



**MEMORANDUM TO THE JUDICIAL SERVICE COMMISSION
ON THE RECRUITMENT OF
THE CHIEF JUSTICE AND SUPREME COURT JUSTICE OF THE REPUBLIC OF
KENYA**

March 2021

SUBMITTED BY:

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Introduction

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit, non-partisan, and member-based organisation founded in 1959. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya, and has a membership drawn from the Bar and the Bench. ICJ Kenya promotes human rights, democratic governance, justice, and the rule of law in Africa. ICJ Kenya believes in and is guided by Inclusivity, Integrity, Commitment, and Professionalism ideals.

In furthering our vision and mission, ICJ Kenya submits this memorandum to the Judicial Service Commission (JSC) on the Chief Justice and Supreme Court Justice of Kenya's recruitment process. Our views are premised on the principles and best practices of international and regional instruments on judges' appointment and selection.¹

Whereas the First Schedule to the Judicial Service Act, 2011 has outlined the criteria for recruitment of the Chief Justice and Supreme Court Judge, this memorandum has highlighted the salient priority issues for JSC's consideration during the current recruitment process, which are informed by public consultations and dialogues forums.

Background

On October 19, 2016, retired Chief Justice Maraga was sworn in as the Republic of Kenya's fifteenth Chief Justice. He was the second Chief Justice to serve under Kenya's 2010 constitutional dispensation. After 17 years of service, Rtd. Chief Justice David Maraga's tenure came to its end on Monday, January 11, 2021.

On January 20, 2021, the Judicial Service Commission (JSC) advertised the positions of the Chief Justice and the Judge of the Supreme Court of Kenya. This followed the vacancies' declaration of Gazette Notices No. 386 and No. 1606 dated January 18, 2021, and February 21, 2020, respectively.

On February 10, 2021, the JSC issued a statement on the applications received for vacancies in the Chief Justice and Judge of Supreme Court offices. The JSC received thirteen (13) applications for the position of the Chief Justice and nine (9) applications for the position of the Judge of the Supreme Court. Pursuant to the First Schedule of the Judicial Service Act, the JSC shortlisted candidates for interviews for appointment to judge the Supreme Court of Kenya.

The shortlisted candidates will be interviewed in April 2021. It is against this background that ICJ Kenya submits the following select issues for consideration by the JSC:

1. Kenya's want a Chief Justice with a regional orientation

Based on a series of consultative dialogues with civil society, academia, and the public on the kind of Chief Justice they would want for Kenya, it was evident that a Chief Justice with a regional orientation would be ideal. Not only is Kenya an important actor in the great lakes region but also because Judicial independence in the region has come under severe threat across the African continent. Attacks

¹ <https://thecommonwealth.org/sites/default/files/press-release/documents/Compendium%20on%20Judicial%20Appt%20Tenure%20and%20Removal%20in%20the%20Commonwealth.pdf>;

against the Judiciary have increased both at the institutional and personal level attributed to cumulative socio-political tensions. Yet, Judicial independence is a vital pillar in any constitutional order. Within the region, the political elite continues to underplay the Judiciary's role in ensuring that justice is administered fairly and transparently, especially in political contestations.

For example, in 2019 and the Democratic Republic of Congo (DRC), Hon. Justice Yanyi was killed after presiding over the high-profile corruption trial of Vital Kamerhe, the President's chief of staff. In Uganda, the constitutional court noted that the Judiciary's independence was in jeopardy because of budget cuts; the court found that funding to Judiciary in Uganda was inconsistent with the law. (***Ayena Odongo v The Attorney General & Anor (Constitutional Petition-2017/30) [2020] UGCC 2 (07 February 2020)***). In South Sudan, President Salva Kiir's summarily fired fourteen senior judges without input from the JSC. In Malawi, the Chief Secretary to Government attempted to send the Chief Justice and one other Supreme Court Judge on compulsory leave pending their retirement following the Supreme Court's decision nullifying the results of the 2019 presidential election. In Côte d'Ivoire, the Constitutional Council approved President Alassane Ouattara's bid for a third term in office amid violence, revealing executive influence on the Judiciary.

Therefore, the Republic of Kenya's next Chief Justice will be expected to play a critical role in ensuring judicial independence in the region is respected and observed. Through the Chief Justices Forums, for example, judiciaries are emboldened to issue decisions to protect the rule of law, human rights, and democracy, most of which are unpopular with the political class. Kenya's stability is vital in the African continent and the Great Lakes Region. Kenya has always played a significant role in establishing and strengthening the African Union and trade within Africa. Presently, Kenya chairs the East African Community (EAC), and it is essential to enhance collaboration between the judiciaries in the region to promote efficiency in the delivery of justice.

2. Observation and Monitoring of the Interview Process

ICJ Kenya humbly proposes that the JSC invite international, regional, or national professional bodies or associations to monitor and observe the Chief Justice and Supreme Court Judge's in-person interviews. These institutions or bodies may be requested to present reports or scorecards of the process based on their conformity assessment with the relevant constitutional, regional, or international standards. ICJ Kenya opines that this will bolster JSC's legitimacy. Further, the feedback mechanism would potentially strengthen its internal interview processes.

In seeking such targeted public participation in the interview process, the legitimate expectation is that these independent bodies will use objective criteria that will cover not only the academic and professional qualifications but also the candidate's values, philosophy, and judicial ethos. The qualifications at the very least should mirror the provisions espoused in the international frameworks, including but not limited to the ***UN Basic Principles on the Independence of the Judiciary***², ***the Bangalore Principles***³, ***IBA Minimum Standards of Judicial Independence***,⁴ ***the Latimer House Principles***,⁵ ***the Lilongwe Principles, and Guidelines on the Selection and Appointment of Judicial Officers***,

² <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>

³ https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

⁴ IBA Minimum Standards of Judicial Independence, retrieved from <https://bit.ly/3eHWaJV>

⁵ <http://kenyalaw.org/treaties/treaties/57/Commonwealth-Latimer-House-Principles-on-the-Three>

Regionally, the Cape Town⁶ and Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers⁷ provide a good benchmark – they comprise fifteen core underlying principles. The main principles include merit, fairness, transparency, and rationality of the appointment. These offer critical indicators to institutions monitoring the interviewing process.

3. Transparency and Public Participation the Interview Process

Whereas the Judicial services Act contemplates a public interview⁸ process as read together with the relevant criteria contained in *the Constitution of Kenya 2010* and the *Judicial Service Act (First Schedule⁹)*, ICJ Kenya contends the institutionalised practice of broadcasting the interviews live should continue and public given online access to the interview process.

Transparency is a core principle in the recruitment of Judges to ensure integrity, legitimacy, and accountability of the recruitment process. A transparent process or framework enables stakeholders to engage at all relevant stages, including the interview stage. During the public dialogue forums, Kenyans expressed that they wished to interrogate the recruitment framework; however, many did not participate in the process due to a lack of understanding or how to engage with the process.

In this regard, ICJ Kenya recommends that the JSC should break down the criteria contemplated in the First schedule of the Judicial Service Act, 2011 to the public to support constructive and meaningful public participation in the process of interviewing the next Chief Justice and Judge of the Supreme Court. The JSC, in the short term, can explain the import of the criteria through media talk shows. In the longer-term, the JSC must strengthen its public outreach strategy for legitimacy, build public support and trust in the recruitment process by convening townhall sessions (online and physical) and structured media engagements.

4. The need to bolster public confidence in the Judiciary and the apex court

The recruitment process of the Chief Justice and Supreme Court Judge must also be **legitimate** in the eyes of the public if the courts are to build and retain the trust and secure the voluntary co-operation of the public to guarantee the orderly administration of justice. In this sense, the responsibility of judges for '**engendering public confidence,**' as it is expressed in the **Commonwealth Latimer House Principles**, is inextricably bound up with their responsibility for upholding the rule of law.

Therefore, the incoming Chief Justice, the third under the Constitution 2010, will have an uphill task to better the relationship with other arms of government and address monumental issues, including funding gaps and corruption in the Judiciary. The Judiciary will also play an essential role in determining the political contestations in various public offices in the 2022 general elections. As such,

⁶ https://www.biicl.org/documents/868_cape_town_principles_-_feb_2016.pdf?showdocument=1;

⁷ The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers, retrieved from <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf> The principles which were adopted by the Southern African Chief Justices' Forum in 2018 and supported by the Global Judicial Integrity Network in 2018-2019.

⁸ Judicial Service Act, 2011, First Schedule, Part IV, Clause 10(5)

⁹ First Schedule Part V

the Chief Justice will be critical in ensuring political stability in the country post-2022. Agreeably and alluded to earlier, Kenya's political stability is crucial to Kenyans and the larger great lakes region.

Similarly, concerning the Supreme Court Justice, Kenya's expressed the view that the current Supreme Court has not realised its full potential as the apex Court in Kenya and regionally by curving its space in the global or regional jurisprudential arena. Thus, Kenyans' legitimate expectation that the Supreme Court Judge's key attribute during the recruitment process must be someone who can boldly contribute to the collective intellectual development of home-grown jurisprudence and the advancement of law in the region.

5. Equality and Inclusion Principle

ICJ Kenya acknowledges the need to foster gender equality within the judiciaries in the appointment and selection process to strengthen the administration of justice. This will be in line with regional instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, popularly referred to as the Maputo Protocol.¹⁰

Article 10 of The UN Basic Principles on the Independence of the Judiciary declares that judicial appointments may not be based on discrimination on the grounds of race, color, sex, religion, political or other opinions, national or social origin, property, birth, etc. status.¹¹ According to the **Commonwealth Latimer House Principles, Principle IV(a)**,¹² judicial appointments should be made based on clearly defined criteria and a publicly declared process. The process should ensure:

- i. equality of opportunity for all who are eligible for judicial office;
- ii. appointment on merit; and
- iii. Appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

Equally, ICJ Kenya contends that the JSC should ensure gender equality as articulated under Goal 5 of the Sustainable Development Goals (SDG), which recognises the need for the provision of women and girls with equal access to education, health care, decent work, and representation in political and economic decision-making processes. Goal 16 is dedicated to promoting peaceful and inclusive societies for sustainable development, providing access to justice for all, and building effective, accountable institutions at all levels.

In this regard, the JSC should ensure that equality and inclusion principles are key considerations in recruiting the Chief Justice and the Supreme Court Judge. This will enhance the Judiciary's legitimacy by reflecting the diversity and inspiring public confidence in the judicial institution.

¹⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (the Maputo Protocol), was adopted on July 11, 2003 to complement and strengthen the articles of the African Charter related to the protection and promotion of women's rights. It is an important instrument of reference given its broad provisions that seek to protect the rights of women, and it is a symbol of the commitment of African States' to end discrimination, violence, gender stereotypes against women and other violations against women.

¹¹ Art 10. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, art A.4.(j), the Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region, art 13 and the Committee of Ministers of the Council of Europe, Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities, para 45

¹² Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice <https://thecommonwealth.org/sites/default/files/press-release/documents/Compendium%20on%20Judicial%20Appt%20Tenure%20and%20Removal%20in%20the%20Commonwealth.pdf>

6. The Diversity Question

ICJ Kenya acknowledges the need for JSC to ensure that the judicial bench reflects the society in all respects and may actively prioritize selecting candidates who enhance the diversity of the bench. However, JSC must be careful in applying the diversity principle by avoiding ethical bias and political considerations. Further, whereas diversity is an essential consideration in selecting the next Chief Justice and Supreme Court Justice, it is critical to factor in numerous other fundamental principles such as gender equality and inclusion.

7. Independence of the Commission in decision-making and access to information

To safeguard the Judiciary's institutional independence and accountability in the practical application of the separation of powers principle, the JSC recommends judges for appointment by the President, except for the Chief Justice and the Deputy Chief Justice. The National Assembly must approve their appointment.¹³ These dual roles make the JSC a powerful actor in determining judicial appointment outcomes in the Kenyan context.

The UN Special Rapporteur on the Independence of Judges and Lawyers in the 2009 report observed that:

"... the composition of the judicial appointing commissions matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges,"¹⁴

In the 2009 report, the report further points out the danger of a commission that is effectively under political control:

"... if the body is composed primarily of political representatives, there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the government exerts its influence indirectly."

The public has a right to know how its judges are selected.¹⁵ A transparent process may be achieved by demonstrating openness in the selection process and steps taken towards scrutiny and review of individual cases at any citizen's request. The constitution contemplates the right to access information as a fundamental right¹⁶, including of individual candidates. Therefore, collective transparency is needed, not only for the sake of disappointed candidates who are not appointed but also for the broader purpose of enabling interested parties and public members to scrutinize how the Commission

¹³ Article 172(1)(a) of the Constitution.

¹⁴ Annual Report 2009 (n15), para 28.

¹⁵ Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para 21

¹⁶ Article 35 (1) of the Constitution of Kenya, 2010

discharges its mandate.¹⁷ In this regard, providing reasons for selecting judges by the JSC is critical to ensure transparency and accountability. In South Africa, the Courts have noted that the JSC may be required to give reasons for its final decision, at least in circumstances in which judicial vacancies were left unfilled after the Commission had invited and publicly interviewed several well-qualified candidates.¹⁸

In sum, ICJ Kenya opines that the JSC should proactively provide a general picture of its approach and interpretation of the selection criteria and the candidates' scorecards. It includes making its advisory and recommendation to the President and Parliament public upon request. However, regional guidelines recommend that the deliberations within the JSC should remain private.¹⁹ This has been further provided for in the Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary.²⁰ This has been confirmed by the High Court decision in the South African case of *Helen Suzman Foundation v Judicial Service Commission and Others [2014]*²¹. In this case, the bench ruled that it is unjustifiable for the JSC to make a blanket ban on all disclosures. Instead, the JSC can make the fact-specific justification for non-disclosure. This is critical in an open and democratic society in which the rule of law and the values of accountability, responsiveness, and openness are paramount.

8. Leadership and Integrity of the Judges

Informed by the public dialogues, Kenyans have expectations of what the next Chief Justice of Kenya should prioritise and address upon assumption of office. These include providing leadership in jurisprudence, reducing case backlog, resource mobilisation, and eradicating corruption in the Judiciary. The JSC ought to recommend candidates who can provide solid and sound leadership coupled with character (good ethics, courage, and boldness) and proficiency in management and administration of the Judiciary. These are the areas that matter to the public.

Therefore, the persons recommended for an appointment must be suitable for the role they are to perform. Their responsibility for upholding the rule of law means that multiple qualities are required, as the ***Commonwealth Latimer House Principles recognise in the opening sentence of Principle IV – Independence of the Judiciary:***

"An independent, impartial, honest, and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice."

The qualities of independence, impartiality, honesty, and competence are directly related to judges' ability to uphold the rule of law. They dispense justice by performing their daily tasks of controlling

¹⁷ J. van Zyl Smit, (2015) *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law). The British Institute of International and Comparative Law Charles Clore House, 17 Russell Square, London WC1B 5JP

¹⁸ *Judicial Service Commission and Another v Cape Bar Council and Another [2012] ZASCA 115; 2013 (1) SA 170 (SCA)*.

¹⁹ Principle 13 of the Cape Town Principles on role of independence Commissions in Selection and Appointment of Judges in the Commonwealth stipulates *"The procedures for deliberation by the commission should enable it to come to a reasoned decision in matters of selection. Deliberations should take place in private, but a sufficient record of proceedings must be kept. The commission should communicate its selection decisions to the final appointing authority, if any, without undue delay"*.

²⁰ Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary, II.9. retrieved from https://www.ency.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf

²¹ *ZAWCHC 136; 2015 (2) SA 498 (WCC)*.

court proceedings, determining questions of fact and law, and holding other branches of government to account. The selection criteria and processes in place must be a reliable means of identifying candidates with these characteristics.

9. The Merit Question

The JSC appointments should primarily be made based on merit to increase public confidence in the Judiciary. The requirement to ensure that judicial appointees meet the minimum standards of competency, diligence, and ethics is critical to ensure effective and just decision-making and the Judiciary's integrity. The principle to conduct recruitments on a meritorious basis is central to international declarations and statements on the Judiciary. For example, in the **IBA Minimum Standards of Judicial Independence**, it is declared that "[s]election of judges shall be based on merit."

In a 2013 report, the Commonwealth judicial and legal associations found that there is a "remarkable uniformity of view about what criteria make a person fit for judicial office' among member states."²² The report sets out a Model Clause for judicial appointments commissions which includes the following list of criteria based on the current practice of Commonwealth states:

"intellectual capacity; integrity and independence; judgment; objectivity; an ability to understand and deal fairly with all persons and communities served by the Courts; authority and communication skills; and efficiency."

The Model Clause does not claim to provide an exhaustive list of criteria. Still, it does indicate that a candidate's intellectual abilities, moral qualities, and practical skills are all relevant to merit determination. There may also be a need for additional criteria when filling the position of Chief Justice or other senior positions with significant leadership responsibilities.²³

10. Essential Qualities and Characteristics of the Incoming Chief Justice

ICJ Kenya is cognisant of the political context in which the incoming Chief Justice will be required to navigate. On September 1, 2017, President Uhuru Kenyatta, in a rally in Nairobi, accused the Supreme Court of ignoring the people's will and publicly reprimanded the Judges of the Apex Court. He promised to 'revisit' the issue and fix the Judiciary for having overturned the presidential election.²⁴ Since this event, the Judiciary has had its budgets significantly reduced. From ICJ Kenya's analysis, there have been unjustified rhetorical attacks on the Judiciary at both personal and institutional levels and well-choreographed social media propaganda to tarnish judges' reputations. Therefore, in addition to the provided constitutional and legal criteria, ICJ Kenya recommends that the JSC should also consider the following in the recruitment process;

²² Karen Brewer, James Dingemans and Peter Slinn, *Judicial Appointments Commissions: A Model Clause For Constitutions* (report on behalf of the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, 2013) (hereafter Model Clause)

²³ Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2006), 8–9.

²⁴ See 'Uhuru Kenyatta to Court: "We Shall Revisit This"' retrieved from <https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html> on 15 March 2021

10.1. Reconfiguring relationships with the Executive and Legislature

The continued defiance of court orders by the Executive has hampered judicial independence by the Executive.²⁵ In this regard, Kenyans expect a Chief Justice that will be bold and courageous and prioritise the needs of the common *mwananchi* while coming up with the solution to defiance of Court orders. The Chief Justice should exhibit skills in political strategy and have political access. The persons should have the ability to engage the other two heads of the Executive and Parliament on the Judicial independence, particularly, disobedience of Court orders and judicial funding – which are perpetual problems that stem from the fragmented relationship between the Judiciary and other arms of government. While this is so, the Chief Justice should prioritise unifying the people of Kenya.

10.2 Resource mobilisation and development

Following the August 8, 2017, presidential election annulment, the Executive slashed the Judiciary budgetary allocation and several independent constitutional offices. The government rationalised this budgetary allocation reduction because it needed money for the repeat presidential elections and enhanced free-day secondary education.²⁶ This intentional withholding of funds from the Judiciary shows that the institution continues to be under-resourced, thus compromising its ability to deliver justice effectively.

To address resource mobilisation and development issues, the incoming Chief Justice must have impeccable interpersonal skills and emotional intelligence to increase confidence amongst peers and enable engagement with stakeholders at all levels, including development partners, civil society, and the public large.

Conclusion

The Judiciary function is to interpret and apply national constitutions and legislation, consistent with international and regional human rights standards, to the extent permitted by each country's domestic law. ICJ Kenya notes that there is a need to ensure that the right people are appointed to fill the positions of Chief Justice and Judges of the Supreme Court of Kenya. It is in this regard and in addition to the preceding observations, ICJ Kenya wishes to reiterate the following critical points for JSC considerations:

1. That the JSC circulates the advisory to the public on the candidate's suitability presented to the President and Legislature. This will bolster the transparency and legitimacy question;
2. Makes public the deliberations of the JSC and final score sheet;
3. Takes a longer-term approach to educate the public on the recruitment processes of judicial officers.

---End---

²⁵ See P.O. Ogemba 'Matiba's Death Epitomize Frustration Former Detainees go Through to get Compensated' retrieved from <https://www.standardmedia.co.ke/article/2001277150/matiba-s-death-epitomize-frustration-former-detainees-go-through-to-get-compensated> on 15 March 2021

²⁶ See W. Menya, 'Treasury CS Raids Judiciary Cooffers to Fund Presidential Poll,' retrieved from <https://www.nation.co.ke/news/Treasury-CS-raids-Judiciary-cooffers-to-fund-election/1056-4119008-e5wtec/index.html> on 15 March 2021