitution or a President. The appreciation of the values and objectives of separation of powers and rule of law is very much alive in the Westminster Model Constitution

<sup>119</sup> M J C Vile *Constitutionalism and the Separation of Powers*, (Clarendon Press, Oxford 1967) 20

were able to violate tenets of democratic principles by emasculating the judiciary through weakened accountability mechanisms. According to Muigai, overshadowed and dominated all other constitutional institutions including the judiciary, and undermined the possibility of constitutional accountability, hence this set the tone for subsequent amendments.<sup>120</sup>

## 2.4. JSC under the Independence Constitution

After the amendment of the Westminster Constitution, the independent Constitution made the role of the JSC irrelevant in terms of appointment, discipline, promotion and dismissal of members of the judiciary. Indeed the amendments were meant to give the executive discretionary power to the exclusion of the legislature to control the judiciary.<sup>121</sup> The JSC comprised the CJ<sup>122</sup> who was the Chairman, the AG<sup>123</sup> and a representative from the Court of Appeal, the High Court and the Chairman of the Public Service Commission (PSC).<sup>124</sup> All members of the commission were however appointed by the President. It can therefore be concluded that with all appointments being made by the executive and this did not spare the magistrates. Although the JSC had mandate to appoint and dismiss magistrates the provisions were only on paper.<sup>125</sup>

### 2.4.1. Role of JSC in the Appointment of Judges

In the appointment process, the requirements such as qualifications, integrity and experience were not clear, thus the executive and the President in particular could exercise considerable influence over the appointment process.<sup>126</sup> This was criticized by the African Peer Review who were clear that this compromised judicial independence and more so the fact that the JSC played.<sup>127</sup> This gave a loophole to influence the appointment, promotion and dismissal process of

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<sup>120</sup> Githu Muigai, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997); A Study in the Politics of the Constitution', (Unpublished PhD Thesis, University of Nairobi, 2001) 116

<sup>121</sup> Section 69, Constitution of Kenya (amended): The JSC was charged with the responsibility of appointing judges and magistrates and also disciplining magistrates among other responsibilities

<sup>122</sup> Ibid. Section, 61 (1).

<sup>123</sup> Ibid. Section, 109 (1).

<sup>124</sup> Ibid. Section, 106 (2)

<sup>125</sup> Ibid. Section, 69.

<sup>126</sup> Mona Rishmawi *et al* (ed), *The Harassment and Persecution of Judges and Lawyers* (10<sup>th</sup> edn, Centre for Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ), Geneva 2000) 251.

<sup>127</sup> Africa Peer Review Mechanism: Country Report on the Republic of Kenya, (May 2006) 86, available at <<http://www.nepad.org/2005/files/aprm/APRMkenyareport.pdf>> accessed 17 August 2014.

judges.<sup>128</sup> This gap in the Constitution made it possible for political appointments to be made to the bench.

Public servants under the independent Constitution including judges served at the pleasure of the President.<sup>129</sup> Being an appointee of the president, he/she was obliged to defend the appointing authority than lose the position. In the *Murithi* case, a former director of intelligence, who contended that because of the provisions of section 25 of the constitution 1963, the president's power to dismiss civil servants, was limited.<sup>130</sup> This suit was dismissed with costs with the court granting declaratory order in essence holding that Section 25(1) of the independence Constitution, 1963 in Kenya as in colonial Kenya, every public servant including judges held their offices at the president's pleasure.<sup>131</sup>

#### **2.4.2. Appointment of Contract and Acting Judges**

On the eve of independence, Kenya lacked sufficient number of indigenous lawyers therefore a lot of reliance was placed on expatriate and acting judges for over 30 years.<sup>132</sup> It is regrettable that even after 1993 a time that Kenya had enough trained lawyers, the government still relied on foreigners.<sup>133</sup> Continued employment of the judges raised pertinent questions of legitimacy as they lacked security of tenure.<sup>134</sup> Therefore they were easily influenced by the executive as failure to abide would lead to their contracts being terminated.<sup>135</sup> For example Justice Schofield's contract was not renewed after he gave an order for *habeas corpus* against the government in the *Karanja* case.<sup>136</sup> Justice Miller (CJ and contract judge) advised Schofield that his contract would not be renewed.<sup>137</sup> In his own words: 'There were concerns about independence of some judges.

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid. Section 25 (1).

<sup>130</sup> *Stephen Mwangi Murithi v Attorney General*. High Court of Kenya, Nairobi civil suit No.1170 of 1981

<sup>131</sup> Save in so far as may be otherwise provided by this constitution or by any other law, every person who holds office in the service of the Republic shall hold that office in the pleasure of the President .

<sup>132</sup> International Bar Association Report on the Legal System and Independence of the Judiciary, (1996)11 <<http://www.ibanet.org>> accessed 17 July 2009; Stanley D Ross, 'The Rule of Lawyers in Kenya (1992) 30 Journal of Modern African Studies 421, 422

<sup>133</sup> Rhoda Howard and Howard Hassman, *Human Rights in Commonwealth Africa* (Rowman and Littlefield New York, 1986)168

<sup>134</sup> John Hatchard, Muna Ndulo and Peter Slain, *Comparative Constitutional and Good Governance: An East and Southern African Perspective* (CUP, Cambridge 2004 )159

<sup>135</sup> IBA Report 1996) (n 113) 11

<sup>136</sup> Stanley D Ross, 'The Rule of Lawyers in Kenya (1992) 30 Journal of Modern African Studies 429

<sup>137</sup> Ibid.

The Chief Justice (Cecil Miller) interfered with the Karanja Case and he informed me it was at the behest of the President. This was with a view to achieving a certain judgment. <sup>138</sup> Schofield decided to resign instead due to the apparent interference by the executive:

*Yes, it was the reason. When the matter came up before me, I was in the process of renewing my contract. There were a series of interventions from the Chief Justice who advised that my contract was in jeopardy. I told him I was willing to pay the price for my principle and independence. When the file was taken away, I resigned.*<sup>139</sup>

In another illustration, Justice Torgbor retired after a letter from the Head of the Civil Service informed him that his contract would not be renewed. He had previously presided over a case where an application by the President (Daniel Arab Moi) was dismissed.<sup>140</sup>

Another cadre of judges known as acting judges was appointed without the input of JSC. Acting judges are appointed by the executive and lack security of tenure. The concern raised by the appointment is that they have no form of independence whatsoever:

*The current acting judges work in fear and without confidence as they do not have security of tenure. There seems also to be some sort of competition among the acting judges in an apparent attempt at recognition or for 'showcasing'. To this extent it can be said that the state has not done much to fulfill its duty to guarantee independence of the judiciary. In fact the state seems to be doing the direct opposite, i.e., to encourage judicial dependence and interference thereof by the other arms of government.*<sup>141</sup>

In the opinion of Sir Brennan, 'judicial independence is at a risk when future appointment or security of tenure is within the gift of the executive'.<sup>142</sup>

### 2.4.3. Removal of Judges

The mandate of the JSC in Section 69 of the amended Constitution was the removal of judges. The removal of judges should be protected by the Constitution as it protects

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<sup>138</sup> David Okwemba, 'Kenya Judge Schofield fights on for Cause of Justice' <<http://www.allafrica.com>> accessed 6 March 2009.

<sup>139</sup> Ibid.

<sup>140</sup> Mona Rishmawi *et al* Ed, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* (CIJL of the ICJ, Geneva 1993-1994)195.

<sup>141</sup> J R Kowade, 'Separation of Powers and Kenya's Judicial Performance since 2003' in Maurice Odhiambo Makaloo and Phillip Kichana (eds), *Judicial Reform in Kenya 2003-2004* (Kenya Section of the ICJ, Nairobi 2005) 40.

<sup>142</sup> F D Brennan, 'The State of the Judicature' (1988) 72 *Australian Law Journal* 34-35.

independence of the judiciary. Therefore it should not be done arbitrarily as to do so would expose them to internal and external pressure when deciding cases.<sup>143</sup> Judges under the Constitution could only be removed on account of inability to perform functions of the office, misbehavior as laid down in the Constitution.<sup>144</sup> Notwithstanding the provisions of the Constitution only the CJ could present to the President such information and not the JSC. After which the President would appoint a tribunal to investigate the matter and recommend the removal of a judge.<sup>145</sup> The removal process does not therefore reflect independence since all the JSC members were Presidential appointees.

The period after 1978 when Daniel Arap Moi was President witnessed a further erosion of judicial independence. In 1988, Justice O'Connor was dismissed by the Chief Justice on grounds that he had refused to be transferred to Meru.<sup>146</sup> To put the matter to rest, the Head of the Civil Service issued a statement to clarify the matter as follows;

*I wish to inform the public and all interested parties that in relieving Mr. Justice O'Connor of his duties, the Chief Justice, who is chairman of the Judicial Service Commission, acted within the powers vested in him by the constitution of this country...Under the Constitution of Kenya, the power to exercise disciplinary control over judges or to remove them from office are vested with the Judicial Service Commission which can delegate its powers to any of its members including the Chief Justice.*<sup>147</sup>

This pronouncement was made when the Constitution provided that a judge could only be removed on recommendation by a tribunal.<sup>148</sup> It was evident that the office of the President (the executive) was usurping the judicial function in an attempt to interpret the Constitution.

Apparently this statement by the Chief Secretary was a precursor for what was to follow. Shortly afterwards the Constitution was amended which removed the security of tenure of the Judges.<sup>149</sup>

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<sup>143</sup> USAID Report, *Democracy and Governance Guidance for Promoting Judicial Independence and Impartiality* (USAID, Washington, 2002) 19.

<sup>144</sup> Section 62, Constitution of Kenya (Amended).

<sup>145</sup> Ibid. Sub Section 62(4)-(7).

<sup>146</sup> International Commission of Jurists (ICJ). *State of the Rule of Law in Kenya, Report 2006*. (Nairobi: ICJ, 2006) at 22.

<sup>147</sup> James Thuo Gathi, *The Dream of Judicial Security of Tenure and Reality of Executive Involvement in Kenya's Judicial Process*, (Thoughts on Democracy Series-Issue II) KHRC, Nairobi) at 13-14.

<sup>148</sup> Section 62(4), Constitution of Kenya Revised Edition 1993.

<sup>149</sup> Macharia Munene (ed). *Constitutional Documentary History of Kenya, 1895-2002*. (USIU Press: Nairobi, 2002) at 85.

The specifics of the amendment were to remove the requirement for a tribunal to determine the issue of the removal of judges and vest the power with the President. The amendment was passed in less than three hours,<sup>150</sup> and its effects were noticeable during the radical surgery.

#### **2.4.3.1. The Radical Surgery**

The radical surgery was a test case on how not to remove judges and symbolic of the diminishing relevance of the JSC in the discharging its constitutional mandate. It was so called by the Minister of Justice and Constitutional Affairs of the NARC government as a mechanism to purge the judiciary of officers who were loyal to the former President Moi.<sup>151</sup> The radical surgery was however done with very little input from the JSC, the constitutionally mandated body for that task.

The radical surgery was carried out pursuant to the release of a report of the Integrity and Anti-Corruption Committee. The report outlined various instances of corruption within the Judiciary and in an unprecedented step named judicial officers implicated in the alleged corrupt practices. A total of 105 judicial officers including 23 judges and 82 magistrates were named in the report.<sup>152</sup> The officers were accused of among other things demanding and accepting cash bribes, sexual favours, and free transport in return for partisan judgments.<sup>153</sup> Using the report, the Chief Justice immediately asked the judges to honorably resign instead of facing public humiliation.<sup>154</sup>

### **2.5. JSC in the Constitution of Kenya 2010**

The Constitution of Kenya communicated a fierce urgency to reform the Judiciary requiring the establishment of an expanded Judicial Service Commission within months and the retirement of the Chief Justice in six months. The JSC, which now includes representatives of the public, the legal profession and the various levels of the courts, conducts public interviews for all candidates for the position of judge, with the public invited to participate by sending memoranda on their

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<sup>150</sup> Ibid.

<sup>151</sup> Gladwell Otieno, 'The NARCs Anti Corruption Drive in Kenya; Somewhere over the Rainbow?' [2005] 14(4) *African Security Review* 9.

<sup>152</sup> Report of the Integrity and Anti-Corruption Committee entitled, *An Anatomy of Corruption in Kenyan Judiciary*.

<sup>153</sup> Winnie Mitullah, *Kenya's Democratization: Gains or Loses? Appraising the Post Kanu State of Affairs* (Nairobi: Claripress, 2005) at 48.

<sup>154</sup> 'Graft Probe Shames Judiciary', *East African Standard*, 1 October 2003.



suitability and unsuitability. The Chief Justice and the Deputy Chief Justice were also publicly vetted by the legislature before they were appointed. All judges and magistrates who were in office before the promulgation of the new Constitution had to undergo a vetting process to determine their suitability.<sup>155</sup>

Abdullahi has stated that the decision to promptly address the shortcomings of the judiciary after the promulgation of the constitution was deliberate.<sup>156</sup> He gives two reasons why the drafters of the Constitution saw it fit to reform the judiciary ahead of the other two arms of Government:

*First, the Constitution, having reformed the judiciary, intends the judiciary to oversee the reform programme. This guardian angel role for the judiciary has a textual constitutional underpinning. It empowers the judiciary to look into the very constitutionality of the proposed amendments. Second, the new Constitution has entrusted the fate of Kenya and its people to the law and not men.*<sup>157</sup>

The Judicial Service Commission (JSC) conducts the appointment of judicial officers. The Chief Justice, Deputy Chief Justice, judges and magistrates were appointed after a rigorous, competitive and transparent process.<sup>158</sup> The JSC shortlists successful candidates for the position of the Chief Justice and Deputy Chief Justice and hands them to the president to select from the list the preferred candidate. This has given the judiciary (JSC) some level of political autonomy since the role of the President in the appointment process is purely ceremonial.<sup>159</sup> Nevertheless, the manner of judicial appointments has posed critical constitutional, policy and ethical questions. For example, the relevance of open interviews as a basis of approval and appointment<sup>160</sup>, the essence of Section 129 of the evidence Act<sup>161</sup> which provides that judges and

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<sup>155</sup> Kalpana Rawal, *Constitutional and Judicial Reforms: The Kenya Experience*, Presented at the Southern African Chief Justices' Forum Annual Conference Friday, August 2, 2013 Livingstone, Zambia at 5.

<sup>156</sup> Ahmednasir Abdullahi (2010) 'Politicians should let judiciary deal with law reforms,' Sunday Nation, Nairobi, October 2, 2011.

<sup>157</sup> Ahmednasir Abdullahi (2010) 'Politicians should let judiciary deal with law reforms,' op. cit. He is a member of JSC, representing LSK. He is a former chair of LSK, a former lecturer at the University of Nairobi Law School, and has been consistent in criticizing the judiciary for what he terms as (intellectual) incompetence and corruption

<sup>158</sup> The Judicial Service Commission (JSC) conducted interviews from May 3-12 2011 to nominate the Chief Justice, and the Deputy Chief Justice. The interviews were conducted in the open and aired live by the media. In accordance with the 2010 Constitution, the public participated in the process by sending their questions, comments and opinions to the interview panel who then posed such questions or comments to the interviewees.

<sup>159</sup> In April 2011, after the President withdrew his nomination of Justice Alnasir Visram as the Chief Justice, and deferred to the JSC, the Commission conducted public interviews of the candidates short-listed for the offices

<sup>160</sup> Under Article 166 of the Constitution of Kenya, 2010

<sup>161</sup> Cap 80, Laws of Kenya. under section 6 of the Judicature Act, Chapter 8 of the Laws of Kenya provides for judges' professional immunity in these terms: "No judge or magistrate and no other person acting judicially,

magistrates should not be subjected to processes that may undermine the confidentiality of the judicial function and the judicial offices before the public.

The JSC derives its mandate from Article 171 of Constitution, 2010. It is composed of eleven commissioners according to article 171(2) of the constitution, 2010, and it is chaired by the Chief justice. The JSC spearheads judicial reforms especially through judicial appointments. Under the repealed constitution, 1963 the JSC was largely ignored by the executive, most of the judicial appointments were made solely by the president through his informal advisors. Judicial appointments were more of political rewards to entrench the authoritarian rule of the president. This was boldly noted by Abdullahi, a member of JSC:

*Gone is the era when the Executive would announce the appointment of candidates to high offices through mystical rituals that were difficult to rationalise. Gone is the era when the only consideration for the government was the tribal or political affiliation of the candidate. Gone is the era when appointments were used as a rewarding tool for the loyalty a community shows to the President.*<sup>162</sup>

The independence of the judiciary as an institution is now manifesting as it can question the acts of the executive and even the legislature. A notable example is the *Matemu case*.<sup>163</sup> However by granting the JSC exclusive powers to appoint, promote, discipline and dismiss judges, the Constitution has given the Commission too much power that can be deployed against individual judges to the point of interfering in their independence.

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*shall be liable to be sued in a civil court for an act done by him in the discharge of his duty whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of...''*

<sup>162</sup> Ahmednasir Abdullahi (2010) 'Vetting requirement a major win from new laws, 'Sunday Nation 28/8/2011,

<sup>163</sup> *Trusted Society of Human Rights Alliance v. Attorney General & 2 Others* [2012] eKLR. Mumo Matemu was appointed Chairman of the Ethics and Anti-corruption commission (EACC). The High court ruled that Parliament and the Executive had overlooked integrity issues raised about Matemu while working at the Agricultural Finance Corporation as the legal officer and nullified the appointment. The decision reviewed the powers of the Judiciary toward the actions of Parliament and Executive demarcating the separation of powers of three arms of State; asserted role of courts in reviewing appointments made by the Executive and Parliament; and seems to settle the integrity or suitability standards to hold public office. The judgment raises fundamental questions about the watered down Leadership and Integrity Act 2012 passed by Parliament. The judges strongly indicted Parliament and the Executive for not being judicious or rigorous and thorough in the performance of public duty. Matemu later in appealed and the Court of Appeal overturned the ruling in 2013.

## **2.6. Conclusion**

The history of the JSC is a fairly recent one. A formal establishment of the JSC came into being during the period just before independence. Before that the functions of appointment and dismissal of judicial officers was made by administrators or members of the executive. The institutionalization of JSC as we know it today came about during negotiations for independence. Indeed the Westminster model Constitution provided for JSC whose function was the appointment and dismissal of judicial officers. However on attainment of independence, the Constitution was amended to remove from the JSC the role of dismissing judges. The essence of the amendment was to revert to the imperial constitutional dispensation as it was during the colonial days characterized by concentration and control of appointment powers. The Constitution of Kenya 2010, institutionalized the JSC as an independent commission with the mandate of appointment, promotion, discipline and dismissal of judges. This mandate gives the JSC discretionary powers to determine the future of judges and if abused could threaten their individual independence. Chapter three is an appraisal of legal framework for JSC in the performance of its mandate.

## CHAPTER THREE

### THE LAW ESTABLISHING THE JUDICIAL SERVICE COMMISSION (JSC) AND ITS EFFECT ON INDEPENDENCE OF JUDICIAL OFFICERS

#### 3.1. Introduction

The Chief Justice of the Supreme Court of Canada Brian Dickson in *the Queen v. Beauregard*<sup>164</sup> states that, “*the role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system*”.<sup>165</sup> The cornerstone of the rule of law is judicial independence. This means that the judiciary must be detached from politics and be free from parliamentary administrative and executive interference. The executive’s authority is vested in the president and legislative authority is vested in parliament in the constitution.<sup>166</sup> In Kenya this has not been achieved since the JSC still exercises a lot of influence in terms of appointment, promotion, discipline and even removal of members of the judiciary.

Although the concept of judicial independence is common in democratic states where it is embedded in the Constitution, a major characteristic in Kenya involves constitutional guarantees of institutional independence but not individual independence. The view of this study is that measures meant to ensure institutional independence, need to be extended to individual independence for the judges. This can be achieved through above board and a transparent appointment procedures, remuneration, promotion, discipline and removal processes for

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<sup>164</sup> [1986] 2 S.C.R. 56 at para. 30.

<sup>165</sup> Ibid.

<sup>166</sup> Section 23(1), and section 30 in the constitution of Kenya, 1963.

judges.<sup>167</sup> Judicial officials should also be immune from civil and criminal suits so long as they are still serving. In the opinion of Fombad, this can be achieved through:

*Vesting judicial functions exclusively on the judiciary, qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits.*<sup>168</sup>

This chapter analyses the role and functions of JSC in the appointment, promotion, discipline and removal of judges and how it affects the ability of judges to enforce human rights especially in circumstances where the JSC is the defendant. The analysis will focus on two case studies namely the *Colletta*<sup>169</sup> and *FIDA* case<sup>170</sup> where the High Court in finding for the JSC was against explicit legal provisions.

### **3.2. The Constitutional and Statutory Foundation of the Judicial Service Commission (JSC)**

The JSC is established as a constitutional commission,<sup>171</sup> and its composition and functions are stipulated by the Constitution<sup>172</sup> and elaborated by the Judicial Service Act.<sup>173</sup> The Commission is composed of the Chief Justice, who is its Chairperson, one Supreme Court Judge, one Court of Appeal Judge, one High Court Judge, one Magistrate, the Attorney-General, two advocates,<sup>174</sup> 13 one person nominated by the Public Service Commission and, lastly, two members of the public, appointed by the President with the approval of the National Assembly.<sup>175</sup> The Chief Registrar of the Judiciary is the Secretary to the Commission.<sup>176</sup> Members of the Commission, apart from the

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<sup>167</sup> Fombad, C.M. :Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa~, (2007) 55 *American Journal of Comparative Law* 10.

<sup>168</sup> Ibid.

<sup>169</sup> Misc. Civ. Appl. No. 21 of 2005, [2006] eKLR.

<sup>170</sup> Petition 102 of 2011, [2011] eKLR.

<sup>171</sup> Art 171(1) of the Constitution of Kenya 2010 (Constitution).

<sup>172</sup> Arts 171 and 172 of the Constitution.

<sup>173</sup> Act No. 1 of 2011. Part III of the Act Sections 13-25.

<sup>174</sup> Elected by members of the Law Society of Kenya.

<sup>175</sup> Article 171 (2) of the Constitution, 2010.

<sup>176</sup> Ibid Article 171(3).

Chief Justice and the Attorney General, hold office for a term of five years and are eligible to be nominated for one further term of five years, provided they remain qualified.<sup>177</sup>

The JSC has been vested with constitutional responsibility for `promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.<sup>178</sup> The Commission has the following functions: recommending to the President of the Republic persons for appointment as judges;<sup>179</sup> reviewing and making recommendations on the conditions of service of judges and judicial officers and the staff of the judiciary;<sup>180</sup> preparing and implementing programmes for the continuing education and training of judges and judicial officers;<sup>181</sup> and advising the national government on improving the efficiency of the administration of justice.<sup>182</sup> In the performance of its functions, the Commission is to be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary, and the promotion of gender equity.<sup>183</sup>

The Judicial Service Commission (JSC) conducts the appointment of judicial officers. The Chief Justice, Deputy Chief Justice, judges and magistrates were appointed after a rigorous, competitive and transparent process.<sup>184</sup> The JSC shortlist successful candidates for the position of the Chief Justice and Deputy Chief Justice and hands them to the president to pick from the list the preferred candidate. This has given the judiciary (JSC) some political autonomy somehow.<sup>185</sup> Nevertheless, the manner of judicial appointments has posed critical constitutional, policy and ethical questions. For example, the relevance of open interviews as a basis of

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<sup>177</sup> Ibid. Article 171(4).

<sup>178</sup> Ibid. Article 172(1).

<sup>179</sup> Ibid. Article 172(1) (a).

<sup>180</sup> Ibid. Article 172(1)(b), 230(2)(b) and 230(4).

<sup>181</sup> Ibid. Article 172(1)(d).

<sup>182</sup> art 172(1)(e).

<sup>183</sup> art 172(2).

<sup>184</sup> The Judicial Service Commission (JSC) conducted interviews from May 3-12 2011 to nominate the Chief Justice, and the Deputy Chief Justice. The interviews were conducted in the open and aired live by the media. In accordance with the 2010 Constitution, the public participated in the process by sending their questions, comments and opinions to the interview panel who then posed such questions or comments to the interviewees.

<sup>185</sup> in April 2011, after the President withdrew his nomination of Justice Alnasir Visram as the Chief Justice, and deferred to the JSC, the Commission conducted public interviews of the candidates short-listed for the offices.

approval and appointment<sup>186</sup>, the essence of Section 129 of the evidence Act<sup>187</sup> which provides that judges and magistrates should not be subjected to processes that may undermine the confidentiality of the judicial function and the judicial offices before the public.

The JSC derives its mandate from Article 171 of Constitution, 2010. It is composed of eleven commissioners according to article 171(2) of the constitution, 2010, and it is chaired by the Chief justice. The JSC spearheads judicial reforms especially through judicial appointments. Under the repealed constitution, 1963 the JSC was largely ignored by the executive, most of the judicial appointments were made solely by the president through his informal advisors. Judicial appointments were more of political rewards to entrench the authoritarian rule of the president. This was boldly noted by Ahmednasir Abdullahi, a member of JSC:

*Gone is the era when the Executive would announce the appointment of candidates to high offices through mystical rituals that were difficult to rationalise. Gone is the era when the only consideration for the government was the tribal or political affiliation of the candidate. Gone is the era when appointments were used as a rewarding tool for the loyalty a community shows to the President.*<sup>188</sup>

The institutional independence of the judiciary is now manifested as it can question the acts of the executive and even the legislature. A notable example is the *Matemu case*<sup>189</sup> however it has not attained individual independence as demonstrated by the extent to which it is unable to question the JSC.

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<sup>186</sup> Article 166 of the Constitution of Kenya, 2010.

<sup>187</sup> Cap 80, Laws of Kenya. under section 6 of the Judicature Act, Chapter 8 of the Laws of Kenya provides for judges' professional immunity in these terms: "No judge or magistrate and no other person acting judicially, shall be liable to be sued in a civil court for an act done by him in the discharge of his duty whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of..."

<sup>188</sup> Ahmednasir Abdullahi (2010) 'Vetting requirement a major win from new laws, 'Sunday Nation 28/8/2011,

<sup>189</sup> *Trusted Society of Human Rights Alliance v. Attorney General & 2 Others* [2012] eKLR. Mumo Matemu was appointed Chairman of the Ethics and Anti-corruption commission (EACC). The High court ruled that Parliament and the Executive had overlooked integrity issues raised about Matemu while working at the Agricultural Finance Corporation as the legal officer and nullified the appointment. The decision reviewed the powers of the Judiciary toward the actions of Parliament and Executive demarcating the separation of powers of three arms of State; asserted role of courts in reviewing appointments made by the Executive and Parliament; and seems to settle the integrity or suitability standards to hold public office. The judgement raises fundamental questions about the watered down Leadership and Integrity Act 2012 passed by Parliament. The judges strongly indicted Parliament and the Executive for not being judicious or rigorous and thorough in the performance of public duty. Matemu later in appealed and the Court of Appeal overturned the ruling in 2013.

### 3.2.1. Appointment and Promotion of Judges

The Constitution of Kenya 2010 represents a paradigm shift in the appointment of judges as compared to the previous one. All judges are appointed by the President pursuant to the recommendation by the JSC.<sup>190</sup> The Chief Justice (CJ) and Deputy Chief Justice (DCJ) are further subjected to approval by the National Assembly.<sup>191</sup> Thus unlike the CJ and DCJ the final decision making process in the appointment of judges is the JSC. This is a very powerful mandate as the power exercised over individual judicial officers can be overwhelming. This will be illustrated in the appointment process discussed below.

The procedure of appointment for judicial officers begins by the advertisement of positions that are vacant in various mediums.<sup>192</sup> The CJ is mandated to advertise such a vacancy within 14 days in the Kenya gazette and thereafter post it on the website.<sup>193</sup> Names of those shortlisted are published in the press with an invitation to members of the public to share their views on the shortlisted candidates. Those who go through this stage are called for an interview publicly in the presence of the press, which facilitates public participation and transparency. The recommendation stage is however closed to the public and no reasons are given for this recommendation.<sup>194</sup> The JSC is mandated to determine the qualification of the applicants using criteria that is professional competence, written and oral communication skills, integrity, fairness, good judgment, legal and life experience and demonstrable commitment to public and community service.<sup>195</sup> This criterion is used anytime a judge should be promoted. All promotions of judges to superior courts especially the Court of Appeal (CA) and Supreme Court (SC) have to be evaluated by the JSC.

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<sup>190</sup> arts 166 and 172(1)(a).

<sup>191</sup> art 166(1) (a); Section 30 of the Judicial Service Act

<sup>192</sup> 1<sup>st</sup> Schedule Section 3 (2), Judicial Service Act, 2011.

<sup>193</sup> Ibid. Section 3 (1)(b and c): (a) post a notice on its website; b) send notice of the vacancy to the Law Society of Kenya and any other lawyers' professional associations; and (c) circulate the notice in any other appropriate manner.

<sup>194</sup> Walter Ochieng, 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya', (2013) 3 *Young African Research Journal* 6.

<sup>195</sup> Regulation 13 of the First Schedule of the Judicial Service Act.



The implication is that judges wishing to get any type of promotion are unlikely to antagonize the JSC in order to get a positive evaluation. This arises from the fact that judges may have the tendency of agreeing with the beliefs of the JSC and not necessarily the quality of their decisions. Therefore to increase chances of being promoted, a judge is unlikely to grant orders that contradict the JSC as the appointing authority. These fears have been recognized by Dennis Lloyd who opines that:

*The question of promotion is almost as important as that of initial appointments in regard to judicial independence. For if the judiciary has to look for its future prospects to the politicians they may be unwilling to incur executive displeasure and so mar the chances of later promotion, even though they are secure in their posts.*<sup>196</sup>

Similar views have been expressed in South Africa relating to the manner of appointing acting judges. The view expressed is that: 'if the acting judges know that the JSC is evaluating their actions on the bench, they may feel pressured consciously or subconsciously to make decisions that meet with the JSC's approval.'<sup>197</sup>

### 3.2.2. Disciplining of Judges

The Constitution of Kenya and the Judicial Service Act envisages the disciplining of judges in their capacity as state officers.<sup>198</sup> This is encapsulated in chapter 6 of the Constitution on 'leadership and integrity' which is applicable to all state officers.<sup>199</sup> The Constitution provides for disciplinary measures in situations where state officers violate the code of conduct.<sup>200</sup> The Public Officers Act is implementing legislation of which requires the commission to establish a code of conduct and ethics.<sup>201</sup> The responsible agent is the JSC which has formulated the Judicial

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<sup>196</sup> Lloyd D (ed), *Idea of law* (Penguin Books, London 1973) 258.

<sup>197</sup> Gordon, A., and Bruce, D., 'Transformation and the independence of the judiciary in South Africa in Centre for the Study of Violence and Reconciliation,' Gordon, A, and Bruce, D, (eds): *After the transition: Justice, the judiciary and the respect for the law in South Africa* (Cape Town 2007): Centre for the Study of Violence and Reconciliation, 51: Acting judges fill temporary vacancies on the bench. For appointments to all courts except the Constitutional Court, the Minister of Justice is empowered to appoint acting judges 'after consulting the senior judge of the court on which the acting judge will serve.' See Section 175(2) of the Constitution of South Africa. The President is empowered to appoint an acting judge of the Constitutional Court 'on the recommendation of' the Minister of Justice and 'with the concurrence of the Chief Justice'. See Section 175(1) of the Constitution of South Africa.

<sup>198</sup> Article 260 (q), Constitution of Kenya, 2010: 'State officer' means a person holding a State office. \_

<sup>199</sup> Ibid.

<sup>200</sup> art 75(2).

<sup>201</sup> Section 5(1), Public Officers Act, 2003.

Service Code and Ethics.<sup>202</sup> The applicable provision is that: 'where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act, 2003, Judicial Service Commission Regulations or the Constitution as the case may be.'<sup>203</sup>

It is therefore evident that a judge is subject to various sanctions namely: removal which can be effected by the President through the appointment of a tribunal to investigate and recommend whether or not to remove him/her.<sup>204</sup> The other mechanisms for the discipline of judges are solely controlled by the JSC.

### 3.2.3. Management and Oversight of the Judiciary

The JSC has a constitutional mandate of 'promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.' However, this has been interpreted by the JSC as giving it 'total control over the judiciary'<sup>205</sup> which would extend to the management and oversight of the judiciary. These two roles provide the JSC with broad governance and policy making and disciplinary control of judicial officers. This is in addition to the management and evaluation and the management of the court.

The researcher is of the view that this mandate is not only far-reaching but could be subject to challenge especially if exercised in a way that violates human rights.<sup>206</sup> This has been illustrated by the JSC being involved in various suits whose common denominator was violation of human rights. Some of the suits have related to the validity of nomination of Supreme Court judges,<sup>207</sup>

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<sup>202</sup> Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of the Kenya Gazette, 2003.

<sup>203</sup> Rule 22 of the Judicial Service Code of Conduct and Ethics.

<sup>204</sup> Government of Kenya 'Final report of the taskforce on judicial reforms' (2010) at 28: Disciplinary actions are varied ranging from transfers, withdrawal of official work, refusal to grant permission to attend conferences or workshops to refusal to grant leave to the judge. See Government of Kenya 'Final report of the taskforce on judicial reforms' (2010) at 28.

<sup>205</sup> Mango C, '*Policy direction and administration of the judiciary by the judicial service commission: A new dawn, a fresh paradigm*,' <<http://www.eKLR/klrjournal/judgescolloquim2011.htm>>accessed 7 March 2012

<sup>206</sup> *Petition 102 of 2011*, [2011] eKLR

<sup>207</sup> *ibid.*

the validity of the JSC's recommendation for removal of the Deputy Chief Justice, the validity of nomination of Supreme Court judges,<sup>208</sup> the validity of the JSC's recommendation for removal of the Deputy Chief Justice, and whether lack of special measures to allow the disabled access to court buildings violates the Constitution<sup>209</sup>. The two case studies discussed below illustrate this point.

### 3.2.4. Judicial Funding

One way of ensuring judicial independence is by securing the financial autonomy of the judiciary. The sources of funding for the judiciary are set out in Section 4, Judiciary Fund Regulations of the Judicial Service Act. The sources of the fund shall consist of such moneys as may: `be appropriated for the Fund by Parliament; granted from the Consolidated Fund; for that purpose be obtained from investments, fees or levies administered by the Judiciary; be from any grants, gifts, donations or bequests; and be from all proceeds resulting from net proceeds of disposal of excess or surplus property, or stores, including miscellaneous receipts.<sup>210</sup>

The creation of the Judiciary fund has secured the financial autonomy of the judiciary. Every year, the judiciary Chief Registrar is expected to prepare an estimated expenditure for the following financial year and present it to the National Assembly for approval.<sup>211</sup> After approval the funds are paid directly to the judiciary Fund.<sup>212</sup>

### 3.3. Case Study

The two case studies of *Republic v. Judicial Service Commission and another (Colletta case)*<sup>213</sup> and *Federation of Kenyan Women Lawyers and 5 Others v. the Judicial Service Commission and another (Fida case)*<sup>214</sup> are selected to illustrate the actual situations of holding the JSC accountable for violation of human rights. Whereas the *Colletta case* was set against the

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<sup>208</sup> 43Nancy Makokha Baraza v Judicial Service Commission & 9 Others, [2012] eKLR <[http://www.kenyalaw.org/Downloads\\_FreeCases/pdf.htm](http://www.kenyalaw.org/Downloads_FreeCases/pdf.htm)> accessed 5 September 2014.

<sup>209</sup> Kadida, J, `Disabled now sue to access court buildings,' The Star (2012)2.

<sup>210</sup> Section 4, Judiciary Fund Regulations [L.N. 35/2012.]

<sup>211</sup> Article 173(3) Constitution of Kenya, 2010

<sup>212</sup> Article 173(4) Constitution of Kenya, 2010

<sup>213</sup> Misc. Civ. Appl. No. 21 of 2005, [2006] eKLR

<sup>214</sup> Petition 102 of 2011, [2011] eKLR.

background of the previous Constitution, the *FIDA* case shows that individual independence has not yet been attained even within the current Constitutional dispensation.

### 3.3.1 The Coletta Case<sup>215</sup>

#### **Issues in the Case;**

This case concerned a number of issues, first, whether a court of law can second guess the decision of the JSC by arriving at a finding that is at variance with that of the JSC. Secondly, whether the rules of natural justice are available whenever the rights of a JSC employee are violated and if they can be enforced.

#### **Facts of the Case**

The plaintiff was a former employee (secretary) of the judiciary but was retired by the JSC. The reasons advanced for the forced retirement were stated to be that she behaved in a manner that did not befit a court official. In opposing the application, the applicant alleged that the retirement violated her right to natural justice by not affording her the opportunity to be heard.

#### **Decision**

The court declined to grant judicial review remedies of certiorari and mandamus the applicant had asked for. In the view of the court:

*The contract of employment between the applicant and the respondent did not have underpinnings that brought it into the realm of public law rights, nor was the nature of her job in great public service to an extent where the public would be said to be interested or concerned to see that the respondent acted towards the applicant lawfully and fairly.*<sup>216</sup>

In failing to grant the prayers of the applicant, the court was not only going against its earlier decisions but was implying that the applicant did not qualify for public rights or rules of natural justice. This was notwithstanding the fact that she was a public employee in circumstances where

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<sup>215</sup> *Republic v. Judicial Service Commission and Another*, Misc. Civ. Appl. No. 21 of 2005, [2006] eKLR.

<sup>216</sup> *Ibid.*

public rights were violated by constitutional and statutory bodies.<sup>217</sup> It must be remembered that rules of natural justice are available to any person who deals with a public body and therefore are very important in the administration of justice. The fact that the court departed from its earlier precedent set in the case of *Onyango v Attorney General*,<sup>218</sup> and clear legal provisions leads to only one conclusion that the decision was arrived at so as not to appear to be opposing the JSC.

### 3.3.2. The FIDA Case<sup>219</sup>

#### Issues in the case;

The issue in this case was whether the JSC violated provisions of Article 27 (6) of the Constitution, which provides that: 'the State shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender\_ and Article 172(2) (b) providing for gender equality in judicial service.

#### Facts

The facts of the case were that on 15<sup>th</sup> June 2011, the JSC recommended 5 persons to the President for appointment as judges of the SC. Out of the 5, 1 was a woman while the rest were men. The JSC had earlier recommended 2 people, 1 woman and 1 man for appointment as CJ as DCJ respectively. FIDA petitioned these recommendations on the grounds that it not only violated the Constitution but the fundamental rights and freedoms of women by failing to take into consideration the constitutional requirement on gender equity.

#### Decision

The High Court dismissed the petition on grounds that Article 27 of the Constitution does not give rights but are 'inspirational' in nature and the effect is to create 'legitimate expectation on the part of the citizens that the government would indeed formulate and undertake legislative and

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<sup>217</sup> *Onyango v Attorney General*, [1987] Kenya Law Reports 711.

<sup>218</sup> Ibid

<sup>219</sup> *Federation of Kenyan Women Lawyers and 5 Others v. the Judicial Service Commission and another*, Petition 102 of 2011, [2011] eKLR (*Hereinafter Fida case*).

policy measures<sup>220</sup> The court further held that `inspirational affirmative action measures\_ are in the category of socio-economic rights that can only be realized progressively. In the view of the court, affirmative action should be progressively realized since legislative and policies formulation as a basis for implementation of these rights is nonexistent. The court concluded that the realization of Article 27 that relates to gender equality in the public service is an unrealistic and unreasonable expectation.

### 3.3.3. Interpreting the *FIDA* Case

The decision of the High Court in the *FIDA* case is faulty in a number of respects. It is not only a disservice to the interpretation of the principles of equality and nondiscrimination in the Constitution but also a setback in the advancement of the rights of women. In finding that Article 27 is only progressive and `does not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions\_<sup>221</sup> the court has even questioned the very basis, merits and wisdom of Article 27.<sup>222</sup> The decision by the High Court goes beyond the role of the court which is to interpret the law using available tools and not to question its very basis of the provision.

The decision seems to be in line with the official policy of the JSC that in order to curb impunity, it would interrogate judgments and those that appear incompetent would attract disciplinary measures. The Vice Chairman of JSC is quoted as having said that:

*The days when a judge or a magistrate would make an outrageous decision and tell the lawyers or litigants to 'go and appeal' are over. We as the Judicial Service Commission expect the judicial officer or the bench of judges to get it right in the first instance so that the chances of appeal are [sic] minimized. Where a given judge doesn't get it right on the law too frequently, we are of the view that it raises a competency or integrity issues [sic] that must be quickly addressed by the Judicial Service Commission. We are aware that many jurisdictions monitor how the appellate Courts handle matters that are referred to them from lower Courts. Judges whose*

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220 Ibid  
221 Ibid.  
222 Ibid.

*judgments are frequently appealed against and overturned should be subject to certain redress and measures.*<sup>223</sup>

This policy therefore has the effect of intimidating judges to decide matters in line with the policies of the commission. Consequently pursuant to the influence the commission has over the judges they are left with very little option but support the position of the JSC.

It should be recognized that the letter and spirit of the Constitution of Kenya, 2010 was meant to streamline the rights of women in Kenya through affirmative action and removing cultural practices that have over the ages discriminated against women.<sup>224</sup> The framers of the Constitution took a historical perspective of Kenya on gender rights by introducing provisions that prohibit discrimination on the basis of gender, sex, race or creed and the promotion of affirmative action.<sup>225</sup> The role of the state in this enterprise is to facilitate legislative and policy measures for the advancement of socio-economic and political empowerment of women.<sup>226</sup> What the decision does is to wipe out all the gains made by women in the Constitution of Kenya. It is a retrogressive decision with wide ranging negative impact on the status of women and slows down the ability of women to participate fully in the development of the country. Much more importantly the decision fails to advance the participation of women in public life on equal footing as their male counter parts.

The High Court misinformed itself in linking Article 21 to the enforcement of gender equality in Article 27. The progressive realisation quoted by the High Court envisaged in Article 21 of the Constitution is confined to rights in Article 43,<sup>227</sup> which are rights of a socio-economic nature. The rights that are provided in Article 27 on gender equality do not come under the rubrics of Article 43, thus not supported by progressive realisation.<sup>228</sup> The right of equality is actionable per

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<sup>223</sup> Mango C, :*Policy direction and administration of the judiciary by the judicial service commission: A new dawn, a fresh paradigm,* <<http://www.eKLR/klrjournal/judgescolloquim2011.htm>>accessed 7 September 2014.

<sup>224</sup> Kameri-Mbote, P, :*Fallacies of equality and inequality: Multiple exclusions in law and legal discourses* (Inaugural Lecture, University of Nairobi 2013) 2.

<sup>225</sup> Article 27(4) of the Constitution, 2010.

<sup>226</sup> Ibid. art 27(6).

<sup>227</sup> Article 43, Constitution of Kenya, 2010: Rights relate to housing or shelter, water, health care, reproductive health, emergency treatment, food, social security, education and clean environment.

<sup>228</sup> Ambani O, :*Bench got it wrong on affirmative action rights,* *Nairobi Law*

se against the state as the prime duty bearer. It is erroneous for the High Court to hold that Article 27 is only inspirational, it is a right for immediate enforcement and the view that it is progressive and therefore suspended is not backed by sound legal judgment in my view.

The High Court further departed from its precedent in the cases of *Milka Adhiambo Otieno and Another v. The Attorney General*<sup>229</sup> and *Centre for Rights Education and Awareness; and 8 Others v. Attorney General & Another*.<sup>230</sup> In the latter case, the Court, in underscoring its disagreement with the rationale of the decision in the *Fida case*, opined that:

*...the view that the phrase 'progressive realisation' is applied to those circumstances where an allocation of limited resources is required. The state can only achieve certain rights over a period of time as resources are limited. The phrase is used in reference to socio-economic rights, and this is made clear in Article 21 of our Constitution.*<sup>231</sup>

Much more importantly, the decision is not only inconsistent with the Constitution but impedes the ability of the state and statutory bodies to combat discrimination using affirmative action provisions. The fact that equality can simply be violated by in action gives the state huge latitude to violate the equality provisions against the marginalised groups and other representative groups.<sup>232</sup> The role of the High Court this case is to give coherence and harmonise expectations of society and the Constitution, in my view the court failed in balancing gender equality in an inclusive manner. It is evident that the interpretation adopted by the court watered down gains made by women for fear of antagonising the JSC. This is illustrated in the manner in which the JSC took a very strong position in defense of its decision. This was particularly noticeable when the Constitutional Implementation Commission (CIC) as *amicus currie* in the *FIDA* case argued that JSC had breached the Constitution.<sup>233</sup>

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<sup>229</sup> *Monthly* <<http://www.nairobilawmonthly/November2011/Casedigest.htm>>accessed 5 September 2014. Kisumu High Court Petition 44 of 2011 [2012] eKLR.

<sup>230</sup> Nairobi Petition 2008 & 207 of 2012 [2006] eKLR.

<sup>231</sup> Ibid.

<sup>232</sup> Ochieng at 17.

<sup>233</sup> Makabila, S., and Kiprotich, A., :Is there more than meets the eye in CIC woes~ (*The Standard* 17 July 2013).



My view is that expecting the court to contradict the JSC was expecting too much. This is because in a matter of speaking the mandate of the JSC over judges in terms of performance management, involves the review, evaluation and measurement of results of the judiciary as an institution and individual judges as well as setting targets and goals. These parameters rather than being forums to evaluate performance turn out as measures to influence the judiciary in making decisions that are in agreement with the JSC and not necessarily the law and substantial justice. Thus the independence of the judiciary becomes undermined when a court cannot enforce breach of rights over an institution that has authority over it.<sup>234</sup> There is an urgent need for the independence of the courts to be protected in circumstances when the interests of the powerful are at stake.

### **3.4. Conclusion**

The hall mark of a democratic state is the level to which judges have individual independence that enables them promote, protect and enforce human rights against entities that have power over it. This is because this is the cardinal mandate of the JSC to ensure compliance with the law. The judiciary is the only legally constitutionally created institution for the enforcement of fundamental rights and protections as well as the interpretation of Constitution. To the extent that courts in Kenya are unable to enforce human rights violation by the JSC is a serious indictment on the JSC.

However with the wide discretionary powers by the JSC over the judiciary, judges are left with very little protection against the JSC. Moreover, judges do not have the wherewithal to hold the JSC accountable in the phase of human rights violation. This is illustrated in the two cases of *Coletta* and *FIDA*. This is made possible by the reality that the JSC has the power to determine the future of individual judges as it determines the appointment, promotion, discipline and removal of judicial officers. For that reason, the structure of the JSC should be revised so that the JSC does not play conflicting roles of management and oversight. The excessive powers exercised by the JSC over judges interfere with the individual independence of the judges.

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<sup>234</sup> Law, D.,:Judicial independence, (Washington University in St. Louis. Faculty Research Paper Series, Paper No. 10-02-06 (2010) 2).

Chapter four will balance the historical perspective of the JSC and the gap existing in the current legal framework.

## **CHAPTER FOUR**

## BEST PRACTICES IN JUDICIAL INDEPENDENCE

### 4.0. Introduction

The judicial system in any democratic state is central to the protection of fundamental rights and freedoms. To a large extent, the courts are charged with the duty of ensuring that victims and potential victims of human rights violations are able to obtain adequate remedy and protection and the perpetrators of human right violations are brought to book. In addition those approaching the court should be granted the dignity of a fair trial that meets international standards. This however depends on the existence of an appointment process that insulates the judges from influence by extraneous factors other than facts and the law in deciding cases.

Chapter two and three pointed out the systemic dominance of the JSC (appointing authority of judges) with executive minded commissions whose pursuit of judicial independence was nonexistence. This chapter analyses how the judiciary can be reformed in a way that it would give independent decisions where its employer (the JSC) is the subject of human rights violations. The approach would include comparative analysis of some jurisdictions and international best practices in the appointment process. This is important because in the two case studies outlined in chapter three it is clear that the plaintiffs did not receive a fair trial from a judiciary that was supposedly impartial.

### 4.1. Composition of the JSC

In the amended Constitution the JSC was the body charged with advising the President on matters of appointment, promotion, discipline and dismissal, its composition was prejudicial to the independence of the judiciary owing to its appointment by the President. There was a definite imbalance of power to the disadvantage of the judiciary which in essence violated the principle of separation of powers and the rule of law. The promulgation of the Constitution Kenya was alive to the anomaly and designed a JSC with diverse membership. It now includes the Attorney General,<sup>235</sup> Supreme Court judge,<sup>236</sup> Court of Appeal judge,<sup>237</sup> High Court judge, Magistrate,<sup>238</sup>

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<sup>235</sup> Article 156 `The Attorney General shall be nominated by the President with the approval of the National assembly and appointed by the President\_ Note the Attorney General currently sitting in JSC was a direct appointee of President having been appointed under the Old Constitution

<sup>236</sup> Elected by the judges of the Supreme Court, art 171 1(b).

two advocates,<sup>239</sup> representative of the Public Service Commission<sup>240</sup> and two members of public.<sup>241</sup> The involvement of more institutions makes the judiciary not beholden to a single organ thus enhances independence. It also lessens political interference with judicial functions and further enhances independence through public participation in judicial appointments.

Be that as it may there is still considerable executive presence in the composition of JSC. For example in the 1<sup>st</sup> year of the inauguration, majority of JSC members were executive appointees such as the AG, Head of Public Service Commission (PSC), judges representing the Court of Appeal, High Court and magistrates were all appointed pursuant to the procedure laid down in the amended Constitution. Out of the 10 members, 5 were carry over's from the amended Constitution and therefore executive minded, 3 were members of the previous JSC. Judges and magistrates on JSC had not undergone vetting process, while the AG and representative of PSC were expected to resign in 1 year<sup>242</sup> and 5 years respectively.<sup>243</sup> It was noticeable that the only new entrants were the 2 LSK and 2 members representing the public one of whom resigned even before the JSC began functioning.<sup>244</sup> As at July 2011, JSC had only 8 members instead of 9 because the CJ representing the Supreme Court had not been appointed. The executive appointee at the time the Constitution was coming into operation was 5 out of 8. The conclusion to be drawn is that the composition of the JSC was at the time deeply skewed with heavy executive presence thereby unlikely to promote judicial independence.<sup>245</sup>

This is the same JSC that appointed the CJ, Deputy CJ, judges of the SC and HC. One member of LSK commented that the JSC would never be independent because apart from 2 JSC members

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<sup>237</sup> Elected by judges of the Court of Appeal, art 171 1(c).

<sup>238</sup> Elected by Kenya Magistrates and Judges Association, art 171 1(d)

<sup>239</sup> Elected by Law Society of Kenya

<sup>240</sup> Article 1711(g), Constitution of Kenya 2010.

<sup>241</sup> Art 171 1(h)

<sup>242</sup> Sixth Schedule s. 31(7)

<sup>243</sup> Sixth Schedule s. 20(4)

<sup>244</sup> :Bishop Muheria Leaves Judicial Commission Job ~ [http://www.youtube.com/watch?v=TtxtPGiOo\\_w](http://www.youtube.com/watch?v=TtxtPGiOo_w) both accessed 12 June 2011 .

<sup>245</sup> Chris Himsworth and Alan Paterson, :A Supreme Court for the United Kingdom: Views from the Northern Kingdom ~ in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Independence Accountability and the Judiciary*, (British Institute of International and Comparative Law, London 2006) at 116.

`the rest are appointees of the normal system\_<sup>246</sup>. This is a serious weakness because it would mean that being executive minded, the JSC would serve the interests of the executive and not advance judicial independence. Judges appointed in such a system would be beholden to make decisions that are partial and favorable to the executive. Such a judiciary would not be free from government pressure on the type of decisions to be rendered<sup>247</sup> and thus could allow the executive more leeway into positions of decision making<sup>248</sup> and in so doing fail to protect the rights of the citizens as against the state. Failure to protect the equality of parties in a dispute poses a great danger not only to institutional but personal independence as well.

#### **4.1.1. International Rules on Establishment of Appointing Body**

International law does not make first and hard rules on the structure and procedure of appointing judges. The only requirement is that whichever criteria are chosen such a body should be composed of judges elected by their peers or a body that is functionally independent of the executive and legislature.<sup>249</sup> The view of the European Charter on the Statute for Judges is that:

In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.<sup>250</sup>

According to the Council of Europe `The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules\_.<sup>251</sup> The African guidelines are in agreement with judicial appointment by an independent body as long as `The process for appointments to judicial bodies shall be transparent and accountable and the

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<sup>246</sup> Isaac Ongiri, `Kibaki, Raila Consult over Nominees for JSC Top Jobs`, The Star (Nairobi, 27 October 2010) 8

<sup>247</sup> Christopher M. Larkins, `Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis`, (1996) 44 *American Journal of Comparative Law* 609.

<sup>248</sup> John Ferejohn, `Independent Judges, Dependent Judiciary: Explaining Judicial Independence,` (1999) *Southern Californian Law Review* 354

<sup>249</sup> ICJ at 42.

<sup>250</sup> *European Charter on the statute for judges, op. cit.*, operative paragraph 1.3

<sup>251</sup> *Recommendation No. R (94) 12*

establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.<sup>252</sup>

#### 4.2. The Function of the JSC

The functions of the JSC in the Constitution are to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.<sup>253</sup> In more specific terms, the mandate of the JSC relates to appointment of judges, discipline of judicial officers, training and advising the government on how to improve administration of justice.<sup>254</sup> Individual members of the JSC are further granted immunity from civil actions<sup>255</sup> for example in the mode of removal which should be accomplished through the establishment of a tribunal.<sup>256</sup> Therefore the JSC has been elevated to a position of an independent commission as it is allocated funds straight from Parliament.<sup>257</sup> Funding for the JSC is charged directly from the consolidated fund.<sup>258</sup> The JSC must however report to the President and National Assembly which should be public so as to enhance accountability.

The function of the JSC in the amended Constitution was constitutionally protected: 'in the exercise of its function, under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.'<sup>259</sup> However its functions were not clearly spelt out, as the current Constitution has not only granted the functions, but they have been expanded as well. What is noticeable is that the JSC has lost its constitutional guarantees of independence. The removal of such independence has a high probability of impacting negatively on the independence of the judiciary and its functions. This is significant because judges need to work in a framework that is devoid of impartiality in the discharge of their mandate.<sup>260</sup> It would

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<sup>252</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, op. cit.*, Principle A, paragraph 4 (h). See also the *Beijing Principles*, Principles 13 to 17 and the *Latimer House Guidelines, op. cit.*, principle II.1.

<sup>253</sup> Article 172, Constitution of Kenya, 2010.

<sup>254</sup> Article 172 (1)(a) - (e).

<sup>255</sup> Article 250(9).

<sup>256</sup> Article 251.

<sup>257</sup> Article 249(3).

<sup>258</sup> Article 250 (7).

<sup>259</sup> Section 68(2) Constitution of Kenya 2008 (Government Printer, Nairobi).

<sup>260</sup> Justice Edwin Cameron :The Need for the Independence of the Judiciary and the Legal Profession (Speech) <<http://www.sabr.co.za/lawjournal/2008/december-2008-vol21-no3-pp34-36>> accessed on 24/7/09.

therefore appear as if any form of interference with the judiciary in general would affect individual independence of the judges.<sup>261</sup> With the exposure of the judiciary to manipulation and control by the executive and the legislature does not seem to violate the Constitution as it currently stands. To that extent the `capacity to remain autonomous so that it might serve as an effective check against the excesses of political branches\_,<sup>262</sup> cannot be assured. This is further concretized by the Judicial Services Act which establishes the National Council for the Administration of Justice (NCAJ).<sup>263</sup> The NCAJ Secretariat is composed of political and executive appointees despite the fact that it is chaired by the Chief Justice.<sup>264</sup> The function of the NCAJ is to formulate policies relating to the administration of justice, implement monitor and review strategies for the administration of justice,<sup>265</sup> mobilize resources for the efficient administration of justice<sup>266</sup> and even oversee the operations of any other body (including the JSC) engaged in the administration of justice.<sup>267</sup> The functions of NCAJ are similar to those of the JSC with a high possibility of conflicting. Thus the failure to guarantee judicial independence in the Constitution compromises judges and magistrates who work under it.

The JSC is also mandated to make regulations that would facilitate its proper functioning.<sup>268</sup> It includes developing a code of conduct, financial processes, training and performance appraisal of judicial staff. On completion of the activities it is presented to parliament for debate before it takes effect. The Judicial Service Act (JSA) establishes a bureaucracy which exposes the judiciary to the danger of interference. According to Malleson, training provides a proper forum to proper exercise of discretion, improper interference which impacts negatively on judicial

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<sup>261</sup> Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges', (2009)10 *Chicago Journal of International Law* 285.

<sup>262</sup> Charles Gardner Geyh, Van Tassel, Emily Field, 'The Independence of the Judicial Branch in the New Republic', (2000) 31 *Chicago and Kent Law Review* 31.

<sup>263</sup> Section 34

<sup>264</sup> Section 34(2)-(p)

<sup>265</sup> S 35(2) (b)

<sup>266</sup> S 35 (2) (d)

<sup>267</sup> S 35 (3) (c).

<sup>268</sup> Section 47(1) (2).

independence.<sup>269</sup> Although these provisions are put in place as a guide to checks and balances, they must be looked at in historical perspectives.

#### 4.2.1. Appointment of Judges

The JSC has an elaborate system for the appointment of judges guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary, and the promotion of gender equity.<sup>270</sup> First the JSC determines the qualifications in selecting applicants for recommendation for appointment as judges.<sup>271</sup> The vacancies are advertised by the JSC, after which they are invited for interviews. Names of those shortlisted are then published in widely circulating media with the public being invited to submit their views on the candidates. Successful ones are interviewed in a public forum to allow for public participation and recommendations made to the President for appointment. The process of deliberations before onward transmission to the President is however not public and no reasons are given for the recommendations. The assumption is that the JSC is guided by professional competence, written and oral communication skills, integrity, fairness, good judgment, legal and life experience and demonstrable commitment to public and community service.<sup>272</sup> The same criteria should be used when a judge is seeking promotion.<sup>273</sup>

In a similar format the appointment of acting judges in South Africa suffers the same predicament. This is because: `if the acting judges know that the JSC is evaluating their actions on the bench, they may feel pressured consciously or subconsciously to make decisions that meet with the JSC's approval.'<sup>274</sup> Acting judges fill temporary vacancies on the bench. For appointments to all courts except the Constitutional Court, the Minister of Justice is empowered to appoint acting judges :after consulting the senior judge of the court on which the acting judge

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<sup>269</sup> Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing Company Aldershot 1999) at 132.

<sup>270</sup> Article 172(2), Constitution of Kenya, 2010.

<sup>271</sup> First Schedule of the Judicial Service Act.

<sup>272</sup> Regulation 13 of the First Schedule of the Judicial Service Act.

<sup>273</sup> Ochieng at 5.

<sup>274</sup> Gordon, A., and Bruce, D., :Transformation and the independence of the judiciary in South Africa in Centre for the Study of Violence and Reconciliation, ~ Gordon, A, and Bruce, D, (eds): *After the transition: Justice, the judiciary and the respect for the law in South Africa* (Cape Town 2007): Centre for the Study of Violence and Reconciliation, 51.



will serve.<sup>275</sup> The President is empowered to appoint an acting judge of the Constitutional Court on the recommendation of the Minister of Justice and with the concurrence of the Chief Justice.<sup>276</sup>

#### 4.2.2. International Law on the Appointment of Judges

In international law, the independence of the judiciary can only be attained when judges are appointed in a transparent manner. The criteria for appointing and promoting judges should be based on legal skills without which the judiciary runs the risk of not complying with its own mandate. To that extent, a merit based appointment is preferred. The approach in international law is that whichever form of appointment method is chosen, it must guarantee judicial independence (institutional and individual) and guarantee impartiality (subjective and objective).<sup>277</sup>

Further the Universal Charter of the Judge contemplates that: the selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.<sup>278</sup> The African Principles and Guidelines on the Right to a Fair Trial have established that the sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.<sup>279</sup> The essential skills required for those to be appointed should possess No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfill their functions.<sup>280</sup>

#### 4.2.3. Promotion of Judges

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<sup>275</sup> Section 175(2) of the Constitution of South Africa.

<sup>276</sup> Section 175(1).

<sup>277</sup> Principle 10, UN Basic Principles on the Independence of the Judiciary: Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

<sup>278</sup> *Universal Charter of the Judge*, article 9.

<sup>279</sup> Principle A, paragraphs 4 (i) and (k), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

<sup>280</sup> Ibid.

Other than appointment and discipline, the JSC is mandated with the task of promotion of judges.<sup>281</sup> The UN Basic Principles envisage that the criteria used to regulate appointment of judges should similarly be used to regulate promotion: 'Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.'<sup>282</sup> Similar provisions are provided for by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>283</sup> This is also in line with the Beijing Principles which have an additional factor that such a system should be independent: 'Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.'<sup>284</sup>

According to the European Charter on the Statute for Judges, promotion should be based on two criteria only namely seniority and merit.<sup>285</sup> With regard to seniority, the statute expects judges to be promoted after spending a fixed term at a post so long as they still discharge professional services. However when it is not based on seniority, promotion of judges should exclusively use merit coming out of an objective evaluation of performance. Performance evaluation should be done either by one of the senior judges or several judges and the outcome discussed by the judge in question.<sup>286</sup> The final decision on promotion should be pronounced by an authority that is independent of the executive and the legislature of which half of membership should be judges elected by their peers.<sup>287</sup> Those who do not qualify for promotion should be given an opportunity to be told why they did not succeed.<sup>288</sup>

The evaluation of a judge for purposes of evaluation by the JSC raises a number of fundamental issues. Judges who seek promotion may not want to antagonize the commission so as to appear preferable.<sup>289</sup> This is founded on a perception that a judge who believes in agreeing with the commission and not the quality of decision has higher chances of promotion; there would be reluctance to antagonize the commission. These are not idle fears, in the words of Dennis Lloyd:

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<sup>281</sup> Section 13, Judicial Service Act, No. 1 of 2011.

<sup>282</sup> UN Basic Principles on the Independence of the Judiciary, principle 13.

<sup>283</sup> The Principle A, paragraph 4 (o)

<sup>284</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, paragraph

17.

<sup>285</sup> ICJ at 51.

<sup>286</sup> *European Charter on the statute for judges* paragraph 4.1.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

*The question of promotion is almost as important as that of initial appointments in regard to judicial independence. For if the judiciary has to look for its future prospects to the politicians they may be unwilling to incur executive displeasure and so mar the chances of later promotion, even though they are secure in their posts.*<sup>290</sup>

#### 4.2.4. Discipline

Judges as state officers come under the ambit of principles of chapter 6 of the Constitution on leadership and integrity.<sup>291</sup> Appropriate discipline for breach of principles of code of conduct is meted out if a state officer<sup>292</sup> violates the code of conduct.<sup>293</sup> The Public Officer's Ethics Act<sup>294</sup> provides for the creation of a code of conduct and ethics.<sup>295</sup> The JSC being responsible for judges, magistrates and other judicial officers exercises disciplinary control.<sup>296</sup> The Judicial Service Code of Conduct and Ethics<sup>297</sup> was created and provides that 'where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act, 2003, Judicial Service Commission Regulations or the Constitution as the case may be.'<sup>298</sup>

Consequently a judge is subject to a number of sanctions such as removal<sup>299</sup> and other disciplinary measures.<sup>300</sup> Other than removal where the President establishes a tribunal to investigate whether or not to remove a judge discipline is carried out exclusively by the JSC. This is a matter that needs to be revisited as these powers are too onerous for one institution especially in the context of oversight and management discussed below. The JSC is also mandated by the Constitution to begin the process of removal, consider and determine the cases to be taken for removal. It is however silent on the procedure to be followed where the wrongs are proved but fall short of grounds for removal. It is further not clear as to whether Parliament

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<sup>290</sup> Lloyd D (ed), *Idea of law* (Penguin Books: London, 1973) at 258.

<sup>291</sup> Article 73, Constitution of Kenya.

<sup>292</sup> Ibid art 75.

<sup>293</sup> Ibid art 75(2).

<sup>294</sup> Act. No. 4 of 2003.

<sup>295</sup> Ibid section 5(1).

<sup>296</sup> Ibid section 3(4).

<sup>297</sup> Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of the Kenya Gazette, 2003.

<sup>298</sup> Rule 22 of the Judicial Service Code of Conduct and Ethics.

<sup>299</sup> Government of Kenya :Final report of the taskforce on judicial reforms (2010) at 28: Disciplinary actions are varied ranging from transfers, withdrawal of official work, refusal to grant permission to attend conferences or workshops to refusal to grant leave to the judge.

<sup>300</sup> Ojwang, J.B.:*Judicial ethics and judges' conduct: The complaints mechanism* (Judges Colloquium 2011) <<http://www.eKLR/klrjournal/judgescolloquim2011.htm>>accessed 2 April 2012.

should legislate on these matters or not. In addition the role of the JSC is not clearly provided for instance in terms of creating rules for the removal.

### 4.3. Judicial Independence in International Law

There are international principles that are seen to define the independence of the judiciary in ensuring judges are immune from outside influence.<sup>301</sup> These principles are within the ambit of transparent appointment, promotion, discipline or dismissal.<sup>302</sup> The essence of transparent appointment in international law, is to safeguard the judiciary against appointing those who share similar beliefs and therefore unlikely to challenge its acts and omissions.<sup>303</sup> This should be accompanied by a removal process that is above board to avoid those that are motivated by vested interests either in retaliation for unfavorable decisions and pressuring judges through impeachment.<sup>304</sup> Judges need to be disciplined in a fair and objective manner so as to protect the judiciary from vindictiveness and ill feelings arising from decisions that did not go the way of the vested interests.<sup>305</sup> The gist of these guarantees is to ensure that judges discharge their mandate independently on the basis of facts and the law without having to worry about other external/internal influences in the form of inducements, threats, pressures, interference to mention but a few.<sup>306</sup>

The judicial organ is an important agent for checking and balancing of other branches of government. It ensures that laws enacted by legislators and acts of the executive are in compliance with national and international laws.<sup>307</sup> This has been highlighted by various international human rights instruments.<sup>308</sup> The UN General Secretary has emphasized that:

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<sup>301</sup> Vijver LVD (ed), *The judicial institutions in Southern Africa: A comparative study of common law jurisdictions* (2006) 1.

<sup>302</sup> Walter Ochieng, 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya', (2013) 2 *The Young African Research Journal (YARJ)* 3.

<sup>303</sup> Principle 13 United Nations Basic Principles on the Independence of the Judiciary

<sup>304</sup> Principle 17 of UN principles; Principle IV(d) Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence

<sup>305</sup> Principle VI(b), Latimer House Principles

<sup>306</sup> Ochieng at 4.

<sup>307</sup> International Commission of Jurists, *International Principles on the Independence and Accountability Of Judges, Lawyers and Prosecutors a Practitioners' Guide* (ICJ: Geneva, 2004) at 1.

<sup>308</sup> The Universal Declaration of Human Rights (UN, Paris, 1948); The International Covenant on Civil and Political Rights (UN, 1966); The American Declaration of the Rights and Duties of Man (International Conference

increasingly the importance of the rule of law in ensuring respect for human rights, and of the role of judges and lawyers in defending human rights, is being recognized.<sup>309</sup> This has been restated by the Inter-American Court of Human Rights that: 'guaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality.'<sup>310</sup> The commission views: 'the independence of the judiciary as an essential requisite for the practical observance of human rights.'<sup>311</sup> The commission further notes that: 'the right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State.'<sup>312</sup>

#### 4.3.1. Treaty Law on Judicial Independence

International human rights law views the independence of the judiciary as an important aspect of the rule of law and separation of powers. The ICCPR which was ratified by Kenya in 1992 is categorical that the right to a fair trial by an independent and impartial court is an absolute right that should not be limited either during war or a state of emergency.<sup>313</sup> The Convention not only

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of American States, Columbia, 1948); The Declaration on Human Rights in Islam (Organisation of the Islamic Conference, Cairo, 1990); The European Convention on Human Rights (Council of Europe, Rome, 1950); The American Convention on Human Rights ("The San Jose Covenant", Costa Rica, 1978); The African Charter on Human and Peoples' Rights (Organisation of African Unity, Banjul, 1981); The Canadian Charter of Rights and Freedoms (annex to the 1982 Constitution); The Basic Principles on the Independence of the Judiciary (UN, 1985); The European Charter on the Statute for Judges (Council of Europe, 1998); The Charter of Fundamental Rights of the European Union (European Council, Nice, 2000); Opinion no. 1 on standards concerning the independence of the judiciary and the irremovability of judges; Opinion no. 2 on the funding and management of courts, with reference to the efficiency of the judiciary and to art. 6 of the European Convention on Human Rights; Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality - of the Consultative Council of European Judges of the Council of Europe, 2001 and 2002.

<sup>309</sup> *Strengthening of the rule of law - Report of the Secretary General to the United Nations General Assembly*, UN document A/57/275, para. 41.

<sup>310</sup> *Legal status and human rights of the child*, Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) OC-17/2002, 28 August 2002, para. 120.

<sup>311</sup> *The Situation of Human Rights in Cuba: Seventh Report*, OAS document OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, Chapter IV, para. 2.

<sup>312</sup> Report N° 78/02, Case 11.335, *Guy Malary vs. Haiti*, 27 December 2002, para 53.

<sup>313</sup> Article 4 (2), ICCPR.

protects fair trial as an aspect of judicial independence but equality before the law as well.<sup>314</sup> Likewise the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that "migrant workers and members of their families shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>315</sup>

Regional human rights legal instruments generally agree with international human rights instruments on the necessity of independence. The American Convention on Human Rights provides that "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature."<sup>316</sup>

The African Charter on Human and Peoples' Rights (ACHPR) uses similar terminology in the American Convention that "every individual shall have the right to have his cause heard,"<sup>317</sup> a right that comprises "the right to be presumed innocent until proved guilty by a competent court or tribunal" and "the right to be tried within a reasonable time by an impartial court or tribunal."<sup>318</sup> This article must be read in conjunction with article 26 of the Charter, which establishes that the States parties "shall have the duty to guarantee the independence of the Courts". The African Commission on Human and Peoples' Rights has said that article 7 "should be considered non-derogable" since it provides "minimum protection to citizens". Further afield, the right to fair trial by an independent judiciary is protected by the European Convention on Human Rights.<sup>319</sup> Judicial independence has also been recognized by non-binding and

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<sup>314</sup> Article 14(1), ICCPR: "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"

<sup>315</sup> Article 18 (1), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>316</sup> Article 8 (1), American Convention on Human Rights

<sup>317</sup> Article 7, ACHPR

<sup>318</sup> Ibid.

<sup>319</sup> Article 6 (1), European Convention on Human Rights: "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

declaratory instruments that establish certain standards in human rights related matters.<sup>320</sup> Those that are established in the UN framework are reflective of international human rights law.

#### 4.3.2. International Standards in Judicial Independence

The right to a fair trial and judicial independence are treated in international human rights law as related rights. The right to a fair trial before an independent and impartial tribunal is not only recognised in treaties but it is also part of customary international law. Therefore, those countries that have not acceded to or ratified these treaties are still bound to respect this right and arrange their judicial systems accordingly.<sup>321</sup> That every accused person has a right to a fair trial by: 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.'<sup>322</sup>

This principle has been recognized in the African and Asian human rights instruments. The ACHPR in 1999 adopted a resolution on the respect and strengthening of the independence of the judiciary.<sup>323</sup> In Asia the Beijing Principles stipulates that the 'Independence of the Judiciary requires that it decides matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.'<sup>324</sup> Further, judges from around the World have approved the Universal Charter of the Judge whose import is that: 'The independence of the judge is indispensable to impartial justice

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<sup>320</sup> Minimum Standards of Judicial Independence (The "New Delhi Standards", International Bar Association, 1982); Draft Universal Declaration on the Independence of Justice (The "Singhvi Declaration", 1989); The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Asia Pacific Legal Association, 1995); The Caracas Declaration (The Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, 1999); The Beirut Declaration (Arab Conference on Justice, 2003); The Bangalore Principles of Judicial Conduct (UNODC, Judicial Group on Strengthening Judicial Integrity, 2001); The Suva Statement on the Principles of Judicial Independence and Access to Justice (INTERIGHTS, The Fiji Human Rights Commission, Fiji Judiciary, 2004); The Judges Charter in Europe (European Association of Judges, 1987); The Universal Statute of the Judge (International Association of Judges, 1999).

<sup>321</sup> ICJ at 7.

<sup>322</sup> United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [Hereinafter, UN Basic Principles].

<sup>323</sup> Adopted in April 1996 at the 19th Session of the African Commission on Human and People's Rights.

<sup>324</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in 1995 and adopted by the LAWASIA Council in 2001, operative para. 3.a.

under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence. <sup>325</sup>

#### 4.4. Judicial Independence for Subordinate Courts

The amended Constitution contained provisions that were anathema to judicial independence. Many of them have been addressed by the Constitution but quite a number of them are yet to be realized. This is because whereas the clamor for constitutional reforms was premised on the attainment of judicial independence for all judicial officers, the constitution has failed to secure security of tenure for magistrates.<sup>326</sup> Independence for this cadre of officers would be significant because the bulk of legal work is transacted by magistrates in the magistrates' courts. This notwithstanding they are supposed to hold the government accountable for violation of human rights.<sup>327</sup> This is a major omission because according to the requirements of the constitution a magistrate with 15 years' experience would qualify for appointment to the highest judicial office in Kenya of CJ and henceforth the President of the Supreme Court and head of the judicial organ.<sup>328</sup>

Under the Constitution of Kenya, Parliament is mandated to 'give subordinate courts original jurisdiction to hear and determine applications for redress of denial, violation or infringement or threat to a right or fundamental freedom in the bill of rights.'<sup>329</sup> The import of this provision is that subordinate courts have power to exercise judicial review over public powers as well as nullify laws that violate human rights therefore have jurisdiction to hold government accountable in the same way superior courts do. The absence of security of tenure and judicial independence compromises their ability to discharge these functions.

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<sup>325</sup> The Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, article 1. The IAJ was founded in 1953 as a professional, non-political, international organisation, grouping not individual judges, but national associations of judges. The main aim of the Association, which encompasses 67 such national associations or representative groups, is to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom.

<sup>326</sup> Oseko at 252.

<sup>327</sup> Article 1 (3) (c)

<sup>328</sup> Article 166 (3) (b) which includes a judicial officer as qualified for appointment as CJ.

<sup>329</sup> Article 23 (2)



Security of tenure is the most important indicator of judicial independence which depends on the mode of removal of a judicial officer.<sup>330</sup> For magistrates lack of security of tenure means that they are not protected anytime they make decisions that are not favourable to the executive. This is exacerbated by their security being entrenched in the JSC Act and not the Constitution. The implication is that with protection being based on Statute security of tenure is very weak. The amendment of a statute is easy because it only requires a simple majority which is easy to master. This provision further erodes the independence of magistrates and a serious omission by the Constitution which can easily be exploited by the legislature and the executive.

#### **4.5. Qualities of an Independent Judiciary**

##### **4.5.1. Independence and Impartiality**

An independent and impartial judicial system is the cornerstone of the rule of law that guarantees protection of human rights in conformity international human rights law. To that extent the Constitution, laws and policies pertaining to judiciary must aim at insulating the judiciary from undue interference from other state organs.<sup>331</sup> This should allow judges and magistrates to be free to carry out their professional duties without political interference. They should also be protected in law and practice from attack, harassment or persecution when carrying out their duties. This is the only way they would actively protect human rights, be accountable to the people as well as maintain the highest standards of integrity in national and international law and ethics.<sup>332</sup> However in Kenya, magistrates are unable to professionally discharge their functions due to the absence of security of tenure, and would be worse if it involves enforcing against its employer, the JSC.

The fact that a suit against the JSC already has a pre-determined decision implies that it lacks a key ingredient of the rule of law and fair trial. The right to a fair trial in criminal, civil, disciplinary and administrative law is generally recognized in international and regional human rights instruments. This can only be achieved in an environment where the judiciary is independent.

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<sup>330</sup> Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in S. Shetreet and J. Deschenes (eds), *Judicial Independence: The Contemporary Debate*, (Martinus Nijhoff Publishers, Dordrecht 1985) 411.

<sup>331</sup> ICJ at 2.

<sup>332</sup> Ibid. at 3.

#### 4.5.2. Impartiality

The right to be tried by an impartial judge is not possible without an independent judiciary. Impartiality means ` the absence of bias, animosity or sympathy towards either of the parties. Courts must be impartial and appear impartial. Thus, judges have a duty to step down from cases in which there are sufficient motives to put their impartiality into question.<sup>333</sup> The state and other institutions have a duty to refrain from influencing judges to make decisions in a particular way, “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”<sup>334</sup> This principle has been reinforced by the Council of Europe adding that: `Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.<sup>335</sup>

Impartially can either be actual or apparent, a judge however should not have any bias, animosity or sympathy towards any of the parties in a dispute.<sup>336</sup> The ACHPR has considered actual and apparent impartiality in the Constitutional Rights Project Case, the Commission held that a tribunal: `regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality.<sup>337</sup> In the event that a judge thinks he/she will be impartial, the duty to step down is always available when they will not be able to be impartial exists even before the parties challenging there impartiality.<sup>338</sup>

In the context of the two case studies in chapter three, it is clear that the courts were within the meaning outlined above. This violates international law and soft law instruments such as the Bangalore Principles of Judicial Conduct which have been adopted by the Judicial Group on Strengthening Judicial Integrity.<sup>339</sup> The principles view impartiality as a prerequisite for an independent judiciary. This is provided in principle 2.5 of the Bangalore principles which outline instances when a judge should disqualify himself:

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<sup>333</sup> ICJ at 30.

<sup>334</sup> UN Basic Principles on the Independence of the Judiciary, Principle 8.

<sup>335</sup> Council of Europe, Recommendation No. R (94).

<sup>336</sup> ICJ at 26.

<sup>337</sup> *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 87/93 (1995), paras. 13-14.

<sup>338</sup> ICJ at 29.

<sup>339</sup> Commission on Human Rights, Resolution 2003/43.

A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where; the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; the judge previously served as a lawyer or was a material witness in the matter in controversy; or the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.<sup>340</sup>

#### **4.6. Conclusion**

The answer to the problem of the absence of judicial independence in Kenya is found in the adoption of international best practices. This is especially true in the sense that international legal instruments in both hard and soft law all envisage an independent and impartial judiciary as the defender against human rights violation. For that to happen, the body that appoints judges must have sufficient safeguards against either executive or legislative interference. This body in making judicial appointments must use merit, for purposes of promotion; the criteria at play should be seniority and merit. The process of evaluating judges for purposes of discipline should be done either by a single judge or judges voted by their peers to avoid extraneous criteria being brought into play. Lastly security of tenure should apply to both judges and magistrates to avoid a situation where one part of judicial system is susceptible to interference.

## **CHAPTER FIVE**

### **SUMMARY, CONCLUSION AND RECOMMENDATION ON THE WAY FORWARD**

#### **5.0. Summary**

The research set out to investigate three issues: first the role of the JSC in the appointment, promotion and discipline of judicial officers in the Judicial Service Act, 2011 and the Constitution. Secondly is to identify forms of encroachment on the independence of the judiciary by the JSC. Thirdly to identify international best practices in judicial independence. On

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<sup>340</sup> The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002.

the first question, it is clear that although the current Constitution is a great improvement over the amended one in terms of the appointment, promotion and discipline of judicial officers. It is still largely controlled by the executive especially at the magistracy level. The forms of encroachment on the judiciary by the JSC, involves the use of their wide discretionary powers to intimidate and interfere with judicial independence. Best practices in judicial independence are encapsulated in both hard and soft law. Hard law is represented by international human rights instruments while soft law is represented by international and regional principles and standards outlined in chapter four. The consensus of these instruments is that all accused persons have a right to a fair trial that can only be delivered by an impartial and independent judiciary.

### **5.1. Conclusion**

The JSC has a constitutional mandate to ensure that the judiciary achieves both institutional and individual independence in its decision making process. However this has not happened because of flaws in the law that has allowed the JSC to exercise arbitrary powers over the judiciary. Although threats to judicial independence could come from other institutions vested with broad powers of financing (Parliament), the mandate of the JSC brings about conflict of interest. Whoever is vested with management/administrative functions should not equally exercise oversight functions. To make a difference and depart from the past, the two roles should be separated.

The idea of a body to appoint judicial officers is not indigenous in Kenya and for that matter the history of the JSC is a fairly recent one. A formal establishment of the JSC came into being during the period just before independence. Before that the functions of appointment and dismissal of judicial officers was made by administrators or members of the executive. The institutionalization of JSC as we know it today came about during negotiations for independence. Indeed the Westminster model Constitution provided for JSC whose function was the appointment and dismissal of judicial officers. However on attainment of independence, the Constitution was amended to remove from the JSC the role of dismissing judges. The essence of the amendment was to revert to the imperial constitutional dispensation as it was during the colonial days characterized by concentration and control of appointment powers. The Constitution of Kenya 2010 institutionalized the JSC as an independent commission with the

mandate of appointment, promotion, discipline and dismissal of judges. This mandate gives the JSC discretionary powers to determine the future of judges and if abused could interfere with their individual independence. Chapter three is an appraisal of legal framework for JSC in the performance of its mandate.

The hall mark of a democratic state is the level to which judges have individual independence that enables them promote, protect and enforce human rights against entities that have power over it. This is because this is the cardinal mandate of the JSC to ensure compliance with the law. The judiciary is the only legally constitutionally created institution for the enforcement of fundamental rights and protections as well as the interpretation of Constitution. To the extent that courts in Kenya are unable to enforce human rights violation by the JSC is a serious indictment on the JSC.

However with the wide discretionary powers by the JSC over the judiciary, judges are left with very little protection against the JSC. Moreover, judges do not have the wherewithal to hold the JSC accountable in the phase of human rights violation. This is illustrated in the two cases of *Coletta* and *FIDA*. This is made possible by the reality that the JSC has the power to determine the future of individual judges as it determines the appointment, promotion, discipline and removal of judicial officers. For that reason, the structure of the JSC should be revised so that the JSC does not play conflicting roles of management and oversight. The excessive powers exercised by the JSC over judges interfere with the individual independence of the judges. Chapter four did balance the historical perspective of the JSC and the gap existing in the current legal framework.

Judicial independence is addressed in international and regional legal instruments as well as in soft law instruments. Although legal reforms in Kenya have addressed the majority of weaknesses in the judiciary, the wide powers exercised by the JSC have not been given a lot of attention. To the extent that the judiciary is unable to question human right violation by the Commission. This is a position that is not envisaged in international law because the appointment, promotion, discipline or dismissal of judges should follow clearly laid down criteria. For example those who fail at the interview stage in the appointment stage should be allowed to ask for an explanation

The answer to the problem of the absence of judicial independence in Kenya is found in the adoption of international best practices. This is especially true in the sense that international legal instruments in both hard and soft law all envisage an independent and impartial judiciary as the defender against human rights violation. For that to happen, the body that appoints judges must have sufficient safeguards against either executive or legislative interference. This body in making judicial appointments must use merit, for purposes of promotion; the criteria at play should be seniority and merit. The process of evaluating judges for purposes of discipline should be done either by a single judge or judges voted by their peers to avoid extraneous criteria being brought into play. Lastly security of tenure should apply to both judges and magistrates to avoid a situation where one part of judicial system is susceptible to interference.

## **5.2. Recommendation**

### **5.2.1. Adoption of international best practices**

It is recommended that in the appointment, promotion, discipline and dismissal of judges, international best practices be adopted. This is because, international human rights instruments, standards and principles provide succinct processes through which the appointment of an impartial judicial system can be achieved such as appointment and promotion solely based on seniority and merit. The process of evaluation should as well be a fair process conducted by an evaluation process which has received full participation by the judicial officers.

### **5.2.2. Commissioners who are Advocates should not Practice**

It is recommended that advocates serving as commissioners in the JSC should cease practicing for the time they serve as commissioners in the JSC. The JSC comprises some members who are practicing advocates as representative of the Law Society of Kenya (LSK). These advocates appear before the same magistrates and judges they would interview either for purposes of appointment or promotion. Nothing stops them from exercising their power over the judicial

officers. Indeed it has been reported that some of advocates on the JSC intimidate judicial officers with the effect of compromising their independence.

### **5.2.3. Limit Administrative and Oversight Function of JSC**

It is proposed that the JSC should not be vested with the roles of both management and oversight of the judiciary. The Chief Justice, assisted by the Registrar of the judiciary, should be vested with the administration of the judiciary, while the JSC should be focused on the appointment, selection and discipline of judges. This will have the effect of reducing the potential of the JSC getting embroiled in suits. In addition, complaints about the merits of decisions should not form part of the grounds for disciplinary actions, as these can be resolved through appeal and review to higher courts. Lastly, performance evaluations on quality or merits of judicial decisions should be based on reversal or affirmation of decisions by appellate courts and not merely on the views of the JSC.<sup>341</sup>

### **5.2.4. Delink Management function from Oversight**

It is against this background that the researcher holds the view that the nature of mandate of the JSC (real or perceived) makes it difficult for judicial scrutiny of human right violations by the JSC. The two functions (Management function from oversight) should be separated so that the JSC is left with duties of appointment, selection and discipline of judges. This would have an added advantage of removing JSC from being embroiled in court cases where it has an interest. Complaints on merits of a decision should not form the basis of disciplinary action but instead should be resolved within the appeal or review in higher courts. Furthermore performance evaluation on the quality or merits of judgments should be decided by appellate courts and not the JSC.

### **5.2.5. Constitutional Amendment to give Magistrates Security of Tenure**

It is further recommended that magistrates should be given security of tenure similar to that provided to judges. This is because whereas the Constitution has extended security of tenure to

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<sup>341</sup> Walter Ochieng, :The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya, (2013) 2 *Young African Research Journal (YARJ)* 20.

judges of the High Court, Court of Appeal and the Supreme Court, magistrates have not been provided with any. Legally this can be interpreted to mean that magistrates can accommodate any form of interference in decision making by the legislature and the executive. This exposure is detrimental to the rule of law and the separation of powers in Kenya. Security of tenure is a key indicator of judicial independence and therefore without it for magistrates who deal with the bulk of cases in the courts, all pretences to judicial independence remain a myth.

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## **APPENDIX 1**

### **INTERVIEW GUIDE**

#### **INTRODUCTION**



