

## Annual Survey of International & Comparative Law

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Volume 19 | Issue 1

Article 7

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2013

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### Recommended Citation

Thuki, Njeri (2013) "A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England," *Annual Survey of International & Comparative Law*: Vol. 19: Iss. 1, Article 7.  
Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol19/iss1/7>

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# A COMPARATIVE ANALYSIS OF JUDICIAL COUNCILS IN THE REFORM OF JUDICIAL APPOINTMENTS BETWEEN KENYA AND ENGLAND

NJERI THUKU<sup>1</sup>

## I. INTRODUCTION

...The Council has, however, learnt with profound shock that William Tuiyott, who has been serving as a Chief Magistrate in Kisii, has also been appointed judge...Mr. Tuiyott has all the qualities that render a person unfit for appointment to a judicial office...Mr. Tuiyott's appointment as judge is a significant step in the wrong direction in the administration of justice in Kenya. Mr. Tuiyott's rise as a magistrate is, by itself the subject of considerable interest. Mr. Tuiyott, who has no formal training in the law, served as an interpreter in the African Native Courts until these courts were abolished in 1967...Between 1993 and 1994, Mr. Tuiyott had an accelerated promotion: within one year he was promoted to Principal Magistrate, then to Senior Principal Magistrate and finally to Chief Magistrate, the highest rank in the magistracy. His performance, like his promotion, has been most questionable...Mr. Tuiyott's contribution to the

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1. Magistrate, Njeri Thuku Kenyan Judiciary. The opinions expressed in this paper are the views of the author and do not necessarily reflect the views or opinions of the Kenya Government or of the Kenyan Judiciary. All statements and information used in this paper are drawn from the public record. I would like to thank Prof. Okeke and Prof. Hamed Adib Natanzi for their guidance and feedback in the writing of this paper.

administration of justice, is to say the least nil. His elevation to high judicial office is an affront to honesty and hard work.<sup>2</sup>

This is the reaction of the chairperson of the Law Society of Kenya (hereinafter "LSK") when Judge Tuiyott was appointed to the Kenyan Bench as a judge in 2000 by President Daniel Toroitich arap Moi. The LSK is the local Bar Association in Kenya that all lawyers admitted to the Bar join; it has membership nationwide.<sup>3</sup> The Council he refers to is the leadership of the LSK comprised of the Chairperson, Vice-Chairperson and other members.<sup>4</sup> The outrage expressed by the LSK chairperson reflects what civil society and activist groups felt at the time.

There is much interest globally in how judicial officers are selected because justice is a central pillar in every country. In this paper, I use the term "judicial officers" to refer to both judges and magistrates. Different methods are used by different countries to select judges, but the goal, regardless of the method, is to have judges and magistrates who can carry out their duties well. The general public must also have faith in the justice system because, if they do not, chaos and anarchy will reign as people take the law into their hands and resort to street justice.

In this paper, I focus on the selection of judicial officers using judicial commissions. These judicial commissions are also referred to as "judicial councils" or "merit commissions," so for the purposes of this study, these three terms are synonymous. This paper focuses on Kenya and England because they have taken similar paths to judicial reform. For example, they both added an extra tier to the hierarchical structure and therefore both have a Supreme Court. They both have robust judicial commissions that have changed the selection of judicial officers. However, the judicial commission in Kenya, known as the Judicial Service Commission (hereinafter "JSC") selects both magistrates and judges who must have had legal training and passed the Kenyan Bar exam. The judicial commission in England, referred to as the Judicial Appointments Commission (hereinafter "JAC"), only selects judges. Though Kenya is a former British colony and part of the Commonwealth, it did not transplant the JAC from England in its reforms. In fact, Kenya's JSC pre-dates the JAC in England but was re-constituted and strengthened in

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2. *LSK reacts to Tuiyott's Appointment*, THE LAWYER, July 2000, at 8-9. See also KOIGI WA WAMWERE, JUSTICE ON TRIAL: THE KOIGI CASE 42-70 (Views Media 1997).

3. About LSK, <http://www.lsk.or.ke/index.php/about-lsk> (last visited March 22, 2013).

4. *Judges Appointed*, THE LAWYER, July 2000, at 3. The opening line stated, "On 2<sup>nd</sup> June, 2000 President Moi appointed three more judges to the High Court of Kenya. They are Lady Justice Rawal, Justices Hewett and Tuiyott." See also *Our Organisational Structure*, <http://www.lsk.or.ke/index.php/our-organisational-structure> (last visited April 19, 2013).

2010. Nevertheless, the JSC has a slight resemblance to the JAC. These two countries also demonstrate the success of judicial councils in both a developed and stable democracy as well as in a developing and fragile democracy.

The purpose of this study is to compare the contributions to judicial reforms that both judicial commissions have made in their respective countries. The JSC in Kenya has been functioning for two years, having officially started its duties in February 2011. Drawing on lessons from the JAC, the JSC's performance in its first two years, and lessons from judicial councils globally, I make recommendations that, if implemented, will strengthen the JSC.

By undertaking this analysis, I am guided by Canadian Professor Lorraine Weinrib, who writes, “[T]he relationship between the nature and quality of adjudication and the design of judicial appointment powers is, surprisingly, a relatively un-studied topic.”<sup>5</sup> If the opening account of Judge Tuyiott’s appointment in Kenya is anything to go by, then Professor Weinrib’s assessment holds merit. How judges are chosen reflects not just their decisions, but also their conduct on the Bench. Public perception of the judicial system and whether the public population feels they will get justice when they come to court is a matter for consideration in the selection of judges.

Professor Carl Baar, also from Canada, opines, “Comparative study, like a liberal education, is always good for you. It is supposed to broaden your perspective by helping you understand how others think about the world and operate within the worlds they have created in the past or are creating for the future.”<sup>6</sup> He cautions, however, that a comparative study can narrow one’s view into traditional frameworks and draw attention away from other factors that are significant when making the comparison.<sup>7</sup> While the substance of this paper is a comparative study, I have taken Carl Baar’s advice to steer clear of superficial comparisons. Instead, I look critically at the distinctive characteristics of the judicial commissions in both Kenya and England from a historical perspective, considering how the judicial commission operates now and the results of its work on the Bench in both countries.

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5. Lorraine Eisenstate Weinrib, *Appointing Judges To The Supreme Court Of Canada In The Charter Era: A Study In Institutional Function And Design*, in *APPOINTING JUDGES: PHILOSOPHY, POLITICS, AND PRACTICE*, 109, 109 (Ontario Law Reform Commission, 1991).

6. Carl Baar, *Comparative Perspectives on Judicial Selection Processes*, in *APPOINTING JUDGES: PHILOSOPHY, POLITICS, AND PRACTICE*, 143, 143 (Ontario Law Reform Commission, 1991).

7. *Id.* at 144.

In order to appreciate the function of judicial commissions and the key role played in judicial appointments in Kenya as well as in England, it is important to have an understanding of its definition. Professors Nuno Garoupa and Tom Ginsburg define judicial councils as “an international ‘best practice’ designed to help ensure judicial independence and external accountability.”<sup>8</sup> They hold the view that the makeup of judicial councils is primarily to shield the selection of judges from the politics involved, while at the same time instilling a measure of accountability.<sup>9</sup> Professor John O. Haley makes the same point in his study of the formation of judicial councils in Latin America, which were introduced as part of reforms. His position is that minimizing the political influence in systems often results from the reform of judicial councils – where the presidents appoints judges, citing the example of the appointment of federal judges in the United States.<sup>10</sup> Francois du Bois, while referring to the JSC in South Africa, complements this definition by describing a judicial commission as a mixed body that can both decide and recommend. Du Bois’ view is that a judicial commission achieves the balance between independence and accountability.<sup>11</sup>

In 1946, France was the first to have a body like a judicial commission that addressed the selection of judges and magistrates – called the *Conseil Superior de la Magistrature*.<sup>12</sup> In 1958, Italy was the next country to have an organ similar to a judicial council, named the *Consiglio Superiore della Magistratura*.<sup>13</sup> It is fascinating to note that these early developments took place in civil law countries, yet in the twenty-first century, the use of judicial councils is accepted in both civil and common law countries.<sup>14</sup> The fascination arises because it demystifies a notion that judicial councils are a preserve of common law countries and because they are a common feature in countries that were former British colonies. Basically, Britain had a constitutional template that was used for almost every country in Africa that agitated for independence. Interestingly, this template had the requirement for a judicial council.

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8. Nuno Garoupa & Tom Ginsburg, *Guarding The Guardians: Judicial Councils And Judicial Independence*, 57 AMJCL 103, 103-104(2009).

9. *Id.*, at 106.

10. John O. Haley, *Judicial Reform: Conflicting Aims and Imperfect Models*, 5 WAUGSLR 81, 86 (2006).

11. François du Bois, *Judicial Selection in post-Apartheid South Africa*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, 280, 285, (Kate Malleson & Peter H. Russell eds., 2006), 285.

12. Haley, *supra* note 10. See also Garoupa & Ginsburg, *supra* note 8.

13. Garoupa & Ginsburg, *supra* note 8, at 107.

14. Owen M. Fiss, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, (Irwin Stotzky ed.) 55, 56 (1993).

Judicial councils are also found in developing as well as developed countries, though their composition and mandate differ from one country to another.<sup>15</sup> It is significant to find judicial councils in both developed and developing countries because it shows that judiciaries in these countries face similar challenges; they are not necessarily worse in a developing country in comparison with a developed country. This may make it seem as though every country should aim to establish a judicial council as a method of selecting judges, but a judicial council may not be appropriate for every unique legal system of every country. In other words, different government structures appeal to different people.<sup>16</sup> Accountability and independence should be the ultimate goals when selecting judicial officers, whatever that method of selection may be.

Chapter 1 gives the historical background of how judicial officers were selected in Kenya from the time of British colonization, beginning in 1895, until independence in 1963. Chapter 1 also examines the historical background of the development of judges in England before shifting to the Lord Chancellor's central role in the appointment of judges. The Constitutional Reform Act of 2005 reformed that role, which reduced his influence in the selection of judges.

Chapter 2 discusses the factors that triggered changes to the systems of judicial appointment in both countries—Kenya and England. The approaches differ; in Kenya, the reform of judicial appointments had been discussed by the public and especially non-profit organizations, so public opinion supported this change.<sup>17</sup> In England, however, the public was not fully prepared for the changes and initially resisted having a judicial commission.

Chapter 3 looks in depth at the pre-2010 JSC and the post-2010 JSC in Kenya. The division is the promulgation of a new Constitution on August 27, 2010 after a referendum. This Constitution brought fundamental changes to the Judiciary and the JSC.<sup>18</sup> A similar change took place in England and Wales when the Constitutional Reform Act, 2005, which

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15. Kate Malleson, *Introduction*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, (Kate Malleson & Peter Russell eds.) 3, 7, (2006).

16. Definition of different in Oxford Dictionaries (British & World English) [http://oxforddictionaries.com/definition/different?q=different+strokes+for+different+folks#different\\_4](http://oxforddictionaries.com/definition/different?q=different+strokes+for+different+folks#different_4) (last visited March 23, 2013).

17. Strengthening Judicial Reforms in Kenya Volume III: The Public's Perception and Proposals on the Judiciary in the New Constitution, [http://pdf.usaid.gov/pdf\\_docs/PNACW006.pdf](http://pdf.usaid.gov/pdf_docs/PNACW006.pdf).

18. Editorial, *Promulgation Marks Beginning of Constitutionalism*, KENYAN WOMAN, Sept. 2010, at 1, <http://www.awefs.org/dmdocuments/KenyanWoman/Kenyan%20Woman%2009.pdf>.

contains the framework for the JAC, became law.<sup>19</sup> I also explore the JAC's composition along with the changes it brought to the Bench.

In chapter 4, I consider other methods of selecting judges that are used in other jurisdictions that yield results surprisingly similar to what judicial councils achieve. I consider judges choosing judges, appointments by election, executive appointments of judges, and legislative appointments. For each of these methods, I focus on a specific country to demonstrate that on each continent, in both civil and common law countries, there are many lessons to learn. Chapter 5 highlights some recommendations primarily for the JSC in Kenya, which is in its formative years but also for any other judicial commission that wants to strengthen its mechanisms. Finally, in Chapter 6, I present closing thoughts in my conclusion.

## II. HISTORICAL BACKGROUND OF BOTH KENYA AND ENGLAND

### A. KENYA: 1884 TO 1963

The history of Kenya, according to Westerners, began after the Berlin Conference in 1884-1885, when the partition of Africa by European powers took place.<sup>20</sup> Borders that were drawn at the time defined the countries in Africa as they exist even today.<sup>21</sup> Inside these borders lived different communities that, for generations prior to the arrival of Europeans, had devised a way of resolving disputes.<sup>22</sup> However, when the British arrived, they brought their own methods of government, including a judicial system.<sup>23</sup> In modern parlance, this is known as a transplant.<sup>24</sup> The new judicial system that was imposed on the people of

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19. Constitutional Reform, <http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/constitutional-reform> (last visited March 23, 2013).

20. George N. Njenga, *A Synopsis of the History of Kenya before Colonisation*, 22 (2010), <http://www.digital.library.strathmore.edu/xmlui/bitstream/handle/123456789/1167/History%20of%20Kenya%20-%20GN.pdf>.

21. *Id.* at 4.

22. See Sarah Kinyanjui, *Restorative Justice in Traditional Pre-Colonial Criminal Justice Systems in Kenya*, 10 *TRIBAL L. REV* 1 (2009-2010), <http://tlj.unm.edu/volumes/vol10/Kinyanjui.pdf>.

23. SIR FRED PHILLIPS, *CVO, QC, THE MODERN JUDICIARY: CHALLENGES, STRESSES, AND STRAINS* 1-6, (Wildy, Simmonds & Hill Publishing 2010). At page 3, Sir Phillips, expounding on how the laws were devised for the British colonies, explains, "The laws on the matter were normally set out in imperial and local statutes handed down by the British Government; and these laws made provision for the hierarchy of the courts to be set up and for judges that would man them."

24. LEONARD C. KERCHER, *THE KENYA LEGAL SYSTEM: PAST, PRESENT, AND PROSPECT*, 4 (University Press of America 1981). At page 4, writing about the colonial criminal justice system but it applies to the whole process, Kercher states, "This was essentially a cultural transplant alien to the African mind and experience prior to the colonial presence, and was superimposed upon the informal, conciliatory system of controls and sanctions indigenous in most pre-colonial African societies." See also Weinrib, *supra* note 5, at 112. She writes, "The appointment process for the

Kenya allowed them to keep their own judicial system, which the British labeled ‘native courts,’ using a system known as ‘indirect rule’. Leonard Kercher explains indirect rule as “utilizing where feasible...the traditional system of indigenous courts (variously referred to as “native,” “African” or “local” courts).”<sup>25</sup>

The history of the Kenyan Judiciary as it exists today can be traced to 1895, when Kenya became a British Protectorate.<sup>26</sup> Judge Jackton Ojwang’, a Kenyan professor who joined the Bench and is now a Supreme Court judge explains, “Kenya’s judicial experience in the colonial days started with a pluralistic court system, with separate arrangements for Africans, Muslims and Europeans.”<sup>27</sup> He writes that the Governor, who ruled over the colony, appointed judges on behalf of the Crown and that these judges derived their security of tenure from Britain.<sup>28</sup> Thus, the colonizing country had a strong influence on how the governing institutions were established on the colony.<sup>29</sup> In 1920, Kenya officially became a colony and, to assist them, the British used the laws they had brought from Great Britain to India and finally took these same laws to Kenya.<sup>30</sup> These Indian laws were transplanted en masse with minimal changes; for example, the British would substitute the word “India” for “Kenya.”<sup>31</sup> With regard to the legal system, the British set up in Kenya the same courts that existed in Great Britain in the late nineteenth century and early twentieth century.<sup>32</sup>

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Supreme Court of Canada derives from the British system. Unfortunately, in its transplantation to Canada the procedure appears to have lost its institutional strengths.”

25. KERCHER, *supra* note 24, at 5. See also Weinrib, *supra* note 5, at 112. The author’s sentiments that questions the success of transplantation of the British legal system to Canada reflect the situation in Kenya as well.

26. KERCHER, *supra* note 24, at 10. See also Define Protectorate at Dictionary.com, <http://dictionary.reference.com/browse/protectorate> (last visited March 25, 2013). A protectorate is a state or territory that is partly protected or controlled by a stronger state.

27. Jackton Ojwang’, *Government and Constitutional Development in Kenya, 1895-1995*, in KENYA: THE MAKING OF A NATION: A HUNDRED YEARS OF KENYA’S HISTORY, 1895-1995, 148, 156 (Bethwell Ogot & W. Ochieng eds., 2000).

28. *Id.* at 156.

29. See generally MARTIN J. WIENER, AN EMPIRE ON TRIAL: RACE, MURDER, AND JUSTICE UNDER BRITISH RULE 1870-1935 193-221, (Cambridge University Press, 2009).

30. *Id.* at 200. Kenya was initially called East Africa Protectorate, but this name later changed to Kenya. See also History of Kenya, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21> (last visited March 25, 2013).

31. Mathieu Deflem, *Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast and Kenya*, in POLICE STUDIES, Vol. 17(1) 45, (1994), <http://www.cas.sc.edu/soc/faculty/deflem/zcolpol.html> (last visited March 25, 2013). He discusses how criminal law and procedure was transplanted from India to Kenya.

32. WIENER, *supra* note 29, at 215.



These two types of courts, native and colonial, were meant for different people and were also staffed differently.<sup>33</sup> In writing about these arrangements, Judge Ojwang' states,

...the main feature of the judicial system became the distinction that was made between native courts and official courts. The former dealt with matters involving African parties and customary claims; while the official courts applied English law and statute law, and were set in a structure which provided for appeals right up to the Judicial Committee of the Privy Council in England.<sup>34</sup>

Therefore, the magistrates and judges who sat in the courts that applied English law were all male, white, and British.<sup>35</sup> Because of the parallel court system, no Africans sat in the courts imposed by the British.<sup>36</sup> After Kenya's independence, a process known as 'Africanization' of the Bench gradually happened as more Kenyans joined the legal profession, both on the Bench and the Bar.<sup>37</sup> The Kenyan Bar, as at independence in 1963, was comprised of predominantly British men, hence Africanization as more Kenyans attained law degrees and joined the Kenyan Bar. This came as a result of the abolition of parallel courts so that there was only one court for all people not two separate courts based on race.<sup>38</sup> There is a correlation, though not proven empirically, between the number of Kenyans who graduated from legal institutions and the steady increase of Kenyans on the Bench.<sup>39</sup> This was a positive step, but the framework in

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33. See generally JUDICIAL DEPARTMENT ANNUAL REPORT FOR THE YEAR 1937, 1,13-14, (Government Printer, 1938). Native courts were meant specifically for the indigenous people of the country colonized; racially, the native courts were only for black people.

34. Ojwang', *supra* note 27, at 156.

35. See generally JUDICIAL DEPARTMENT ANNUAL REPORT, 1926 – COLONY AND PROTECTORATE OF KENYA, (Government Press, 1927). It has different reports for the courts and Native Subordinate Courts, 1932 annual report with the references to European staff on page 1, 1933, 1934, 1935, 1937, and 1938.

36. See generally JUDICIAL DEPARTMENT ANNUAL REPORT, 1955, (Government Printer, Nairobi 1957). On pages 2 and 3 it gives a list of all the judges serving in 1955 who are all English and male.

37. See generally Republic of Kenya KENYA NATIONAL ASSEMBLY OFFICIAL RECORD, May 1981 (discussing the Parliamentary debate for having Kenyan judges in the *hansard*). [http://books.google.com/books?id=3\\_OAFD9Gk8YC&pg=PA1197&lpq=PA1197&dq=af-ricanization+AROUND%28%29+judiciary&source=bl&ots=sOe4\\_gNQA8&sig=HB4Iuj8oFpIGGsqYjE2n\\_vtbtQ&hl=en&sa=X&ei=ZOI2T\\_D8LYjXiAKM7sWKcG&ved=0CDMQ6AEwBA#v=onepage&q&f=false](http://books.google.com/books?id=3_OAFD9Gk8YC&pg=PA1197&lpq=PA1197&dq=af-ricanization+AROUND%28%29+judiciary&source=bl&ots=sOe4_gNQA8&sig=HB4Iuj8oFpIGGsqYjE2n_vtbtQ&hl=en&sa=X&ei=ZOI2T_D8LYjXiAKM7sWKcG&ved=0CDMQ6AEwBA#v=onepage&q&f=false)

38. Ojwang', *supra* note 25, at 156.

39. See J.B. Ojwang' & D.R. Salter, *The Legal Profession in Kenya*, 34 J. Afr. L.9, 25-26 (1990). They write, "At the time of writing, out of the 31 positions on the High Court bench (including the Chief Justice), 14 are held by indigenous Kenyans, while the remainder are held by Kenyans of foreign origin and by expatriates serving on contract. The Court of Appeal has three vacancies, but the remaining positions are held by Kenya nationals exclusively. Increasingly, (and

the 1963 independence constitution, under which the judiciary operated, was tilted heavily towards the Executive, specifically in the powers of the President, as seen in the setup of the Judiciary Service Commission (JSC).<sup>40</sup> Sir Fred Phillips observes that the constitutions written for countries achieving independence in Africa were prepared by lawyers guided by the colonial office in the respective capital towns. He notes that these constitutions contained a clause stating that judges would be appointed following the advice of judicial commissions.<sup>41</sup> This is how the seed for judicial appointments was planted in the 1963 independence Constitution of Kenya.<sup>42</sup>

The earliest mention of the Judiciary Service Commission and indeed an attempt to have Kenyans sit on the Bench is in a report covering the years 1961-1963, the period just before Kenya's independence.<sup>43</sup> The Chief Justice Sir Ronald Sinclair, headed the pre-independence JSC and sat with two other judges. The report states, "The Chief Justice throughout the period was chairman of the Judiciary Service Commission...There have been varying numbers of vacancies in the establishment of Resident Magistrates over the period, and in fact several vacancies are still reserved for qualified African lawyers who, it is hoped, will soon apply for appointment."<sup>44</sup> The report goes on to explain that many European magistrates retired and were replaced by Asian magistrates hired by the JSC, which carried out "an extensive recruitment exercise."<sup>45</sup> The report states that there were no African lawyers or graduates to be interviewed.<sup>46</sup> Nevertheless, the JSC was undeterred in its first attempt to diversify and expressed its optimism for candidates by reserving places for Africans.<sup>47</sup>

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as should be the case), Kenya nationals have risen to occupy the most crucial, and virtually all, judicial positions in the country."

40. See generally Derek Matyszak, *Creating a Compliant Judiciary in Zimbabwe, 2000-2003*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, 331 (Kate Malleson & Peter Russell eds., University of Toronto Press 2006). Similar arrangements existed in former British colonies.

41. PHILLIPS, *supra* note 23, at 6.

42. Matyszak, *supra* note 40, at 331. He writes at page 331, "Given the similarity between the process of judicial selection provided for the new Zimbabwe and other post-colonial Commonwealth countries in Africa, it is reasonable to suppose that the British Foreign Office used a pro forma for constitution-making during the decolonization process."

43. See *REPORT OF THE JUDICIAL DEPARTMENT FOR THE YEARS 1961-1963: REPUBLIC OF KENYA*, (Government Press Printers 1965). The report is an official government record and is significant because it covers the transition period just before Kenya gained independence in 1963.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

These efforts by the Judicial Service Commission bore fruit as is shown in the Judicial Department's subsequent reports.<sup>48</sup> One report states, "The first fully qualified local African Resident Magistrate was appointed in October 1965, and further appointments of Dar es Salaam law graduates were being considered."<sup>49</sup> Thus began the process of having more and more Kenyans on the Bench and not just in the low levels of the Kenyan Judiciary, but also further up, all the way to the Court of Appeal. Chief Justice Miller is accredited with bringing about this change.<sup>50</sup> Despite these efforts the Kenyan judicial system, until as recently as 2010, continued to have vestiges of colonialism.<sup>51</sup>

There are many negative aspects of colonialism that scholars elsewhere have discussed at length.<sup>52</sup> In relation to the JSC and particularly the Kenyan Judiciary, a colonial hangover was the dress code of the judges and the formality in titles.<sup>53</sup> Kenyan judges, like the British, wore white wigs on their heads, dressed in robes, and, until recently, retained the titles "My Lord" and "Your Ladyship."<sup>54</sup> Magistrates do not wear robes and are referred to as "Your Honour."<sup>55</sup> These trappings of colonialism, which had a place and served a role at a particular point—that is during colonialism—were extremely out of place in independent Kenya in the late twentieth century and early twenty-first century.<sup>56</sup> The wigs and robes demonstrate that, while the idea of a legal transplant may be

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48. See REPORT OF THE JUDICIAL DEPARTMENT FOR THE YEARS 1964-1965, (Government Printer).

49. Compare AHMEDNASIR ABDULLAHI, *Retrench These Judges*, in *The Lawyer*, 10-14, October 2000, with *supra* note 47, at 1. Writing in 2000 in the wake of Judge Tuiyott's appointment, Ahmednasir, now a Commissioner with the post-2010 JSC, argued, "It was probably a mistake when the bench was fully Africanized and expatriate judges dispensed with. This issue should be addressed afresh."

50. See PAUL MWANGI, *THE BLACK BAR: CORRUPTION AND POLITICAL INTRIGUE WITHIN KENYA'S LEGAL FRATERNITY*, 104-131, (Oakland Media Services Limited, 2001). At page 112, Mwangi writes, "To give the devil his due, Miller was not an absolute fiend. During his tenure as Chief Justice he managed to totally Africanize the Court of Appeal."

51. See generally NONSO OKAFO, *RECONSTRUCTING LAW AND JUSTICE IN A POSTCOLONY*, 55-56, (Ashgate Publishing Limited, 2009). (discussing the tension created by colonialism on indigenous law by the imposition of the British).

52. See generally CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (Henry Hold/Jonathan Cape 2005), DAVID ANDERSON, *HISTORIES OF THE HANGED: BRITAIN'S DIRTY WAR IN KENYA AND THE END OF THE EMPIRE* (W. W. Norton & Company, 2005).

53. The Hon. Justice (Dr.) Willy Mutunga, S.C., *Dressing and Addressing the Kenyan Judiciary*, KENYA LAW REPORTS, 2011, <http://www.kenyalaw.org/klrf/index.php?id=889> (last visited March 29, 2013).

54. *Id.*

55. See generally INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM AND INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE, *RESTORING INTEGRITY: AN ASSESSMENT OF THE NEEDS OF THE JUSTICE SYSTEM IN THE REPUBLIC OF KENYA* 55-56 (February 2010), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

56. *Supra* note 53.

suitable at the onset, it should be modified or remodeled to suit the location and circumstances of a new environment, as is the case in independent Kenya.<sup>57</sup> In summary, Kenya found itself achieving independence and becoming a new nation in 1963 with the JSC entrenched in the Constitution.

## B. ENGLISH COURTS – A HISTORICAL PERSPECTIVE

King Henry II, who reigned from 1154 to 1189, is attributed to establishing the foundation of the English courts as they are known today.<sup>58</sup> He (and the kings before him) had a Great Council made up of eminent people in the society as well as his advisers.<sup>59</sup> King Henry II was the first to select members from this council to help him preside over his kingdom.<sup>60</sup> The earliest record of justice being administered by men appointed by King Henry II is 1176. King Henry met with his council that year and divided the country into six circuits so that three judges could visit each circuit; this was the first semblance of a judiciary.<sup>61</sup> In 1178, King Henry II appointed the first bench made up two clerks and three laymen.<sup>62</sup> Their mandate was to “hear and redress complaints from all over England”.<sup>63</sup> They were answerable to the Great Council, but this changed after the Magna Carta was issued in 1215, when the judges found a home in Westminster and their court was given the name the Court of Common Pleas.<sup>64</sup>

Career judges were common in the thirteenth century and they became a permanent feature in later centuries.<sup>65</sup> They were different from part-time judges because the latter had other duties to perform besides the judicial function. This pattern led to the kings appointing judges who had experience in legal matters until it became “uncommon, if not yet unthinkable, for someone to be appointed a justice of one of the major royal courts who did not have a background which equipped him with suitable expertise in the law of the courts.”<sup>66</sup> This delegation was steeped in the early days with allegiance of the judges to the Crown; at least that

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57. *Supra* note 53 at 3, 11, 21, 44-46.

58. PHILLIPS, *supra* note 23, at 1-6.

59. *Id.*

60. *Id.* Philips writes at page 1, “He regularized the system of itinerant justices endowing the commissioners with powers to adjudicate on pleas relating to possession of land and on pleas of the Crown.”

61. PHILLIPS, *supra* note 23, at 1.

62. PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* 15 (Blackwell Publishers, 1992 at 15).

63. *Id.*

64. PHILLIPS, *supra* note 23, at 1.

65. BRAND, *supra* note 62, at 27.

66. BRAND *supra* note 62, at 29.

was the expectation of most kings. It was a foregone conclusion for them that the judges would do their bidding. Baker aptly states,

The judges were servants of the Crown, appointed and paid by the Crown, and often removable at the pleasure of the Crown...Early kings expected subservience from their judges, even in legal matters, and it was a long time before the personal loyalty which judges owed to the king was transformed into a loyalty to the impersonal Crown.<sup>67</sup>

The king appointed the first professional judges from clerics.<sup>68</sup> In this way, judges gained their authority as delegated by the Crown and they sat either as judges, which were permanent positions, or as commissioners of assize, which were temporary posts.<sup>69</sup> This delegation by the Crown was a public affair and known to the public.<sup>70</sup> Still, these judges sat at the pleasure of the king and were subject to removal for at the whim of whoever was king or queen at the time.<sup>71</sup> Over time, the role of Crown in appointing judges slowly evolved into a function performed by the Lord Chancellor.<sup>72</sup>

It is unclear how and when the Office of the Lord Chancellor was established, but what is certain is that the Office of the Lord Chancellor existed before Parliament and the Magna Carta.<sup>73</sup> Those who held this office were clerics who kept the seal and acted as the King's conscience. A more important function that the Lord Chancellor performed which is germane to this discussion is in appointing judges. This function grew out of the increasing role of the Lord Chancellor as "head of the legal system".<sup>74</sup> The Lord Chancellor acquired the unique status of selecting judges by the eighteenth century.<sup>75</sup> However, not all Lord Chancellors acted in such a biased way. In addition to this, due to the work he was

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67. JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 74, (Butterworths & Co. Publishers, 1971).

68. *Id.* at 66.

69. *Id.* at 74.

70. *Id.* at 74.

71. *Id.* at 74-75. See also W.S. HOLDWORTH, A HISTORY OF ENGLISH LAW, Vol. 1, 252, Little, Brown, and Company, 1922.

72. Kate Malleon, *Taking the Politics out of Judicial Appointments?* <http://ukconstitutionallaw.org/2012/02/21/kate-malleon-taking-the-politics-out-of-judicial-appointments/> (last visited March 29, 2013).

73. See Oonagh Gay, *The Constitutional Reform Act 2005 – The Role of the Lord Chancellor*, SN/PC/3792 17 (November 2003), <http://www.parliament.uk/briefing-papers/SN03792.pdf>.

74. Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution - The Blair Government's Proposal to Abolish the Lord Chancellor*, 24 PENN ST. INT'L L. REV. 257, 268 (2005).

75. *Id.* at 269.

required to carry out, the Lord Chancellor soon had administrative personnel to assist in his duties.<sup>76</sup>

There were rumblings about this appointment process and the role of the Lord Chancellor but not much action was taken to redress this issue.<sup>77</sup> Besides, the judges functioned well in their capacity as neutral persons hearing cases and rendering decisions in all manner of cases across England.<sup>78</sup> The main, glaring anomaly was in the selection process, and by the beginning of the twenty-first century, a combination of many factors made change inevitable.<sup>79</sup> One example demonstrates the broad over-reaching of the Lord Chancellor from 2001.<sup>80</sup> The Lord Chancellor at the time was Alexander Andrew Mackay Irvine, Baron Irvine of Lairg more commonly referred to as Lord Irvine. He sent out letters to lawyers seeking donations for the Labour party.<sup>81</sup> His actions caused uproar among the members of the bar who, by virtue of the Lord Chancellor's post, felt "intimidated."<sup>82</sup>

### III. CHAPTER 2 – CATALYSTS, IMPETUS AND TOOLS FOR REFORM

An analysis of the judicial reform that happened in Kenya and England shows that they were driven by the need for transparency, accountability, and diversity, though diversity manifests itself differently in Kenya and is not openly stated.<sup>83</sup> The following different factors contributed to reform in each country.

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76. *Id.* at 269. Fischer writes, "By the early twenty-first century, the Lord Chancellor's Department employed around 12,000 people, and there were predictions that it would double in size by 2008." Some of their duties included administering criminal legal aid and administration for tribunals. *See also* Gay, *supra* note 73, at 9.

77. *See* Clare Dyer, *Falconer Angers Top Judges*, THE GUARDIAN, Jan. 12, 2005, <http://www.guardian.co.uk/politics/2005/jan/12/uk.lords?INTCMP=ILCNETTXT3487> (last visited March 29, 2013)

78. MALLESON, *supra* note 15, at 32.

79. *Id.*

80. *See Abolish The Lord Chancellor*, THE ECONOMIST, Feb. 22, 2001, <http://www.economist.com/node/512992> (last visited March 29, 2013).

81. *Id.*

82. *Id.*

83. *See* Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States*, 34 FORDHAM URB.L.J. 387, 405. *See also* THE REPUBLIC OF KENYA, *The Final Report of the Taskforce on Judicial Reforms*, July 2010. <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>. Chapter 2 of this report is a critical analysis of the JSC and proposes steps to increase transparency and accountability.

A. KENYA: AN IDEA WHOSE TIME HAD COME

In considering the movement for change in judicial appointments in Kenya, the best place to start is with the elections held in 2007; this is a watershed moment in Kenyan history because of the level and intensity of violence surrounding the elections.<sup>84</sup> Violent protests erupted after the announcement of the presidential results, and chaos persisted in six of the eight provinces in the country from December 30, 2007, when the results were announced, to February 28, 2008.<sup>85</sup> Consequently, approximately 1,100 died, 3,500 were injured and 600,000 people were displaced.<sup>86</sup> More pertinent to judicial reform, Raila Odinga, a presidential contender who felt aggrieved by the election results, rejected the idea of having the court resolve the dispute.<sup>87</sup> He said, "Everybody knows that the courts in Kenya are part of the Executive and we do not want to subject ourselves to a kangaroo court."<sup>88</sup>

The crisis ended with an arrangement that appeased the main political parties and their respective presidential candidates.<sup>89</sup> Part of this arrangement included a constitutional overhaul in the form of a new Constitution.<sup>90</sup> This was not a novel idea, since Kenyan people voted against having a new Constitution in a 2005 referendum.<sup>91</sup> However, another referendum was held in 2010 and this time, an overwhelming

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84. See generally Commission Of Inquiry Into Post-Election Violence (October 2008), [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf).

85. See generally KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *On the Brink of a Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Aug. 15, 2008, [http://www.marsgroupkenya.org/Reports/OtherReports/KNCHR\\_REPORT\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPE.pdf](http://www.marsgroupkenya.org/Reports/OtherReports/KNCHR_REPORT_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf).

86. See INTERNATIONAL CRIMINAL COURT, *Kenya's Post Election Violence: ICC Prosecutor Presents Cases against Six Individuals for Crimes against Humanity*, Dec. 15, 2010, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/Pages/pr615.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/Pages/pr615.aspx) (last visited March 29, 2013).

87. See *World Leaders Pile Pressure As Kenyans Pray*, AFRICAN PRESS INTERNATIONAL, January 7, 2008, <http://africanpress.me/2008/01/08/raila-calls-off-his-planned-country-wide-rallies-bbc-has-reported/> (last visited April 19, 2013).

88. *Id.* See also JEAN TARTTER, *Government and Politics*, in KENYA – A COUNTRY STUDY (Harold D. Nelson ed.), United States Government: Department of the Army (1984) 181. Tartter writes, "Kenya's chief justice is appointed by the president of the republic. Appointments to all other posts within the judiciary are controlled by the Judicial Service Commission. Although the president also appoints the judges of the Court of Appeal and the puisne (associate) judges of the High Court, he does so upon the advice of the commission. The commission selects, trains, assigns, and is responsible for the discipline of all the country's magistrates. Judicial appointments are permanent, but retirement is mandatory at 68."

89. See generally KOFI ANNAN FOUNDATION, *The Kenya National Dialogue and Reconciliation: One Year Later*, 52-53, March 2009, [http://kofiannanfoundation.org/sites/default/files/KA\\_KenyaReport%20Final.pdf](http://kofiannanfoundation.org/sites/default/files/KA_KenyaReport%20Final.pdf).

90. *Id.*

91. See *Q&A: Kenya Referendum*, BBC NEWS, Nov. 22, 2005, <http://news.bbc.co.uk/2/hi/africa/4438976.stm> (last visited March 29, 2013).

majority of Kenyans voted in favor of a new Constitution.<sup>92</sup> The 2010 Constitution was the blueprint for judicial reform, which included judicial appointments.

The 2007 election was the proverbial straw that broke the camel's back but ultimately ushered in the impetus for judicial reform.<sup>93</sup> Prime Minister Raila Odinga's statement that the courts were 'kangaroo courts' and his refusal to have the court determine the dispute was based on a previous court case – *Kibaki vs. Moi*.<sup>94</sup> Emilio Mwai Kibaki was the Petitioner contesting election results (of the 1997 presidential election) and he lost both in the High Court and in the Court of Appeal.<sup>95</sup> The Respondent was President Daniel Toroitich arap Moi and, at that time, the Court of Appeal was the highest court in Kenya.<sup>96</sup> The Chief Justice, then Bernard Chunga, was among the judges who presided over the appeal in *Kibaki vs. Moi & Others*, and had been appointed by President Moi in September 1999.<sup>97</sup> Aside from being a presidential appointee, Chunga was also "personally loyal" to President Moi.<sup>98</sup> The High Court dismissed Kibaki's case on a technicality, stating that Kibaki should have personally served the President with the election petition challenging the results.<sup>99</sup> The Court of Appeal upheld this decision.<sup>100</sup>

In 2007, then Chief Justice Evan Gicheru was also a presidential appointee.<sup>101</sup> This time, the President was Kibaki (the same petitioner in *Kibaki vs. Moi*).<sup>102</sup> President Kibaki had served one term of five years—from 2002 to 2007—and, in 2007, was running for a second term.<sup>103</sup> During his first term he also appointed judges in the same way his

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92. See *Kenyans Back Change to Constitution in Referendum*, BBC NEWS AFRICA, Aug. 5, 2010, <http://www.bbc.co.uk/news/world-africa-10876635> (last visited March 29, 2013). The report indicates 67% of those who cast their vote wanted a new constitution.

93. See generally James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109 (2008).

94. See generally *Kibaki v. Moi*, (1999) 2 KLR (EP) 351 (Kenya).

95. *Id.* at 352.

96. See CONSTITUTION, SECTION 64(1) (1963) (Kenya).

97. Mugambi Nthinga, *Will Chunga Deliver?*, THE LAWYER, October 1999, at 10.

98. See Korwa G. Adar & Isaac M. Munyae, *Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001*, AFRICAN STUDIES QUARTERLY, Winter 2001, at 13, <http://www.africa.ufl.edu/asq/v5/v5i1.pdf>.

99. *Id.*

100. *Kibaki vs. Moi*, *supra* note 94, at 352-353.

101. See generally John Mwai, *Taking the Reform Broom to the Judiciary*, NAIROBI LAW MONTHLY, April/June 2003, at 5.

102. See *Profile of His Excellency Hon. Mwai Kibaki, C.G.H., M.P., President and Commander-in-Chief of the Defence Forces of the Republic of Kenya*, <http://www.statehousekenya.go.ke/presidents/kibaki/kibaki-profile.pdf>.

103. See Barney Jopson & William Wallis, *Spotlight: Mwai Kibaki – Absentee Leader Seeking Re-election*, FINANCIAL TIMES Dec. 23, 2007, <http://www.ft.com/cms/s/0/564e1668-b17a-11dc-9777-0000779fd2ac.html#axzz1p6QFZNiL> (last visited March 29, 2013).



predecessor had done, that is, in a manner that was neither transparent nor accountable. It is possible that these factors are what contributed to Prime Minister Odinga's refusal (including his reference to the courts being 'kangaroo courts' and implicitly stating he would get no justice) to have the election dispute settled in court.<sup>104</sup> This lack of confidence in the judiciary stemming from judicial appointments and lack of political will, as well as inefficiency within the justice system, are some of the factors that led to Kenya's case before the International Criminal Court.<sup>105</sup>

Once the dust settled, the parties to the Accord wanted to ensure that Kenya would not be ripped apart by violence at the next election, so they agreed that institutional reform should be carried out expeditiously.<sup>106</sup> The Judiciary was one of the institutions targeted for reform and, in particular, the composition and role of the JSC.<sup>107</sup> Therefore, for the first time in Kenya's history, there was political will to implement changes in the judicial appointment system that did not make the Judiciary subservient to the Executive.<sup>108</sup> Based on these prevailing circumstances at the time, the following catalysts led to reform.

First of all, political will was a critical component in light of different outcomes in the referenda held in 2005 and 2010.<sup>109</sup> From both President Kibaki and Prime Minister Odinga, there was a general consensus that the country needed a new constitution as a step towards good governance.<sup>110</sup> The new Constitution contained changes to the Judiciary, which was an agenda item in what is popularly referred to as the Annan

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104. MWAI, *supra* note 101, at 5-8. John Mwai at page 5 writes, "Moi's appointments to the office of the Chief Justice were characterized by patronage and appointing those judges who would be compliant, not to the wishes of the majority and for enhancement of constitutionalism and the rule of law, but to the wishes of the former president and the ruling party, KANU. Appointments to the important offices of the High Court and Court of Appeal judges and that of the Chief Justice were done after vigorous lobbying and as a reward to those who could not deviate from the wishes of the executive."

105. See ICC - Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/chambers/pretrial%20chamber%20ii/Pages/19.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/chambers/pretrial%20chamber%20ii/Pages/19.aspx) (last visited April 19, 2013).

106. KOFI ANNAN FOUNDATION, *supra* note 89, at 10-14.

107. See generally Charles A. Khamala, *Incremental Judicial Reforms in Kenya*, in OXFORD TRANSITIONAL JUSTICE RESEARCH: DEBATING INTERNATIONAL JUSTICE IN AFRICA 111(2009), [http://www.fljs.org/sites/www.fljs.org/files/publications/Justice\\_in\\_Africa.pdf](http://www.fljs.org/sites/www.fljs.org/files/publications/Justice_in_Africa.pdf).

108. MWANGI, *supra* note 50, at 104-131.

109. See SABELO J. NDOLOVU-GATSHENI & RUSSEL BRUETON, *The Politics of Constitution-Making and Referendum: The Case of Kenya and Zimbabwe*, Aug. 27, 2010, <http://www.saiia.org.za/sa-foreign-policy-african-drivers-opinion/the-politics-of-constitution-making-and-referendum-the-case-of-kenya-and-zimbabwe.html> (last visited March 29, 2013).

110. President Mwai Kibaki & Prime Minister Raila Odinga, *Kenya's Constitution*, WASH. TIMES, August 12, 2010, available at <http://www.washingtontimes.com/news/2010/aug/12/kenyas-constitution/> (last visited March 29, 2013).

Accord.<sup>111</sup> The Annan Accord is the name of the agreement reached by Kibaki and Odinga that led to the end of post election violence following the disputed presidential elections in 2007.<sup>112</sup> Therefore, as leaders' their support for the 2010 referendum played a pivotal part in galvanizing the Kenyan public to vote for a new constitution.<sup>113</sup> It signified the change that Kenya desperately needed in its institutions, especially in the Judiciary.<sup>114</sup> This is a very different scenario from 2005, when the political parties affiliated to President Kibaki and Prime Minister Odinga (then just an ordinary Minister) led opposing camps.<sup>115</sup> President Kibaki's party called for the nation to accept the new Constitution, while Prime Minister Odinga called for a rejection.<sup>116</sup> As a result, voters rejected a new Constitution.<sup>117</sup> Therefore, in considering the catalysts for change in judicial appointments, political will was an important factor.

Secondly, the 2010 Constitution is a major harbinger of judicial reform in Kenya as set out in Chapter 10 of the Constitution, which touches on the Judiciary.<sup>118</sup> The highlights of the changes to the Judiciary include the formation of the Supreme Court, the expansion and empowerment of the Judicial Service Commission (JSC), and the establishment of the judiciary fund.<sup>119</sup>

Third is the role of civil society groups, also known as non-governmental organizations. The constitutional changes had been proposed and discussed by civil society groups for almost seven years and in particular by the Law Society of Kenya (LSK).<sup>120</sup> These groups recognized in the 1990s that the only way to bring about change in the judicial appointment system was to entrench these changes in the Constitution.<sup>121</sup>

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111. KOFI ANNAN FOUNDATION, *supra* note 89, 10-11. The Annan Accord is a power sharing agreement between the main presidential contenders of Kenya's 2007 election. It led to an uneasy peace and provided concrete steps on the measures to be taken to ensure lasting peace and address the underlying causes that led to the violence following the disputed elections in 2007.

112. *Id.*

113. Kibaki & Odinga, *supra* note 109.

114. Makau wa Mutua, *Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya*, in HUMAN RIGHTS QUARTERLY, 23 (2001): 99, available at <http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/hrq/v023/23.1mutua.html> (last visited March 29, 2013).

115. Gathii, *supra* note 93, at 1120-1121.

116. *Id.*

117. *Id.*

118. See CONSTITUTION, Chapter 10 (2010) (Kenya).

119. *Id.* at Art.163, 171-173. A detailed analysis of the JSC follows in Chapter 3 of this paper.

120. See Muciimi Mbaka, *Judicial Appointments in Kenya*, in JUDICIARY WATCH REPORT: ANALYSIS OF JUDICIAL REFORM IN KENYA 1998-2003 45-54 (Ben Sihanya & P. Kichana eds., 2004).

121. See Albert Kamunde, *Restructuring and Strengthening Kenya's Judicial Service Commission*, in JUDICIARY WATCH REPORT: ANALYSIS OF JUDICIAL REFORM IN KENYA 1998-2003 151-163 (Ben Sihanya & P. Kichana eds., 2004).

Meaningful change, however, would only be seen if the composition and system of choosing judges was made transparent and accountable.<sup>122</sup> These civil society groups produced reports that criticized presidential appointments to the Bench and agitated for change.<sup>123</sup> They proposed ways to address the poor appointment methods, including proposals to reform and strengthen the JSC.<sup>124</sup>

Last is the influence of public perception of the judiciary, which also contributed to calls for reform in judicial appointments. “Why hire a lawyer when you can buy a judge?” was the tongue-in-cheek saying that captured the endemic corruption within the Kenyan judiciary.<sup>125</sup> The perception that justice was for sale to the highest bidder (and not blind, as demonstrated by the iconic symbol of justice as a blindfolded lady holding scales) is what the public came to expect.<sup>126</sup>

B. ENGLAND: “AN IDEA WHOSE TIME HAD NOT YET COME”<sup>127</sup>

To quote a former Attorney-General of England and Wales the system of appointing judges was ‘lamentably amateur’.<sup>128</sup>

The catalysts for reform in England and Wales were public perception, the impact of decisions from the European Court of Human Rights, and the need to modernize and influence from academics.

Scholars are divided as to whether judicial reform came gradually or suddenly to the English judiciary. Some argue that the changes came

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122. *Supra* note 55, at 94.

123. *See* STATE OF THE RULE OF LAW IN KENYA – 2000: Report by the International Commission of Jurists (Kenya Section), International Commission of Jurists (2000). At page 9 the Reports provides, “The president still appoints all judges of the high court and court of appeal from nominees of a judicial commission entirely appointed by himself. He can remove them on the advice of a tribunal entirely appointed by himself. Late last year, he appointed as Chief Justice, a Deputy Director of Prosecution famous for the trials and convictions of political dissidents in the late eighties.”

124. *See generally* JUDICIARY WATCH REPORT: ANALYSIS OF JUDICIAL REFORM IN KENYA 1998-2003 45-54 (Ben Sihanya & P. Kichana eds., 2004). *See also* JUDICIARY WATCH REPORT: JUDICIAL REFORM IN KENYA 2003-2004, (Maurice Odhiambo Makoloo and Philip Kichana eds., 2005). KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (2005); JUDICIARY WATCH REPORT: JUDICIAL REFORM IN KENYA (Philip Kichana ed., 2005).

125. *See* JOHN MWAI, *Why Hire A Lawyer When You Can Buy A Judge?*, NAIROBI LAW MONTHLY, July 2003, at 4. (The Nairobi Law Monthly is an authoritative magazine on legal issues in Kenya).

126. *See* *Supreme Court Has Work Cut Out For It*, THE STANDARD NEWSPAPER, October 27, 2011 available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000045730&cid=16&story=Supreme%20Court%20has%20work%20cut%20out%20for%20it> (last visited March 29, 2013).

127. *See* Andrew Le Sueur, *From Appellate Committee to Supreme Court: A Narrative*, in THE JUDICIAL HOUSE OF LORDS 64 (Louis Blom-Cooper, Brice Dickson, & Gavin Drewryeds, 2009).

128. PHILLIPS, *supra* note 23, at 15.

suddenly, while others argue that the discussion of what needed to change had been going on for years prior to Tony Blair's announcement in June 2003.<sup>129</sup> Nevertheless, the proposals received much criticism from critics and senior judges.<sup>130</sup>

These senior judges had a common thread in that they were all appointed by the Lord Chancellor.<sup>131</sup> Judith Maute observes:

There was no need for formality in the appointment system because the Lord Chancellor his staff, and the judges consulted were quite familiar with the small pool of eligible candidates. Once it was done in smoke-filled rooms of gentlemen's clubs or in the Temple corridors. Lawyers were appointed to be judges after the right word in the ear; they were "tapped on the shoulder" and asked if they fancied promotion to the Bench. Whom you knew counted; as did your college or school...The sheer volume of new appointments required a more formal, professionalized process administered by departmental staff. Nevertheless, the heart of the system remained closed, with private consultations, or "secret soundings" about individual candidates conducted by the Lord Chancellor or his staff with senior members of the bench and bar. These anonymous subjective reviews, described in 1973 by Sir Robert Megarry as "a mysterious system of osmosis and grapevine," often determined a candidacy, with comments that one was a "good chap," socially inept, or based on explanation of a single court performance.<sup>132</sup>

The selection process described above led to a homogenous bench and public increasingly perceived the bench as being far removed from the reality of everyday life for ordinary citizens.<sup>133</sup> However, it was critical to have diversity on the bench.<sup>134</sup> While there is little empirical evidence to support the view that having a Bench that reflects society influences the

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129. Malleon, *supra* note 72, at 102.

130. Fischer, *supra* note 74, at 264. See also *Judge Selection Plan Criticized*, BBC NEWS, October 6, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/3720952.stm](http://news.bbc.co.uk/2/hi/uk_news/3720952.stm) (last visited March 29, 2013).

131. Maute, *supra* note 83, at 395. Maute writes, "An at-will political appointee of the elected Prime Minister, the Lord Chancellor sat in the Cabinet of the executive branch, served as the Speaker of the House of Lords, led the Lord Chancellor's Department (which is roughly equivalent to the United States Department of Justice), and was head of the judiciary. The Lord Chancellor had primary responsibility for selecting all judges in England and Wales."

132. *Id.* at 396-397.

133. *Id.* at 403.

134. Kate Malleon, *Creating A Judicial Appointments Commission: Which Model Works Best?*, in PUBLIC LAW105 (Spring 2004).

decisions made, “the corrosive impact of their absence on the legitimacy is now too great to ignore.”<sup>135</sup>

A second catalyst for reform was the political landscape both within the United Kingdom, as well as that of the European Union.<sup>136</sup> In the United Kingdom, the Labour Party had won a second term by the time Tony Blair announced the changes to the judiciary in England and Wales.<sup>137</sup> Change within the judicial structure was part of the Labour Party campaign platform at the time, so his proposal caught many by surprise.<sup>138</sup> The government recognized the necessity for reforms to gain credence both locally and abroad that the judicial system promoted and valued the tenets of democracy and human rights. It also needed to demonstrate that justice was being done.<sup>139</sup>

The impetus for change developed into a pressing need after the United Kingdom passed the Human Rights Act 1998 and the reform of the European Court of Human Rights.<sup>140</sup> It became apparent that the arena of enforcing rights would move from Parliament to courts, and these courts were not ready for the challenge.<sup>141</sup> The decisions that judges made

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135. *Id.* at 106.

136. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 481 (2011).

137. See James Vallance White, *The Judicial Office* in, *THE JUDICIAL HOUSE OF LORDS 46* (Louis Blom-Cooper, Brice Dickson, & Gavin Drewry eds, 2009). Vallance writes, “However, on 12 June 2003, in a statement expected to be concerned with ministerial changes, the Government announced that the jurisdiction of the House of Lords would be ended and that its functions would in the future be carried out by a supreme court. This is not the place to discuss the merits of that decision, but it is worth reflecting on the difference between the way it was announced and the years—indeed decades—of public debate which preceded the settlement of 1876.”

138. *Id.* White writes, “Although it is true that a number of eminent lawyers and academics over the years had expressed their support for the establishment of a supreme court, there had not been the succession of government green and white papers which might have been expected to precede an announcement of such constitutional importance, nor was it made in fulfillment of a manifesto commitment.”

139. FISCHER, *supra* note 74, at 263.

140. Clark, *supra* note 136, at 480-481. The Human Rights Act 1998 made it untenable for the Lord Chancellor to continue to be a member of all three arms of government like he had been before it was passed. See also Gay, *supra* note 73, at 14.

141. See Dawn Oliver, *The Lord Chancellor as Head of the Judiciary*, in *THE JUDICIAL HOUSE OF LORDS 1876-2009 97-111* (Louis Blom-Cooper, Brice Dickson and Gavin Drewry eds., 2009). At pages 110-111, she writes “The pressure for change came from a number of quarters: the lack of clarity about when it was or was not appropriate for a Lord Chancellor to sit as a judge in cases involving governmental interests, coupled with the case law of the European Court of Human Rights on Article 6 of the ECHR, indicating that the UK arrangements were unlikely to stand up if challenged before that court; the steady rise over a long period in the importance of the Lord Chief Justice as the recognized professional head of the judiciary—the Chief; in recent year the combination of aggressive criticism of the judges by Home Secretaries and other ministers which Lord Chancellors had not been able to restrain; rather stubborn insistence by Lord Chancellor Irvine on his own authority to determine how the powers of the office should be exercised and increasingly unconvincing assertions that he could be both a party politician and head of the judiciary; and finally the increased workload attaching to the Cabinet and executive roles of the Lord Chancellor.”

would bring them more and more into the limelight, and their manner of appointment was inevitably bound to be a topic of discussion in the legal fraternity.<sup>142</sup> In addition, there was the direct consequence of the United Kingdom being part of the European Union and its obligation to ensure that the decisions from the European Court of Human Rights were enforceable and binding on English courts.<sup>143</sup> Enacting the Human Rights Act and incorporating the decisions of the European Court on Human Rights provided more impetus for reform because the final appellate court was no longer the House of Lords.<sup>144</sup> Dissatisfied parties could seek recourse in the European Court of Human Rights.<sup>145</sup> It was no longer business as usual, and the system of appointment that had served well for hundreds of years was not compatible with the 21<sup>st</sup> century.<sup>146</sup> In addition, decisions from the European Court of Justice also influenced the rulings and judgments of the courts within the United Kingdom and ultimately led to the change instituted by Tony Blair.<sup>147</sup>

Yet another critical factor that influenced reform in the judiciary in England and Wales is the office of the Lord Chancellor.<sup>148</sup> The Lord Chancellor was a member of the Cabinet and the House of Lords, in addition to heading the Judiciary and chairing the Judicial Committee in the House of Lords.<sup>149</sup> In this set up, the doctrine of separation of powers did not exist in the person of the Lord Chancellor.<sup>150</sup> Dawn Oliver explains:

It was not always easy to determine whether the old-style Lord Chancellor was exercising his role as head of the judiciary, or his role as a member of the Cabinet – or both, at any given time. (His role as Speaker of the House of Lords did not raise difficulties of that kind). There were grey areas between the head

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142. Peter Russell, *Conclusion in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 421 (Kate Malleson & Peter Russell eds., University of Toronto Press 2006).

143. Oliver, *supra* note 141, at 111.

144. Clark, *supra* note 136, at 481.

145. Oliver, *supra* note 141, at 111.

146. Russell, *supra* note 142, at 421.

147. Clark, *supra* note 135, at 481. She writes at page 481, “Because ECJ rulings are supreme, national courts, including the U.K.’s highest court, have been empowered to strike down inconsistent domestic law, including constitutional law. This growth in judicial power was an overarching factor driving both the creation of the new Supreme Court and the overhaul of the judicial appointment system.”

148. Oliver, *supra* note 141, at 97. She writes, “Although it is impossible to identify specific statutory or formal provisions as the old-style Lord Chancellor’s role as head of the judiciary, that role was of central importance, especially to many members of the judiciary, and when the CRA reforms were announced it was the end of this role that caused the most anguish among judges.”

149. See Lord Mance, *Constitutional Reforms, The Supreme Court And The Law Lords*, in *CIVIL JUSTICE QUARTERLY* Apr. 2006: 155, 155-156.

150. Oliver, *supra* note 141, at 97.

of the judiciary and member of the Cabinet roles and the lines were fuzzy.<sup>151</sup>

Within the judiciary, the Lord Chancellor made the judicial appointments in England, Wales and Northern Ireland.<sup>152</sup> His department contained the whole machinery of filling in the appointments from initial advertising to final appointment; and he did this for judges in England, Wales and Northern Ireland.<sup>153</sup> In fact, he “had tremendous influence over all aspects of the English judiciary.”<sup>154</sup> The Lord Chancellor’s role, particularly in this aspect of appointments, led to his being criticized for cronyism, partisanship and lack of public accountability.<sup>155</sup> Therefore, reforming the Lord Chancellor’s office seemed an idea whose time had come. Canadian scholar Lorraine Eisenstat Weinrib described the Lord Chancellor’s appointment method in the following terms:

He does not consult with cabinet colleagues but works from his own familiarity the members of the bar, confers with senior members of the judiciary, and relies upon the work of a small but important office in the permanent civil service...This system offers no checks and balances either before or after appointment, no representation from the bar or the public, no formal procedures or criteria of selection, other than experience at the bar.<sup>156</sup>

What some found distasteful about the process of reforming judicial appointments is how it was initiated and the manner it was carried out, because these appointments were carried out suddenly without discussion, consultation, or notice.<sup>157</sup>

The final catalyst in changing the way judges were appointed in England and Wales was the influence of the academic community. Some scholars had long predicted the judicial reforms instituted by Tony Blair in June 2003 because the appointment process was insulated and undemocratic.<sup>158</sup> These commentators include Sir Thomas Legg, Professors Robert Hazell, Andrew Le Sueur, Kate Malleon, Robert

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151. Oliver, *supra* note 141, at 98.

152. Fischer, *supra* note 74 at 271. See Oliver, *supra* note 141, at 103.

153. Fischer, *supra* note 74, at 272.

154. Maute, *supra* note 83, at 398.

155. *Id.*

156. Weinrib, *supra* note 5, at 114.

157. Malleon, *supra* note 15, at 39. She writes at page 39, “The clumsy manner in which the reforms were introduced should, therefore, be distinguished from their general desirability.”

158. Clark, *supra* note 136, at 474.

Stevens and Diana Woodhouse.<sup>159</sup> For these commentators, the question was not whether there would or should be reform in the judiciary, but rather how the reform would be carried out.<sup>160</sup> They proposed suggestions such as involving the Houses of Parliament in the screening of judges and the inclusion of a Supreme Court, whose nominees would be questioned and confirmed by Parliament.<sup>161</sup> Some of these proposals, like involving Parliament, never saw the light of day but the underlying principles of accountability and transparency were entrenched when the JAC was set up.<sup>162</sup>

Those were the unique catalysts that contributed to the reform of judicial appointments in both countries. The tipping point in both Kenya and England and Wales was political will; it was this political desire that led to judicial commissions as they exist today.

#### IV. A CRITICAL LOOK AT THE JUDICIAL SERVICE COMMISSION AND JUDICIAL APPOINTMENTS COMMISSION

##### A. KENYA -THE JUDICIAL SERVICE COMMISSION: PRE-2010 AND POST-2010

The Judicial Service Commission (JSC) is a constitutional institution with its composition and mandate stipulated in the Kenyan Constitution.<sup>163</sup> The modalities of the JSC are expressed in further detail in the Judicial Service Act, 2011.<sup>164</sup> Twelve members comprise the JSC, including the Chief Registrar (non-voting member) of the High Court, who acts as the Secretary to the JSC,<sup>165</sup> and five members who are from the Judiciary. These include the Chief Justice, who is the Chairperson of the JSC, one Supreme Court judge, one Court of Appeal judge, one High Court judge and one Magistrate.<sup>166</sup> These judicial officers are chosen by their peers, thereby equally representing all levels of the Kenyan

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159. *Id.*

160. *Id.*

161. *Id.* at 475.

162. *Id.* at 476-478.

163. *Supra* note 118, at Art. 171-173.

164. In its introductory statement the Judicial Service Act is described as “An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and function of the National Council on Administration of Justice for connected purposes.” (The Judicial Service Act is available at <http://www.elaw.org/node/5689>.)

165. *Supra* note 117, at Art.171.

166. *Id.* at Art.171 (2)(a)-(d). The Chief Registrar does not have the power to vote on issues in the JSC.



judiciary.<sup>167</sup> The other members of the JSC are the Attorney-General, two lawyers admitted to the Kenyan Bar with at least fifteen years experience,<sup>168</sup> “one person nominated by the Public Service Commission and one woman and one man to represent the public, not being lawyers appointed by the President with the approval of the National Assembly.”<sup>169</sup> Therefore, the majority of the members in the JSC are not from the judiciary.<sup>170</sup>

In judicial councils that have a majority of the members as judges, it is assumed that the judges will use this majority to self-regulate their members, and the underlying thought is that there will be greater independence in the judicial council.<sup>171</sup> Through empirical analysis collected from 121 judicial councils, democracies have strong judicial councils and these, in turn, have a majority of the members as judges.<sup>172</sup> Furthermore, this strength will be seen if the judges act “as a homogenous body.”<sup>173</sup> In fact, 93 of the 121 judicial councils observed were cited in the country’s constitution and ostensibly embedded in it as a way to protect them from executive interference.<sup>174</sup> This prevents manipulation and ensures independence.<sup>175</sup>

The JSC that existed before the new Constitution in 2010 (hereinafter ‘*pre-2010 JSC*’) was also a constitutional organ entrenched in the Constitution.<sup>176</sup> It was made up of five members—the Chief Justice (as Chairperson), the Attorney-General, two judges appointed by the President from the Court of Appeal and the High Court and the Chairman

167. *Id.* at Art.171(2)(b)-(d). See also D.B.M Mosotah, *On the Cusp of Judicial Rebirth*, NAIROBI LAW MONTHLY 26, March 2011, at 26-28. At page 26, Mosotah writes, “Each cadre of the courts is entitled to elect one representative to the commission; thus a Court of Appeal judge is elected by the Judges of Appeal, a High Court Judge is elected by the Judges of the High Court and a Magistrate is elected by magistrates”

168. The term used in Kenya for lawyers admitted to the Bar is ‘advocate’. These lawyers must be one male and one female and are chosen by the local Bar Association known as the Law Society of Kenya to which all lawyers join as soon as they are licensed to practice.

169. *Supra* note 118, at Art. 171(2)(e)-(h).

170. *Supra* note 118, at Art. 171(2).

171. *Supra* note 8, at 121.

172. Garoupa & Ginsburg, *supra* note 8, at 121.

173. *Id.*, at 122. Garoupa and Ginsburg are quick to caution that it is a simplistic view to think that having a majority of judges in the judicial council automatically leads to independence since there are country specific variables that must be considered. At page 130 they write, “We found little evidence in favour of the widespread assumption that councils increase quality or independence in the aggregate. Therefore, we emphasize the complexity of the role of a judicial council and reject the simplistic view that importing or transplanting certain types of judicial council is likely to have a decisive impact on the quality of the judiciary. We thus reject the view of international organizations that assert that judges should always and everywhere form the majority of members on the Council.”

174. *Id.*

175. *Id.*, at 123.

176. See CONSTITUTION, Art. 68, 69 (2008) (Kenya).

of the Public Service Commission.<sup>177</sup> The pre-2010 JSC was described in the Constitution as an appointing commission with the mandate to appoint, discipline and remove judicial officers.<sup>178</sup>

Commenting on the Kenyan JSC, Makau wa Mutua, a leading Kenyan scholar writing about the pre-2010 JSC, states:

In any case, all JSC members are presidential appointees, either directly or indirectly, because he appoints the Attorney-General, the Chief Justice, and the Chairman of the Public Service Commission. Thus the president personally composes without any constitutionally required oversight or mandatory input from any other source, the most important judicial commission in the country.<sup>179</sup>

Therefore, the appointment of judges was ultimately vested in the president and, accordingly, the JSC was an extension of the Executive.<sup>180</sup> Under the pre-2010 JSC, judicial appointments at the High Court level for judges were not transparent.<sup>181</sup> Mutua observes that there was no consultation at all regarding the candidates that the president appointed as judges.<sup>182</sup> It is unclear if these selections were based on merit, which is not to cast aspersions on the candidates appointed as judges.<sup>183</sup> However, there never was a clear guideline on how judges were appointed with the pre-2010 JSC, and these appointments sometimes led to embarrassing consequences.<sup>184</sup>

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177. CONSTITUTION, Art. 68 (1) (2008) (Kenya). *See also* Matyszak, *supra* note 40, at 330-354 (discussing a similar arrangement that exists in Zimbabwe).

178. *Supra* note 176, at Art. 69 (1).

179. Mutua, *supra* note 114, at 104. *See also* du Bois, *supra* note 11, at 280, 283.

180. OJWANG, *supra* note 27, at 156. He writes at page 156, “The President appoints the Chief Justice, who also serves as Chairman of the Judiciary Service Commission. This Commission then operates as an advisory body to the President, in the appointment of all other judges, of the High Court as well as the Court of Appeal.”

181. I make this distinction because the hiring of magistrates was done very differently.

182. Mutua, *supra* note 114, at 104. *See also* Russell, *supra* note 142, at 424. This situation described by Mutua is similar to the Zimbabwe JSC in terms of the composition of the JSC and president’s hand in selecting the members. Peter Russell observes that the composition of the Zimbabwe JSC was designed to have a ‘compliant judiciary’. The same can be said of Kenya’s pre-2010 JSC.

183. Mosotah, *supra* note 167, at 26-28. On page 27, Mosotah writes, “In past appointments, political connections and tribal considerations – sometimes referred to as ‘jobs for the boys’ – prevailed over integrity and ability. Consequently, the quality of justice began to deteriorate. It is only by chance that we find some bright and exceptionally good judges on the Bench.”

184. *Id.* at 27. Mosotah writes at page 27, “The system was opaque and made it impossible to determine the process of selection and appointment. Besides, there was a manifest lack of consultation among stakeholders.”

For example, in April 2009, President Kibaki appointed seven judges; of these, five joined the High Court and two judges were elevated from being high court judges to Court of Appeal judges.<sup>185</sup> Out of the five high court judges, three were career judicial officers who were Chief Magistrates, the highest rank within the magistracy.<sup>186</sup> The other two were lawyers who met the requirements stipulated in the 1963 Constitution.<sup>187</sup> In less than a year, one of these lawyers (now a judge) was arrested and charged by the Kenya Anti-Corruption Commission, an institution whose mandate includes the facilitation of recovery for ill-gotten wealth.<sup>188</sup> He was charged under the Anti-Corruption and Economic Crimes Act with fraudulently making payments from the sale of public property and faced an alternative charge of abuse of office.<sup>189</sup> The charge stated the judge committed this crime in July 2008 while he was a company secretary; he was charged together with his superior.<sup>190</sup> The case went to trial and the judge and his co-accused were subsequently acquitted.<sup>191</sup> An important point to highlight is that the information about the judge's record may have come to light if there was more input from different sources about judges prior to their appointment, but the pre-2010 JSC did not take this into consideration.<sup>192</sup> Above all, the damage done to the public's perception of the Kenyan Judiciary was massive, because the public believed the judiciary to be above reproach.<sup>193</sup> While the judge was acquitted, the ordeal still left a

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185. See press release from State House, the official residence of the Kenyan President available at <http://www.statehousekenya.go.ke/news/april09/2009020401.htm>.

186. See The Magistrates' Court Act, (2007) Cap. 10 § 5 (1). (Kenya).

187. Section 61(3) of the 1963 Constitution states: "A person shall not be qualified to be appointed a judge of the High Court unless –

- (a) he is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; or
- (b) he is an advocate of the High Court of Kenya of not less than seven years standing; or
- (c) he holds, and has held for a period of, or periods amounting in the aggregate to, not less than seven years, one or other of the qualifications specified in paragraphs (a), (b), (c) and (d) of section 12(1) of the Advocates Act as in force on 12<sup>th</sup> December, 1963."

188. See Press Release, The Kenya Anti-Corruption Commission (KACC), <http://www.eacc.go.ke/archives/pressreleases/chitembe-arrest.pdf>.

189. Muchemi Wachira & Casper Waitthaka, *Anti-Graft Team Arrests Judge*, THE DAILY NATION, December 28, 2009, <http://mobile.nation.co.ke/News/-/1290/832294/-/format/xhtml/item/0/-/10oiqg6z/-/index.html> (last visited March 29, 2013).

190. Evelyn Njoroge, *Kenyan Judge Denies Graft*, CAPITALFM NEWS, December 29, 2009, <http://www.capitalfm.co.ke/news/2009/12/kenyan-judge-denies-graft-charge/> (last visited March 29, 2013).

191. See Wahome Thuku, *Judge, Ex-NSSF Boss Acquitted in Land Fraud Case*, THE STANDARD, October 31, 2011, [http://www.standardmedia.co.ke/?articleID=2000045966&story\\_title=Judge,-ex-NSSF-boss-acquitted-in-land-fraud-case](http://www.standardmedia.co.ke/?articleID=2000045966&story_title=Judge,-ex-NSSF-boss-acquitted-in-land-fraud-case) (last visited March 29, 2013).

192. Mutua, *supra* note 114, at 104.

193. See generally Dearbhail McDonald, *Why Our Judges Must Be Like Caesar's Wife*, IRISH INDEPENDENT, October 20, 2007, <http://www.independent.ie/national-news/why-our-judges-must->

nasty taste in the mouths of many and tainted the Kenyan Judiciary. Ultimately, it revealed the deep chasms in the pre-2010 JSC appointment procedure and its very weak role in having the selection and appointment of judges.<sup>194</sup> The Minister of Justice and Constitutional Affairs at the time was Martha Karua. She resigned after these seven judges took their oaths of office.<sup>195</sup> One report attributed the resignation of Ms. Karua to one particular judge's appointment.<sup>196</sup> She said, "Judges are being appointed without my knowledge and a lot more."<sup>197</sup> It should be noted that there was no role delineated in the 1963 Constitution for the Minister of Justice and Constitutional Affairs in the appointment of judicial officers.<sup>198</sup> Ms. Karua compared her role as being Minister to being valued stakeholder in this process and felt slighted for not being consulted.<sup>199</sup>

The post-2010 JSC was a very different body from its predecessor, and this difference was not only in its composition.<sup>200</sup> Its *modus operandi* and selection of judges, in particular, had infused an air of confidence and change that the Kenyan justice system desperately needed.<sup>201</sup> The fact that the judiciary has changed, is a view held by a Commissioner in the post-2010 JSC. He was one of the harshest critics of the Kenyan Judiciary.<sup>202</sup> Article 172(1)(a) refers to the post-2010 JSC as a

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be-like-caesars-wife-1200209.html (last visited March 29, 2013). The writer reports about a situation in Ireland but the same analogy can be made in Kenya and indeed anywhere around the world that judges must be above reproach.

194. Mutua, *supra* note 114, at 104.

195. See Duncan Miriri, *Martha Karua Resigns From Her Ministerial Position*, THE KENYA WEEKLY POST, April 6, 2009, <http://www.kenyaweklypost.com/modules.php?name=News&file=article&sid=430> (last visited March 29, 2013).

196. Muchemi & Waitaha, *supra* note 188. Their report states, "Ms. Karua, however, singled out Justice Chitembwe's case saying he had been sacked from the NSSF for corruption. Ms. Karua, who is the Gichugu MP, resigned when President Kibaki went ahead and swore in the judges."

197. See *Kenya Coalition Minister Resigns*, BBC NEWS, April 6, 2009, <http://news.bbc.co.uk/2/hi/africa/7985805.stm> (last visited March 29, 2013).

198. See *supra* note 96, at § 61(2).

199. See *Kenya Justice Minister Martha Karua Resigns*, <http://africanewsonline.blogspot.com/2009/04/kenya-justice-minister-martha-karua.html> (last visited March 29, 2013). The report stated, "As the Minister in charge of Justice, Ms. Karua expected to be consulted before new judges were appointed. 'If my hands are tied and the Judiciary continues to be used as a place where people sacked from parastatals are recycled, the agenda is forestalled and all reforms are annihilated then I better leave and fight for the rights of ordinary mwananchi[people],' she said after the appointments."

200. Mosotah *supra* note 167, at 27.

201. See AHMEDNASIR ABDULLAHI, *Our New Look Judiciary Is the Best, Let's Embrace It*, Sunday Nation, February 12, 2012, available at <http://www.nation.co.ke/oped/Opinion/Our+new+look+judiciary+is+the+best+lets+embrace+it+/-/440808/1324972/-/item/11/-/kx3816z/-/index.html>.

202. *Id.* Cf. with the views by the same Ahmednasir Abdullahi in, *Retrench These Judges' The Lawyer*, 10-14, October 2000 published by Legal Media Limited. At page 10, he said, "Rather it is the product of decades of a state mechanism deliberately executed to undermine the rule of law in the country. The underlying factors that have contributed to this unsatisfactory state of affairs are,

recommending body but the reality is that in the one year since it began its work, the President has not rejected any of the recommendations made by the JSC.<sup>203</sup>

The JSC has also changed the manner in which it fills the vacancies.<sup>204</sup> In the past, there was no notification that there were vacancies even when it was clear there was a shortage in the number of judicial officers.<sup>205</sup> Today, the post-2010 JSC advertises vacancies for judges both in the newspapers and online.<sup>206</sup> This is a historic change; previously, only vacancies for magistrates were advertised.<sup>207</sup> The advertisement sets out clearly the constitutional requirements and also requests the candidate to submit a detailed resume that includes evidence of “community service, financial discipline, pro bono activity, involvement as a party in litigation and involvement in political activity... three professional referees and two character references.”<sup>208</sup> After processing these applications, the JSC advertises the names of the applicants and those it has shortlisted for interviewing.<sup>209</sup> This invitation also invites members of the public to write in with any information they have about the candidates.<sup>210</sup> The caveat is that the JSC will interview the letter writers, but these

firstly the caliber of judges appointed by the executive leaves a lot to be desired. The executive in appointing judges applies a “secret” test unknown to anyone including the Bar and the citizens of the country.” At page 13 he wrote, “It is a matter of public record that many judges just like Tuyiott have no university education. There are many judges who just like Tuyiott have delivered queer judgments that have no basis in law and fact. At page 14 he concludes his treatise, “Magistrates should never be appointed to become judges, and lawyers practicing law in remote regions should be re-educated before being appointed judges.”

203. Article 172(1)(a) provides, “The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall recommend to the President persons for appointment as judges;”

204. See Kenyan Jobs & Vacancies and Career Advice, <http://www.careersmartkenya.com/2011/10/judicial-service-commission-jsc-job.html> (last visited March 29, 2013). Note the advertisement for Court of Appeal judges posted on October 5, 2011. It is the most recent selection of judges to a court.

205. The Judicature Act, 2007, Cap. 8 § 7. (Kenya). The Judicature Act sets out the hierarchy of courts in Kenya and specifies the numbers required to fill each court.

206. See Latest Kenyan Jobs and Vacancies, <http://www.kenyancareer.com/2011/04/supreme-court-judges-and-high-court.html> (last visited March 29, 2013).

207. *Supra* note 55, at 55-60 (discussing the conditions of magistrates in Kenya).

208. *Supra* note 204. See Christopher Kendall, *Criticism And Reform: A Survey Of Canadian Literature Of The Appointment Of Judges*, in APPOINTING JUDGES: PHILOSOPHY, POLITICS, AND PRACTICE, 211, 211-230 (Ontario Law Reform Commission, 1991). Kendall writes about a similar process in Canada in 1991, quoting K. Makin in an article that appeared in *The Toronto Globe & Mail*, February 22, 1990 at A13. Makin states, “The committee advertises through news media for candidates, who are interviewed rigorously on developments in the law, on their community involvement, and on their personal attitudes to sensitive issues. Each candidate must supply four references and the list that is eventually sent by the committee to Mr. Scott [Attorney General] goes beyond ranking, including detailed comments on each candidate’s strengths and weaknesses.”

209. See Nzau Musau, *Shortlisting Complete For Advertised Judges Positions*, THE STAR NEWSPAPER (May 28, 2011), available at <http://www.the-star.co.ke/national/national/26060-shortlisting-complete-for-advertised-judges-positions> (last visited March 29, 2013).

210. *Id.*

proceedings must remain confidential.<sup>211</sup> Another major change is that the interviews are open to the public and have even been aired live on one of the local television stations in real-time.<sup>212</sup> Candidates are asked a variety of questions ranging from their legal competence to their views about what members of the public have written them (though the names of those who have written are not disclosed).<sup>213</sup> Finally, after concluding the interviewing process, the list of successful candidates is made public through broadcast and written media, and then they take the oath of office before the President.<sup>214</sup>

## B. JUDICIAL APPOINTMENTS COMMISSION

The Judicial Appointments Commission (JAC) is an independent commission that selects candidates for judicial office in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland.<sup>215</sup>

Unlike in Kenya, the Judicial Appointments Commission (JAC) had no predecessor<sup>216</sup> and is an organ created ostensibly under the Constitution Reform Act 2005.<sup>217</sup> The CRA also created a second tier judicial commission to handle the heavy volume of appointments in the lower courts.<sup>218</sup> The establishment of the JAC was mired in controversy because the CRA did not just introduce a new way of selecting judges in England.<sup>219</sup> It drastically altered the office of the Lord Chancellor and introduced a Supreme Court, a new level in the judicial hierarchy of

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211. *Id.*

212. *See generally* John Ngirachu, *Kenya: Public Interviews For Top Judiciary Jobs Praised As Leaders Welcome Nominees*, ALL AFRICA, May 13, 2011, <http://allafrica.com/stories/201105160151.html> (last visited March 29, 2013). *See also* du Bois, *supra* note 11, at 280, 288 (for a similar practice taking place in South Africa).

213. Musau, *supra* note 209.

214. *See* Wahome Thuku, *Chief Justice Nominates Judges*, THE STANDARD, December 10, 2011, available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000048149&cid=4> (last visited March 29, 2013). This was the news announcement from a leading Kenyan station. *See also* CJ Names New Court of Appeal Judges, <http://www.youtube.com/watch?v=A5tJMaffSL8> (last visited March 29, 2013).

215. *See* About the JAC, <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> (last visited March 29, 2013).

216. *See* Maute, *supra* note 83, at 387-389. Maute notes, “Historically, British judges were selected by the powerful Lord Chancellor, using stringent (but sometimes unstated) eligibility criteria and “secret soundings” – process of anonymous consultation with unnamed sitting judges.”

217. Hereinafter CRA.

218. Clark, *supra* note 136, at 478-479. According to Clark, the JAC is the second commission because the first is the Supreme Court appointment commission that deals with filling vacancies in the Supreme Court.

219. *Id.* 480.

courts, and the last appellate court (thereby replacing the House of Lords as the last appellate court in England).<sup>220</sup>

Schedule 12 of the CRA states that the JAC shall be made of 15 members, five of whom are from the judiciary.<sup>221</sup> Thus the judges on this judicial commission are the minority but what is even more interesting is that the Chairperson of the JAC is a lay person.<sup>222</sup> The CRA does not specify the criteria for the Commissioners on the JAC but the lay members who form the majority are selected through a transparent process.<sup>223</sup> Judith Maute, writing on the selection of the commissioners comments, "Commissioners must be selected through an open application process in accordance with "The Nolan Principles of Public Life," requiring selflessness, integrity, objectivity, accountability, openness, honesty, and leadership."<sup>224</sup> The term of a commissioner is five years and can be renewed once.<sup>225</sup>

Perhaps the best indicator of the success of the JAC is in the diversity on the Bench. Kate Malleon, summed it fittingly:

The narrow background from which the judiciary is drawn, particularly at senior levels, has become its Achilles' heel. Almost the only fact that many people know about judges in England and Wales is that they are generally elderly, white, male barristers educated at private schools and Oxbridge.<sup>226</sup>

This was the public perception of the English Bench in England and Wales as well as abroad.<sup>227</sup> However, the JAC has made concerted efforts to address this deficiency and this is expressed in its slogan during of its

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220. See Fischer, *supra* note 74, at 257, 262.

221. Constitutional Reform Act, 2005.4, § 2, sched.12 (Eng.).

222. *Id.* See generally Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53, 82 (2009). They write, "The JAC is composed of 15 commissioners drawn from the judiciary, the legal profession (one barrister and one solicitor), the lay magistracy, and the lay public. The Chairman of the Commission is required to be a lay member."

223. Maute, *supra* note 83, at 412-413.

224. *Id.* at 414. She makes it clear that the Commissioners are selected by application and are processed through a 'meticulously-selected panels'.

225. *Supra* note 221, at §§ 12-13.

226. Malleon, *supra* note 134, at 105.

227. Maute, *supra* note 83, at 389. She writes, "As a practical matter, these forces produced an English judiciary consisting almost exclusively of older white males drawn from the highest ranks of senior barristers-the most elite branch of the English legal profession. Many in the public perceived the judiciary as socially biased and out-of-touch." See also Weinrib, *supra* note 5, at 113. She provides a Canadian perspective on the British judiciary in her introductory remarks. She writes, "The Lord Chancellor, appointed at the recommendation of the Prime Minister, makes recommendations for superior court appointments and is influential in bringing forward names for the positions of Law Lord, Lord Chief Justice and Master of the Rolls."

first year which was, “Committed to Merit.”<sup>228</sup> A more concrete example of this commitment from the JAC is seen in its first report published in 2007.<sup>229</sup> The JAC stated, “We are fully committed to promoting the judiciary’s diversity. Here our work focuses on four areas: gender, ethnicity, professional background and stability.”<sup>230</sup> The JAC developed a strategy to make these ideals a reality. Additionally, it included in its Annual Report for 2006/07 a table to show its progress in achieving diversity in each of these four areas.<sup>231</sup>

In its 2010/11 report - which is the most recent report available at the time of writing- the JAC reported on the three groups of people it was targeting to be able to attract candidates onto the Bench, that is women, black and minority ethnic candidates (hereinafter ‘BME candidates’)<sup>232</sup> and solicitors. On women, the report stated, “The long term analysis indicated that women are applying and being selected in increasing numbers under the JAC.”<sup>233</sup> On the progress on black and ethnic minorities, the reports states, “BME lawyers are applying in larger numbers, and BME candidates are doing well in selection exercises for posts such as Recorder and Deputy District Judge, which are traditionally the first step on the judicial ladder. The JAC wants to see BME candidates continue to progress through the judiciary.”<sup>234</sup> The report was not so positive on the progress in getting solicitors to fill in the vacancies on the Bench. It states, “Progress has been slower on solicitor applications than for women and BME candidates. There has been little difference in the proportion of solicitors applying for most roles over the past ten years – there have been small increases but no dramatic leap forward.”<sup>235</sup> To remedy this state of affairs, the JAC noted in its report it would take steps to encourage more solicitors to apply for vacancies “and support those applying to perform better to their best advantage in the selection process.”<sup>236</sup>

A report prepared in March 2010 for the Justice Select Committee gave an overview of the Constitutional Reform Act, focusing on the different

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228. See Judicial Appointments Commission Annual Report 2006/07 available at [http://jac.judiciary.gov.uk/static/documents/JAC\\_AR-2006-07.pdf](http://jac.judiciary.gov.uk/static/documents/JAC_AR-2006-07.pdf).

229. *Id.* at 10-11.

230. *Id.* at 25.

231. See *Aggregate Diversity Table of the Seven Exercises* in the Annual Report 2006/07 available at [http://jac.judiciary.gov.uk/static/documents/AR\\_2006-07\\_tables.pdf](http://jac.judiciary.gov.uk/static/documents/AR_2006-07_tables.pdf).

232. See Judicial Appointments Commission Annual Report 2010/11- Building the Best Judiciary for a Diverse Society, 16, available at [http://jac.judiciary.gov.uk/static/documents/JAC\\_Web\\_cover\\_2011\\_Final\\_New.pdf](http://jac.judiciary.gov.uk/static/documents/JAC_Web_cover_2011_Final_New.pdf).

233. *Id.*

234. *Id.* at 17.

235. *Id.* at 18.

236. *Id.* at 18.



areas of reform.<sup>237</sup> One of these was the challenges faced by the JAC in carrying out its mandate. In particular, one unsuccessful candidate filed a case against the JAC arguing that the method of pre-qualifying candidates by making them sit for a test was against the principle of merit selection. The court dismissed this application and said the JAC was at liberty under section 88 of the CRA, 2005 to choose the method of pre-qualifying candidates.<sup>238</sup> This is just one case I highlight to show that even where the method of selecting judges such as using judicial commissions, aims to promote fairness and transparency, there will inevitably be a disgruntled minority.

Ultimately both Kenya and England acknowledged the flawed processes in selecting and appointing judges. For Kenya, though the Judicial Service Commission was institutionalized in the Constitution, it was heavily influenced by the Executive appointments to it. This made it easy to appoint judges either beholden to the Executive or with the perception that they were beholden to the Executive. In essence, it stripped the Judiciary of independence. In England the problem was the lack of transparency and a skewed view that only people of a certain gender and background were appointed judges. There was no diversity. The setting up the Judicial Appointments Commission aimed to bring diversity to the Bench in England. Thus, both countries began the journey towards transparent appointments to the Bench by the use of judicial councils. However, other countries have achieved diversity and a measure of transparency by using other methods and not judicial councils. It is these methods that are explored in the next chapter.

## V. DISADVANTAGES OF JUDICIAL COMMISSIONS AND BENEFITS OF OTHER JUDICIAL SELECTION SYSTEMS

Zeus made a bull, Prometheus made a man and Athena made a house. They invited Momos to judge their handiwork. He was so jealous of it that he said that Zeus had made a mistake in not putting the bull's eyes on his horns so that he could see where he was butting. Likewise, Prometheus should have attached man's mind [phren] outside his body so that his wicked qualities were not hidden but could be there for all to see. As for Athena, he told her that she should put wheels on her house so that if an undesirable person moved in next door one could move away

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237. See generally Memorandum to the Justice Select Committee-Post Legislative Assessment of the Constitutional Reform Act, 2005-March 2010, available at <http://www.official-documents.gov.uk/document/cm78/7814/7814.pdf>.

238. *Id.* at 13.

easily. Zeus was so enraged by Momo's jealousy that he banished him from Olympus.

This fable shows nothing is too perfect for criticism.<sup>239</sup>

Thus far it has been argued that the merits of judicial councils reflect positive changes in judicial appointments in Kenya, as well as in England and Wales. But, is this the best way of appointing judges? Does it mean that countries that rely on other systems are plagued with unreliable judiciaries? This chapter considers other methods of appointing judges and argues some alternative selection methods are just as effective. Alternative methods include judges choosing judges in Japan, electing judges in Bolivia, executive appointments of judges in Algeria and legislative appointments in the United States. These four countries represent different parts of the world with different judicial systems as a means of comparison to see how the various methods work in each country.

#### A. JUDGES CHOOSING JUDGES – JAPAN

A judicial role in the selection of judges is often endorsed as a step that reinforces the independence of the judiciary.<sup>240</sup>

The effectiveness of a judiciary is determined by its independence and reliance by the populace, as well as its predictability in making a decision.<sup>241</sup> David M. O'Brien, a professor and specialist in judicial politics writes, "The Japanese judiciary is unitary, unlike the system of judicial federalism in Australia, the United States, and elsewhere, with both a national judicial system and separate state judiciaries...Japanese judges and courts are highly professional and tightly controlled, in contrast to the decentralized, relatively non-bureaucratic, and far more independent federal courts in the United States."<sup>242</sup> The Japanese method for choosing judges at first glance appears insular and subjective, yet over the years has stood the test of time and produced an effective judiciary.<sup>243</sup>

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239. OLIVIA & ROBERT TEMPLE, *THE COMPLETE FABLES-AESOP* 94 (Penguin Group 1998).

240. Baar, *supra* note 6, at 149.

241. See generally J. Mark Ramseyer & Eric B. Rasmusen, *The Case For Managed Judges-Learning After The Political Upheaval Of 1993*, 154 U. OF PA. L. REV. 1879, 1926 (June 2006).

242. 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* 355, 356 (Mallison & Russell eds., 2006).

243. Ramseyer & Rasmusen, *supra* note 238, at 1879.

The decision to become a judge in Japan begins when a student enrolls at the undergraduate level for a degree in law similar to countries where students go from high school directly to study law.<sup>244</sup> In Japan, after undergraduate graduation, all law students take the Japanese bar exam in order to gain admission to the Legal Training and Research Institute (Shihou Kenshuu Sho Training Institute), which is supervised by the Supreme Court of Japan.<sup>245</sup> Hon. Sabrina Shizue McKenna, a Hawaii Supreme Court justice explains the competitive nature and academic rigor of the Japanese bar. The Bar exam in Japan has an extremely low pass rate; in 1991, of the 20,000 who took the exams only 500 passed.<sup>246</sup>

Thereafter students must decide whether they want to be attorneys, prosecutors or judges.<sup>247</sup> Students are compelled to make this decision at the infant stage of their careers because the system is so rigid. If they choose the judicial path, they must apply to an assistant judicial placement. If their application is successful, they are hired for a term of ten years. However in practice, assistant judges function like full judges after five years.<sup>248</sup>

Nevertheless, the inflexible system of choosing which area the Japanese lawyer wants to practice immediately after passing the bar exam has changed. Shizue McKenna observes that the rigidity about choosing one option after the National Bar Exam began to change in the 1990s, and attorneys now have the option to be appointed as judges.<sup>249</sup> Still, the Japanese method produces judges who opt for a career on the bench until they reach retirement age primarily because there is not much fluidity in moving from the bench to the bar. The rigidity that makes it difficult for one to shift from the bench to the bar is not unique to Japan. It is seen in civil law countries in Europe and in Asia as well. This practice is also the same for judges in France, Germany, Italy, Austria, Sweden, and Korea.<sup>250</sup>

The selection panel that admits students into the Shihou Kenshuu Sho Training Institute is made up of judges who are supervised by the Chief

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244. O'Brien, *supra* note 242, at 256. ("Unlike legal education in the United States, but like that in Great Britain, Germany and France, students study law as undergraduates and earn a BA in law.")

245. See Hon. Sabrina Shizue McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PAC. L. & POL'Y J. 121, 124 (July 2001).

246. *Id.* at 124; see also O'Brien, *supra* note 242, at 356.

247. McKenna *supra* note 245, at 125.

248. O'Brien *supra* note 242, at 357.

249. McKenna, *supra* note 245, at 127.

250. McKenna, *supra* note 245, at 127.

Justice.<sup>251</sup> The role of this panel, known as the General Secretariat of the Supreme Court is not limited to admission, but it also decides in what region the judges will work and when they will get promoted.<sup>252</sup> Some may argue the panel takes the form of a commission because its selection process goes beyond choosing students eligible to be judges, but the reality is that only judges make decisions about appointment, promotion, and other administrative decisions.<sup>253</sup> There is no input from other sources. David O'Brien summarizes the Japanese judiciary well when he writes:

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>254</sup>

This system is also likely to subtly influence judges' decisions since they know their judgments have a direct impact on promotions and assignments to work in specific parts of the country.<sup>255</sup> Therefore, if they give a decision deemed to be unfavorable by the panel deciding promotions or placements, their promotions may be delayed or they may be placed in courts far from their families.

Some argue that when judges make decisions thinking of the consequences to their promotion and placement the outcome is a compliant judiciary that is not willing to make decisive actions to check excesses of government, which these proponents consider a

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251. See generally Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 7 THE HARVARD JOHN M. OLIN DISCUSSION PAPER SERIES, Discussion Paper No. 624 (2008).

252. See 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).

253. *Id.* at 64.

254. O'Brien, *supra* note 242, at 360.

255. See generally Mark Ramseyer & Eric Rasmusen, *Managed Courts Under Unstable Political Environments: Recruitment and Resignations in the 1990s Japanese Judiciary*, HARV. L. & ECON. RESEARCH PAPER SERIES, Discussion Paper No. 571, 4 (2006). (explaining that “[g]enerally, the Secretariat 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 the occasionally politically charged case, if a judge tried to implement of out-of-power parties the Secretariat sometimes derailed his 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. Over the next few decades, the Secretariat imposed on them significant career penalties.”).

disadvantage.<sup>256</sup> Others argue there are merits to the system of appointments because it encourages homogeneity in decisions and increases public trust if the parties are able to predict the outcome of a case.<sup>257</sup> In assessing the system, it is important to bear in mind the influence of Japanese culture, which is more inclined to look for ways to dissolve the dispute instead of litigating.<sup>258</sup>

In Japan, the conclusion is that judges choosing judges is a method that has proved useful.<sup>259</sup> Proponents of this appointment system argue that judges know best the qualities to look for in applicants.<sup>260</sup> They also understand rigors of judicial work better, and consequently, are at an advantage when it comes to choosing who would make a good fit within the institution.<sup>261</sup> But ultimately the system of judges choosing judges is about control because the General Secretariat of the Supreme Court controls who joins the bench and ultimately who becomes a judge.<sup>262</sup>

The same system was partially used in England and Wales by the Lord Chancellor in "secret soundings."<sup>263</sup> These soundings consisted of consultations with different people who might weigh in on the matter.<sup>264,265</sup>

However since 2003, there have been developments to adapt a model based on a judicial council.<sup>266</sup> In 1999, the Justice System Reform Council was established to consider wide range of reforms needed for the justice system.<sup>267</sup> It came up with a proposal to have an "Advisory Committee for the Nomination of Judges for the appointment or reappointment" of judges to all courts except the Supreme Court.<sup>268</sup> It is made up of eleven members, five who are appointed from three groups

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256. Takahashi, *supra* note 252, at 64; *cf.* Ramseyer & Rasmusen, *supra* note #252, at 1. (comparing judges in U.S. federal courts with managed courts like the ones in Japan and posit that their political preferences have no influence on their jobs, therefore they have a great deal of independence since they know their decisions on the Bench have no consequences to their personal or professional life).

257. Ramseyer & Rasmusen, *supra* note 255, at 8.

258. Takahashi, *supra* note 252, at 41-44.

259. Ramseyer & Rasmusen, *supra* note 241, at 1929-1930.

260. *Id.* at 1888-1890.

261. *Id.* at 1890.

262. O'Brien, *supra* note 242, at 360.

263. Maute, *supra* note 83, at 396-397.

264. Oliver, *supra* note 141, at 103.

265. Oliver, *supra* note 141, at 104.

266. KAHEI ROKUMOTO, *Justice System In Japan: Its Background And Processes in Korea and Japan*, in JUDICIAL TRANSFORMATION IN THE GLOBALIZING WORLD 319 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

267. *Id.*

268. *Id.* at 343.

of legal professions in Japan - judges, attorneys, and prosecutors.<sup>269</sup> The other six members appointed are, “law professors and other persons with relevant knowledge and experience.”<sup>270</sup>

The function of this committee is to consider the list of names presented by the Supreme Court for appointment to the bench.<sup>271</sup> This consideration includes collecting background information on the candidates and making inquiries from the relevant bodies.<sup>272</sup> The Committee then makes a recommendation to the Supreme Court on the suitability of the candidate for the bench.<sup>273</sup> These changes were introduced to address the shortcomings of the traditional system of appointment, as well as to inject objectivity and transparency.<sup>274</sup>

## B. ELECTING JUDGES – BOLIVIA

Another way of choosing judges, though not very popular, is by election.<sup>275</sup> In this system, judges run for office the same way politicians run. They get votes from the electorate who cast ballots in favor of the candidate they would like to be a judge.<sup>276</sup> The judicial candidate campaigns exactly the same way a politician does by spending money on advertising and portraying other judicial aspirants negatively.<sup>277</sup> More than a decade ago, scholar T. Leigh Anenson persuasively argued that Latin American countries should adopt the electoral method of judicial selection as part of overall judicial reform.<sup>278</sup> She claimed that, “[E]lection is congruent with an attempt ‘to integrate the judiciary into... [Latin American] life’ as well as the promise to ‘maintain an open-minded approach both internally and towards the rest of society’.”<sup>279</sup> Anenson asserted that the advantages of selection by election are

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269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 344; see also Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5.2 NAT’L TAIWAN U. L. REV. 95-97 (2010) available at <http://www.law.ntu.edu.tw/ntulawreview/articles/5-2/03-Article-Takayuki%20Ii.pdf>. The criterion used varies based on the category of judge that is appointed and includes grades and reports from the General Secretariat and Regional Committees.

273. *Id.*

274. *Id.* at 342. The process of appointing judges since the reform is more transparent.

275. See James Sample et al., *The New Politics of Judicial Selections 2000-2009: Decade of Change*, BRENNAN CENTER FOR JUSTICE 1 (Aug. 2010), available at [http://brennan.3cdn.net/d091dc911bd67ff73b\\_09m6yvpv.pdf](http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpv.pdf).

276. *Id.* at 12.

277. See Adam Liptak, *Rendering Justice with One Eye on Re-Election*, N.Y. TIMES, May 25, 2008, available at <http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=print>.

278. T. Leigh Anenson, *For Whom The Bell Tolls...Judicial Selection By Election In Latin America*, 4 SW. J. OF L. & TRADE IN THE AMERICAS (now called SW. J. INT’L LAW) 261, 277 (Fall 1997).

279. *Id.* at 296.

freedom from political influence since the people choose judges directly and the desire or ability of judges elected to adapt the law to local conditions, as well as an increase in public confidence in the judiciary as a whole.<sup>280</sup>

In October 2011, for the first time in history, the people of Bolivia elected judges by ballot.<sup>281</sup> This was the sole method used in the election. Unprecedented in Bolivia, the selection of judges was the people's choice.<sup>282</sup> One report stated the government settled for this method "as a bold step to hold judges more accountable and improve the judicial system."<sup>283</sup> Another report described the election of judges in Bolivia as "rough justice" and the "wrong way to reform the judiciary."<sup>284</sup>

The report describing the judicial election as "rough justice" was heavily criticized in a response by one civil society non-profit organization.<sup>285</sup> In response to the criticism leveled at the manner of judicial determination, another non-profit organization justified electing judges by explaining that it was a difficult duty to install a new judicial system and the system needed protection from interference.<sup>286</sup>

In fact there were positive results from the election. One such example was the election of Judge Cristina Mamani, who has since been elected by her peers to head the Judicial Council.<sup>287</sup> Mamani is from an indigenous Bolivian group and won the election after receiving more than 450,000 votes, the highest any candidate in the election received.<sup>288</sup> In addition, "Of the 56 newly-elected judges, 50% are women and 40%

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280. *Id.* at 283-293.

281. See Gabriel Elizondo, *Bolivians Vote to De-Colonize Courts*, AL JAZEERA, Oct. 16, 2011, available at <http://www.aljazeera.com/indepth/opinion/2011/10/201110169924243497.html>.

282. Elizondo, *supra* note # 292.

283. See Gabriel Elizondo, *Bolivia Set to Hold Judicial Ballot*, AL JAZEERA, Oct. 16, 2011, available at <http://www.aljazeera.com/news/americas/2011/10/20111016184836437398.html>; See also *Bolivia: Judicial Elections*, NETHERLANDS AID, Dec. 22, 2011, available at <http://www.nl-aid.org/continent/latin-america/bolivia-judicial-elections/>.

284. See generally *Rough Justice: The Wrong Way to Reform the Courts*, THE ECONOMIST, Jan. 7, 2012, available at <http://www.economist.com/node/21542421>.

285. See *Economist Wrongly Reads "Rough Justice" into Bolivian Judicial Reforms*, ANDIAN INFORMATION NETWORK, Jan. 10, 2012, available at <http://ain-bolivia.org/2012/01/economist-wrongly-reads-%E2%80%9Crough-justice%E2%80%9D-into-bolivian-judicial-reforms/>.

286. *Id.*

287. See Emily Achtenberg, *Bolivia's New Faces of Justice*, REBEL CURRENTS, Jan. 13, 2012, available at <http://upsidedownworld.org/main/news-briefs-archives-68/3405-bolivias-new-faces-of-justice>.

288. See *Indigenous Woman Attorney is Bolivia's First President of its New Magistrates Council*, INDIAN COUNTRY, Jan. 12, 2012, available at <http://indiancountrytodaymedianetwork.com/2012/01/21/indigenous-woman-attorney-is-bolivia%E2%80%99s-first-president-of-its-new-magistrates-council-73588>.

are indigenous.”<sup>289</sup> It is progress to have a woman from an indigenous community on the bench because it reflects the view that diversity on the bench can be achieved in other ways apart from a judicial council.

A similar process of choosing judges by election is used in the United States but varies from one state to another.<sup>290</sup> New York is one example of a state that holds judicial elections.<sup>291</sup> In 1973 and 1974, contentious elections were held for the position of the Chief Judge of the Court of Appeals, the highest court in New York.<sup>292</sup> The Institute of Judicial Administration documented these elections.<sup>293</sup> In 1973 one of the candidates who offered himself for election was not from the bench. His name was Jacob Fuchsberg, and “he was the only nonjudge and had been opposed not only by his declared opponents, but also by the New York State Bar Association and the Association of the Bar of the City of New York.”<sup>294</sup>

The authors characterized the election as bitter and highlighted the negative aspects of using elections as a way of choosing judges.<sup>295</sup> Particularly, the authors cited the fact that politics is one of several negative features surrounding judicial elections. Moreover, other negative aspects included the lack of bar association influence in elections, personal financial contributions of candidates to fund their election campaigns, and the fact that public sentiment of candidates is based on which candidate is able to successfully sell themselves to the voters, not on who is actually the best candidate for the position.<sup>296</sup> The

289. *Supra* note 285.

290. *See Fact Sheet on Judicial Selections Methods in the States*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (explaining a breakdown on election methods in the different states).

291. *See generally Judicial Selection in the States: New York*, AMERICAN JUDICATURE SOCIETY, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NY](http://www.judicialselection.us/judicial_selection/index.cfm?state=NY).

292. *See* CYNTHIA OWEN PHILIP ET AL., WHERE DO JUDGES COME FROM? ii (1976) (“The general election campaign was even more bitter than the primary. Judge Breitel and Mr. Fuchsberg each expressed increasingly hostile views about his opponent’s campaign.”).

293. PHILIP ET AL., *id* at i – iv.

294. PHILIP ET AL., *id* at ii.

295. *Id.*; *see also* JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? 3 (1993) (“The traditional arguments supporting the concept of merit selection focus on the problems of judicial elections. Judicial elections tend to draw low voter turnout and limited media attention. As a result, the quality and quantity of information available to the public concerning the individuals on the ballot are problematic. Candidates may thus be elected based on name recognition (or ethnic allegiance), personality or party affiliation, rather than on the basis of their ability to perform judicial duties. Additionally, elections – especially partisan elections – may lead well-qualified individuals to decline becoming candidates due to their concern about the nature of politics involved and the demands of political campaigning. The pressures of campaigning, fund-raising, and eliciting support from various political groups are not only burdensome, but may also put candidates under pressure to undertake favors for the groups from which they seek support. Also having to run for office takes time away from judicial duties for those already on the bench.”).

296. PHILIP ET AL., *supra* note 292, at iii-iv; *see also* Kendall, *supra* note 208, at 211-231.



writers concluded by arguing against the election primarily because of political interference as well as the lack of information provided to the voters during election.<sup>297</sup> The issue of judicial elections in the Court of Appeals in New York was re-visited in the United States Supreme Court case, *New York State Board of Elections v. Lopez Torres*.<sup>298</sup>

In my view, regardless of the jurisdiction, this method of selecting judges will always be the method that attracts the most criticism because it is expensive and diminishes the credibility of judges as independent.<sup>299</sup> Unlike in a political contest, the public does not know much about the judges they are electing. In addition, judges have to go out to the people and campaign, which requires money. Some of those likely to fund judges' campaigns may do so in hopes that a favor will be returned when their case is placed before the judge. They anticipate the judgment will be in their favor regardless of the merits of the case. This erodes independence of the judiciary, which is a critical feature in the dispensation of justice.

#### C. EXECUTIVE APPOINTMENTS – ALGERIA

Globally, direct executive appointments are rare. Most appointments have a component that includes a pseudo-judicial council that makes a recommendation on who should become a judge; the final decision is made by elsewhere, usually by the executive. This was the case in Kenya with the composition of the pre-2010 JSC. As discussed above, the President appointed members of the JSC and thus had an invisible hand in the appointment process.

However, in Algeria this is not the case. The Algerian President sits at the chair of the Supreme Judicial Council that determines judicial appointments, while the vice president of the judicial council is reserved for the Algerian Minister for Justice.<sup>300</sup> Judges and magistrates do not have the security of tenure. Moreover, even though the Algerian

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297. PHILIP ET AL., *supra* note 292, at iv; *see also* Kendall, *supra* note 208, at 217. (considering the possibility of Canada selecting judges by election but ultimately dismisses the notion) (“There are problems with an elected judiciary, however. Morally the objection, as stated by Jeremy Webber, is that the ‘[e]lection [of judges], it is believed, is incompatible with their role as a bulwark against majoritarian excesses, concerned more with protecting individual interests than with pursuing common goals.’ It is also alleged that elections are generally seen as demeaning to the candidates and therefore less likely to attract the qualified members of the Bar.”).

298. *N.Y. State Bd. of Elections vs. Lopez Torres*, 552 U.S. 196 (2008).

299. Adam Skaggs et al., *The New Politics of Judicial Elections 2000-2009*, available at <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>.

300. *See generally* UNDP Programme on Governance in the Arab Region, Country focus on Algeria, available at <http://arabstates.undp.org/rbas/en/home.html>.

Constitution recognizes the independence of the judiciary, in practice this does not happen.<sup>301</sup> The President derives his power to head the Supreme Judicial Council from the Algerian Constitution. Indirectly, he then has the powers to assign, promote, and transfer judges.

In this arrangement, judicial officers are beholden to the executive branch while appointments and dismissals are based on political expediency instead of merit.<sup>302</sup> One of the many consequences of this arrangement is that the rights of individuals are crushed, and consequently the notion of a fair trial disappears.<sup>303</sup> There are very few countries in the world that adhere to this system, where there is direct involvement by executives in the judiciary without any forms of checks and balances.<sup>304</sup>

There are several reasons why there is absolutely no advantage to selecting judges and magistrates in this way. First, judges will have no confidence from the public. Second, judicial officers will make decisions based on fear, timidity or in favor of the Executive because of the Executive's power over them, and therefore trample the rights of the individual.<sup>305</sup> Alternatively, judges will resort to taking bribes and kickbacks from parties in their courts such that justice will be for sale to the highest bidder.<sup>306</sup> This is a truly unsatisfactory arrangement because it makes the judiciary subservient to the whims of the executive and strips away any form of independence from judges.

#### D. LEGISLATIVE APPOINTMENTS— SUPREME COURT OF THE UNITED STATES

The appointment process for justices to sit on the Supreme Court of the United States involves confirmation by the Senate.<sup>307</sup> This process attracts countrywide attention because of the power these judges wield, as well as the fact that sitting on the Supreme Court is a lifetime

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301. See International Commission of Jurists Report on Algeria.

302. See generally Amel Boubekeur, *Countries at the Crossroads 2011 – Algeria*, FREEDOM HOUSE, Nov. 10, 2011, available at <http://www.unhcr.org/refworld/country,,FREEHOU,,DZA,,4ecba654c,0.html>.

303. International Commission of Jurists Report on Algeria, *supra* note # 297.

304. See generally *Attacks on Justice—People's Democratic Republic of Algeria*, International Commission of Jurists 2-3, available at <http://www.unhcr.org/refworld/country,,ICJURISTS,,DZA,,48a3f0280,0.html>.

305. *Id.* at 5.

306. *Id.* at 5.

307. U.S. CONST. ART. II, § 2.

appointment.<sup>308</sup> The appointment process is established in Article II of the United States Constitution and gives the President power to nominate judges to the Supreme Court “by and with the advice and consent of the Senate.”<sup>309</sup> Thus, the Senate plays an important role in the appointment process. If members of the Senate decline to approve the President’s nominee, the Senate Judiciary Committee should then give additional information.<sup>310</sup> Out of 154 nominations received, 120 have been confirmed.<sup>311</sup> Researcher Denis Steven Rutkus observes:

[P]olitics also has played an important role in Supreme Court appointments. The political nature of the appointment process becomes especially apparent when a President submits a nominee with controversial views, there are sharp partisan or ideological differences between the President and the Senate, or the outcome of important constitutional issues before the Court is seen to be at stake.<sup>312</sup>

A good example of this is the Senate’s role in the nomination of Robert Bork. Robert Bork had all the qualities of a justice worthy of sitting on the Supreme Court.<sup>313</sup> President Reagan nominated Bork on July 1, 1987.<sup>314</sup> However, in October 1987 the Senate rejected Bork’s nomination after five days of confirmation hearings in a vote where 42 voted for Bork’s confirmation while 58 voted against it.<sup>315</sup> This was not the first time the Senate rejected a President’s Supreme Court nominee, but it is the largest margin to date that a nominated candidate has lost.<sup>316</sup> This rejection, in addition to the fact that Bork was highly qualified, makes the Senate’s role in Supreme Court judicial determination the focus of attention.<sup>317</sup>

There were many factors surrounding Reagan’s nomination of Bork. These included Reagan’s own views about packing the Court with conservative Judges and the reality that the Republicans no longer held a majority in the Judiciary Committee, as well as the Iran-Contra

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308. See generally Denis Steven Rutkus, Cong. Research Serv., RL31989, Supreme Court Appointment Process: Roles of the President, Judiciary Committee and Senate (2005), available at <http://fpc.state.gov/documents/organization/50146.pdf>.

309. *Id.* at 2.

310. *Id.* at 45-48.

311. *Id.* at 2.

312. *Id.*

313. See generally Mary Katherine Boyte, The Supreme Court Confirmation Process in Crisis: Is the System Defective, or Merely the Participants?, 14 WHITTIER L. REV. 517, 537 (1993).

314. *Id.* at 524.

315. *Id.* at 523.

316. *Id.*

317. *Id.* at 521-522, 531.

Scandal.<sup>318</sup> Furthermore, the media, for the first time played a significant role in the public's perception of a Supreme Court nominee, as Bork's confirmation hearings were aired, (in come cases live) on national television.<sup>319</sup>

No one questioned Bork's credentials, but the schisms between the political parties led to his rejection as a nominee.<sup>320</sup> Professor Ronald D. Rotunda predicted Supreme Court Justice nominees are likely to be caught in the cross hairs of both political parties.<sup>321</sup> He stated:

What may become a legacy of the nomination of Robert Bork is the tendency to treat a confirmation as if it were an election campaign, a media event complete with an avalanche of stump speeches and a bombardment of negative advertising, all accompanied by extensive direct mail advertising, campaign buttons, and solicitation of funds. A bipartisan task force...concluded that the Supreme Court confirmation hearings are "too visible and attract too much publicity," and that these hearings are used "for other purposes, ranging from self-promotion to mobilizing special-interest groups in order to influence public opinion."<sup>322</sup>

Senate involvement in the nomination process of Supreme Court Justices may have influenced the development of the nomination process of Supreme Court Judges in the United Kingdom.<sup>323</sup> Due to the fact that the United States Senate can have such a powerful influence on nominations to the United States Supreme Court, the United Kingdom chose to implement a different process where the House of Commons is not at all involved in the process of choosing Judges in the United Kingdom.<sup>324</sup>

In my view, the history of the United States, along with robust provisions in the United States Constitution and heavy adherence to having a system of checks and balances, makes it possible to have the Senate involved in the nomination process of United States Supreme Court Justices (though there is room for improvement).<sup>325</sup> The United Kingdom observed the United States' process of Supreme Court nominations, particularly the

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318. *Id.* at 517.

319. *Id.* at 527; *See also* Ronald Rotunda, *Separation of Powers: The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L. J. 559, 581 (1988).

320. Boyte, *supra* note 313, at 546.

321. Rotunda, *supra* note 319, at 585.

322. *Id.*

323. Clark, *supra* note 136, at 485.

324. *Id.*

325. Boyte, *supra* note 313, at 542-546.

polarized debates surrounding Bork's nomination, and made the decision to exclude its legislature in the appointment of Judges.<sup>326</sup>

In a fragile democracy, such as Kenya, where appointments tend to be viewed through ethnic lenses, legislative appointments of judges would be extremely difficult, and instead of uniting the country, may heighten ethnic tensions. However, the 2010 Kenyan Constitution does have a limited legislative role in the appointment of the Chief Justice and the Deputy Chief Justice.<sup>327</sup> The role of the legislature (referred to as the National Assembly) is to act as a balance ensuring the President does not bypass the JSC or wield control over it, which in turn ensures that Presidential appointments are fair.<sup>328</sup>

However, does appointment by the legislature ultimately guarantee that judges are accountable and independent? Looking at the history of the Supreme Court of the United States, the answer is yes. In general, Supreme Court Judges make decisions based on fidelity to the law. In the final assessment, judicial appointments by the legislature can bring positive results. The major disadvantage is that the judicial appointment process can be hijacked by political influence and other considerations, which have nothing to do with the competence of the candidate. But this method is still preferred above executive appointments and appointments by elections because it achieves both independence of the judiciary and acceptance of appointments by the people.

## VI. LESSONS LEARNED AND RECOMMENDATIONS

Many lessons can be learnt from the ways in which commissions operate in other systems, but it is neither necessary nor desirable to follow slavishly the detailed arrangements found elsewhere.<sup>329</sup>

If it were possible to have trends in the selection of judges, the latest trend would be selection by using judicial commissions. On balance, judicial commissions appear to be the most effective tool at creating diversity on the bench, reducing political influence on selection, and instilling confidence from the public about the independence of the judiciary. The Judicial Appointments Commission (JAC) in England has been at work for more than five years, since April 2006, while the

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326. Clark, *supra* note # 136, at 478.

327. CONSTITUTION, art.166 § 1(a) (2010) (Kenya) ("The President shall appoint (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly...").

328. See CONSTITUTION, art. 166 § 1(a) (2010) (Kenya).

329. Malleon, *supra* note 15, at 102-103.

Judicial Service Commission (JSC) in Kenya is a year old. Thus, the JSC should draw lessons from the JAC and other judicial commissions worldwide. This chapter considers lessons the JSC can draw from the JAC and then proceed to look for lessons from other sources, but these do not represent an exhaustive list. In addition, most of the recommendations below can be implemented by the JSC without legislative amendment, yet a few recommendations require legislative amendment.

#### A. LESSONS FROM THE JUDICIAL APPOINTMENTS COMMISSION (JAC)

The first lesson the JSC should incorporate is publication of an annual report similar to the JAC's annual report. The report should include information such as goals the JSC sets out to achieve and whether it was able to achieve these goals. This would fulfill the preexisting requirement that the JSC release an annual report. The report should also include an analysis of judicial positions advertised and a categorization of candidates based on gender, current field of practice and locality where they work without the mention of names, as well as candidates who were short-listed and those who were successful in interviews. The report should also contain highlights of achievements of the JSC within the past year and the challenges it faced, as well as proposals on how to overcome those challenges. Since the JSC not only hires, but also disciplines it would be good to have a brief analysis of the complaints it received and how these were resolved. This should be done for both judicial officers and the rest of the judicial staff without mentioning names in the report.<sup>330</sup> Additionally, the report should include guidance on how to lodge a complaint, which could be included in the back of the report. Moreover, hard copies of the report should be made available in every courthouse in Kenya to be kept in court libraries. For courts that do not have libraries, the JSC report should be in the custody of a judicial employee at the court who will make it accessible for public use on request. Finally, a hard copy of the report should be available for sale at an affordable cost to other governmental organs and stakeholders, as well as any interested person who wants to know more about how judges are selected in Kenya.

In order to avoid any conflicts of interest, my second proposal, specifically aimed at lawyers, judges, and magistrates appointed as JSC

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330. Cf. State of California's Commission on Judicial Performance, *available at* <http://cjp.ca.gov/> (reports published online and mention the names of the judges and the disciplinary action taken against them).

commissioners, is to run a conflict of interest check regularly.<sup>331</sup> On a practical level, one suggestion is for the JSC to “discuss conflict of interest problems thoroughly to determine which specific relationships cause concern.”<sup>332</sup> Conflicts of interest arise when any of the commissioner’s relationships (in the personal, professional, or political sphere) appear to influence or in fact influence the commissioner’s ability to make a decision based solely on an applicant’s merit.<sup>333</sup> Currently, there is no policy in place, but the JSC must fully address conflicts issues to make it clear to JSC lawyers when and in what circumstances they either need to recuse themselves or disclose information to fellow commissioners.<sup>334</sup> For example, one proposal would be to prevent a commissioner from taking part in the deliberations if they have any pending matters before the applicant who is a judicial officer.<sup>335</sup>

My third proposal is on how to address the removal of commissioners, a legislative requirement since it affects the content of the Judicial Service Act that governs the JSC.<sup>336</sup> In the excitement to form the JSC, the Judicial Services Act left out one important clause. It is silent on the removal of a commissioner from the JSC. This leaves the JSC vulnerable to excesses of power as the executive branch of government was in the 1963 Constitution. Of course, it is expected that commissioners have been chosen by their respective bodies and in the case of the laypersons nominated by the President; the National Assembly thoroughly scrutinized them. However, there is no clause addressing the removal of the commissioners.

In the Constitutional Reform Act (CRA), JAC commissioners can either resign or be removed from office on recommendation from the Lord Chancellor.<sup>337</sup> The grounds on which the Lord Chancellor can make his recommendations include the failure to conduct duties as a commissioner, conviction of an offence, bankruptcy, and being unfit to hold office.<sup>338</sup> My recommendation is that the Judicial Service Act of 2011 be amended to include grounds for a commissioner’s removal. The

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331. Marla N. Greestein, Handbook for Judicial Nominating Commissioners, THE AMERICAN JUDICATURE SOCIETY 6 (2004), available at [http://www.ajs.org/selection/jnc/docs/JNC\\_HandbkCh1.pdf](http://www.ajs.org/selection/jnc/docs/JNC_HandbkCh1.pdf).

332. *Id.* at 6.

333. *Id.*

334. *Id.* at 7.

335. *Id.* at 8.

336. See generally The Judicial Service Act, No. 1 (2011), KENYA GAZETTE SUPPLEMENT NO. 17 (Kenya).

337. The Constitutional Review Act, 2005, c. 83, §15, sch. 12 (U.K.)

338. *Id.*

current position in the Judicial Service Act is that there are no grounds for removal of a commissioner, so there is need for legislative amendment to include specific grounds for removal.

My fourth proposal is the auditing of complaints filed by the JSC by the Kenyan Judicial Ombudsman. I draw this lesson from the Commission for Judicial Appointments (hereinafter CJA), the precursor to the JAC, which had a five-year mandate beginning in 2001 because it, “served as an independent watchdog entity, auditing the appointment process and investigating complaints about the process and fairness issues arising in specific appointments.”<sup>339</sup> Indeed, the CJA produced a scathing report after reviewing a selection process using “secret soundings” of the Lord Chancellor.<sup>340</sup> In Kenya, the Judicial Ombudsman is not independent enough because it is an office within the judiciary, hence the process of overseeing and evaluating the appointments should be assigned to another independent entity that will carry out this process for a specific period of time, between five and seven years.

#### B. LESSONS FROM AROUND THE WORLD

The JSC should be more transparent about its hiring processes and set out a time schedule on the period it takes to fill vacancies in the judiciary.<sup>341</sup> For example, in this writer’s experience it took about 180 days from my submission of magistrate application in response to an advertisement of vacancies until receiving an offer letter. This occurred during the pre-2010 JSC.

The post-2010 JSC has proved itself more adept at advertising, shortlisting, interviewing, and identifying candidates to fill vacant posts for judicial officers. Admittedly, most of the posts it has filled are for judges, but it has handled a larger volume of interested candidates for these positions than its predecessor, and credit must be given for its efficiency.

However, a cautionary note should be made for the shortlisting process due to conclusions drawn from appointments made in 2011. In April 2011, the JSC advertised 28 vacancies for judges and received 234

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339. Maute, *supra* note 83, at 405-406.

340. See generally *Judging the Judicial Process*, THE LAWYER, April 10, 1999, available at <http://www.thelawyer.com/judging-the-judicial-selection-process/88799.article>.

341. Martin, *supra* note 295, at 8.



applications.<sup>342</sup> Of the qualified magistrates who applied, there was biased selection in short-listing either based on age, years of experience within the judiciary, or rank within the magistracy.<sup>343</sup> While I agree that the JSC should not openly subvert the Constitution or exercise any form of discrimination, it must level the playing field to shortlist and appoint (if the candidates demonstrate ability) youthful judges.

Similar facts apply in the selection of Court of Appeal judges. A variety of candidates applied, yet all selected to the Court of Appeal were High Court judges.<sup>344</sup> It is easy to conclude that the JSC wanted to elevate judges from within to the Court of Appeal but had to be seen as fair in this process. In order to live up to the phrase, “The Judicial Service Commission is an Equal Opportunity Employer and selects candidates on merit, through fair and open competition, from the widest range of eligible candidates,”<sup>345</sup> the JSC must ensure shortlisting and ultimate selection of judges and magistrates are not motivated by other factors.

Drawn from the Bolivian experience detailed previously in this article, the JSC must guard itself against manipulation by the legislative and executive branches. As noted in previous chapters, judicial councils minimize the influence of politics in selecting judges.<sup>346</sup> While the influence is not totally eradicated in any judicial council, it is kept at a minimum. This is an important consideration because it was the political influence through the executive branch (in the person of the President) that contributed significantly to the perception that the judiciary is an extension of the executive office in Kenya. In England and Wales, JAC commissioners are interviewed by a separate body as part of a very competitive and thorough process.

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342. Nzau Musau, *Shortlisting Complete for Advertised Judges' Positions*, THE STAR, May 28, 2011, available at <http://www.the-star.co.ke/national/national/26060-shortlisting-complete-for-advertised-judges-positions>.

343. There are different ranks that include District Magistrate (Prof.) II, Resident Magistrate, Senior Resident Magistrate, Principal Magistrate, Senior Principle Magistrate and Chief Magistrate. All ranks have a different civil and criminal jurisdiction and salary as well. See generally the Magistrates' Courts Act, (2007) Cap. 10 § 5(1) (Kenya), available at <http://www.kenyalaw.org/Downloads/GreyBook/5.%20The%20Magistrates%20Courts%20Act.pdf>.

344. See Wahome Thuku, *Kenya Chief Justice Nominates Judges*, THE STANDARD, December 10, 2011, available at <http://in2eastafrika.net/kenyas-chief-justice-nominates-judges/>. (“The JSC did not pick any of the other 11 lawyers in private practice and from the academia that had been short-listed.”).

345. The phrase appeared at the bottom of the advertisement of Court of Appeal judges on October 4, 2011. Vacancy in the Office of Judge of the Court of Appeal, No. 8 (2011), KENYA GAZETTE NO. 13479, available at <http://www.kenyalaw.org/klr/index.php?id=880>.

346. Kendall, *supra* note 208, at 222. (quoting J. Ziegel) (“It has great attractions. It largely depoliticizes the selection process but still leaves a role for the government to play.”).

The process of selecting some JSC commissioners in Kenya is competitive. JSC members come from different “constituencies,” which include the Kenyan judiciary, the Law Society of Kenya, and members of the public. The Attorney General is the only direct Presidential appointee. The two lay persons, even though nominated by the President, must be approved by the legislature. Thus, there is an element of objectivity introduced for lay members who are Presidential nominees.

The way in which political influence may creep in is through the election of lawyers by their own members. This may happen through politicians seeking to ensure that a lawyer sympathetic to their cause is elected to the JSC by bribing some lawyers so they elect the politician’s choice for the JSC. Though the possibility is remote, it is still worth bearing in mind.<sup>347</sup> The recommendation is for JSC commissioners to be aware of the invisible hand of political influence in their midst.

The JSC must also learn that it is the next target in reform. Nuno Garoupa and Tom Ginsburg write, “The councils, once created, provide an arena for competition and the eternal struggle to calibrate independence and accountability. We thus predict that councils themselves will frequently become the targets of institutional reform . . . .”<sup>348</sup> The inference is that there has been a shift from reform of the judiciary to the reformation of judicial councils.

Furthermore, the JSC ought to decide in its recruitment policies whether it shall adopt a passive or active approach in diversifying the bench. The passive approach would allow non-traditional candidates to apply to join the bench. Evidence thus far in selecting judges for the Kenyan bench shows that more and more candidates from diverse backgrounds and different parts of the country are applying to be judges. This evidence is attributable to the fact that candidates feel there is a better chance they will be considered fairly since the mechanism of appointment is transparent. There are heightened numbers of female lawyers applying, as well as lawyers who practice outside of Nairobi, Mombasa, and Kisumu which are Kenya’s main cities. In the pre-2010 JSC, women and upcountry lawyers would not have had an opportunity at all. The active approach is for the JSC to have a more dynamic method of selection, targeting groups that have been left out. However, in a country where specific ethnic identity dominates over one’s national Kenyan identity, this is problematic, because it could lead to accusations of the JSC promoting a particular ethnic group.

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347. Martin, *supra* note 295, at 20-23.

348. Garoupa & Ginsburg, *supra* note # 8, at 130.

Overall, the 'trickle up' approach is most likely. This approach is similar to the approach that occurred in the 1960s in the form of Africanization that will happen now with diversity.<sup>349</sup> Africanization refers to the process by which Kenyans became members of the bar by studying law at a university, going through law school, sitting for the bar exam, and taking the oath to practice law. By independence in 1963, the Kenyan bar (and bench) was predominantly an all white male affair. But where the JSC can re-dress some of the inequalities as it did in its appointment of five women (out of seven candidates) to the Court of Appeal in December 2011, it should.<sup>350</sup>

But what happens if the JSC makes a recommendation that is rejected by the National Assembly? This happened in England when the Lord Chancellor rejected JAC nominees.<sup>351</sup> The mandate for the JSC as outlined in the Constitution of 2010 is to make recommendations for the position of Chief Justice and Deputy Chief Justice. In its first year of operation, the National Assembly endorsed all JSC appointments. However, the JSC ought to consider what strategy it shall adapt in the event that its recommendations are rejected. This happened in Canada when its commission failed to include a Franco-phone speaking judge, as well as in South Africa when a white candidate was overlooked in favor of a black candidate.<sup>352</sup> Both nominations were rejected.

It is likely that a point of contention in Kenya will be the ethnicity of candidates. If it is seen that there are more judges from one particular ethnic group, it is probable that the JSC may come under fire. In the words of Francois du Bois, the JSC will learn what the South African JSC learned. "[H]ard choices have to be made between diversity and representivity, and between lawyerly excellence and social legitimacy."<sup>353</sup>

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349. Malleon & Russell, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* *supra* note 15, at 8.

350. Prior to this, there had been no woman on the Court of Appeal's bench from January 2009, and the only female judge was appointed to an international court. There were appointments made to the Court of Appeal in April 2009, but the appointments were given to two men.

351. See generally Joshua Rozenburg, *Lord Chancellor Veto Raises Questions for Judicial Standards*, THE GUARDIAN, December 8, 2011, available at <http://www.guardian.co.uk/law/2011/dec/08/lord-chancellor-veto-judicial-standards>. (includes an ongoing discussion on the powers of the Lord Chancellor); See also Kate Malleon, *Taking The Politics Out Of Judicial Appointments*, UK CONSTITUTIONAL LAW GROUP (February 21, 2012), <http://ukconstitutionallaw.org/2012/02/21/kate-malleon-taking-the-politics-out-of-judicial-appointments/>.

352. Malleon & Russell, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* *supra* note 15, at 47; See also Du Bois, *supra* note # 11, at 291.

353. Du Bois, *supra* note # 11, at 283.

Should the JSC defend its position on prior recommendations for judges to the Supreme Court of Kenya? This is water under the bridge since Supreme Court judges are now in office, but it is worth revisiting because there are lessons to learn for the future. The Chief Justice and the Deputy Chief Justice are two of the seven judges who sit on the Supreme Court. It is likely that the drafters of the Constitution of 2010 probably settled on seven judges to represent the provinces in Kenya, which at the time of drafting the Constitution were the administrative units within the executive branch of government. There were eight provinces including Nairobi. It is my position that the composition of the Supreme Court appointments is meant to represent the seven provinces excluding Nairobi.

This is not a novel phenomenon. The Canadian Supreme Court faced a similar challenge in appointing judges from Quebec.<sup>354</sup> However, significant differences exist in Canada, namely that Supreme Court appointments are made by the Prime Minister and legislation mandates that three of the nine judges must come from Quebec. The similarity between Kenya and Quebec is that the composition of the Supreme Court was guided by the need to reflect the population. One way the JSC can make its decisions transparent for Supreme Court appointments is to lobby for a Supreme Court bill that includes a clause requiring that appointments reflect the general population as much as possible.

Another principle for the JSC to acknowledge is that judicial councils are not immune from controversy. No matter how transparent the process is and despite the fact that the driving force for the JSC will always be to select judicial officers on merit, the JSC will face vitriolic criticism. This is likely to take place in the selection of judges to the High Court, Court of Appeal, and particularly the Supreme Court, where selection will inevitably be influenced by politics.<sup>355</sup>

Furthermore, judicial members of the JSC should not have other additional arduous responsibilities in addition to the responsibility of sitting on the JSC. This is regardless of their ability to balance their work with other obligations. Sitting on the council is a demanding task, as additional responsibilities will be assigned by virtue of the position in

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354. F.L. Morton, *Judicial Appoints In Post-Charter Canada: A System In Transition*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 56, 58 (Malleon & Russell eds., 2006); See also Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 241-259 (Malleon & Russell eds. 2006) (positing that the political context of the country has a bearing on Supreme Court appointments).

355. Du Bois, *supra* note # 11, at 292.

addition to handling normal judicial duties. For example, one of the commissioners in the current JSC is also the head of a division. He assumed the head of division role after being elected as commissioner. Although his ability to work as a commissioner has not been compromised by his responsibility as head of a division, the workload of both positions is too much for one individual. Given the JSC's workload in its first year in addition to the fact that commissioners review judicial applications, shortlist candidates, conduct candidate interviews, and meet to deliberate before making their final decision, the representatives of the JSC should have fairly flexible schedules to allow them to focus solely on the JSC. Therefore, their role should be limited to commissioner without outside judicial responsibilities.

The same applies to JSC commissioners who are elected as representatives of LSK. However, their role is slightly more complicated because LSK members elect them. I have already addressed the complications that may arise from these lawyers who are representatives if the member of the LSK is on the JSC. The complications arise because these lawyers who sit on the JSC appear before judicial officers who have matters pending before the JSC, whether in the form of applications for promotions, appointment as a judge, or disciplinary issues. It is more complicated, because judicial officers may perceive prejudice or bias that their matters coming before the JSC, will be handled by the JSC commissioner who is a lawyer based on interactions in court.

In the JSC, one of the lawyers (an LSK representative) publishes an authoritative law magazine monthly. A recent edition featured an article, commentary, and analysis on the conduct of one senior judicial officer. While freedom of speech is a fundamental right recognized in the Kenyan Constitution, the public holds a commissioner to a higher standard. Allowing such a publication is distasteful. He is at liberty to express his views just like all Kenyans, but because he sits on the JSC, he must be sensitive to the fact that he may be seen to be presenting JSC views and not merely his own. The public will perceive bias in the article despite the fact that the article was published after the judicial officer was suspended from office. The caution is that the JSC collectively must be careful what message it sends to the public about its treatment of judicial officers. The public takes their cue from commissioners. They are likely to esteem or degrade judicial officers based on the methods they see being used to appoint (and discipline) judicial officers. Thus far the JSC has handled all situations commendably.

In the future, the JSC will need a strengthened administrative unit to assist it in its work. This is a direct consequence of the growth of the

judiciary. When the post-2010 JSC started its work in February 2011, the Supreme Court existed only on paper. However, it is now staffed with judges, and the number of judges on the Court of Appeal has doubled, and the number of High Court judges has increased by almost fifty percent. Additionally, the number of magistrates is set to increase by thirty percent. The prescribed number of judges to sit on the High Court is seventy, but an amendment was passed recently to increase this number to 150 judges and to increase the Court of Appeal judges to thirty.<sup>356</sup> The eleven commissioners will be overwhelmed if they have to process these files. Consequently, part of their long-term plan should include strengthening the JSC's administrative arm.

Another reason the JSC needs a strengthened administrative arm is to conduct periodic assessments (for example every seven years) of judicial officers. It is important to do this to ascertain the training needs of judicial officers, as well as to achieve standards of ethics and integrity. Currently the Kenyan judiciary is going through a vetting process that aims to thoroughly scrutinize judges and magistrates currently on the bench and assess their suitability to continue holding office. This is the first time the vetting process is taking place with involvement from judicial officers. A board that has already been selected will examine the records of judges and magistrates who were in office when the Constitution was promulgated on August 27, 2010. It will assess among other qualities, the judge's character, quality of judgments, and any complaints lodged against them. When the process is complete, those found suitable to serve will continue to their position. However, it is my view that the process of assessing judicial officers should be periodic and take place once every five years. The lag period is long because I take into account the fact that appointment methods have changed. Additionally, the public is now emboldened to make complaints to the JSC when faced with difficult judicial officers.

The media has played a major role in projecting the image of the JSC in its crusade to restore the judiciary and make justice the 'shield and defender' in the words of the Kenyan national anthem.<sup>357</sup> The media has also helped to promote transparency in judicial appointments by broadcasting interviews of candidates for judgeship in real-time across Kenya. The print media has provided insightful background for the

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356. See generally the State of Judiciary Address, October 2012 by Chief Justice Dr. Willy Mutunga available at [http://www.standardmedia.co.ke/?articleID=2000068789&story\\_title=state-of-the-judiciary-report-2011-2012&pageNo=3](http://www.standardmedia.co.ke/?articleID=2000068789&story_title=state-of-the-judiciary-report-2011-2012&pageNo=3).

357. The line in the anthem is "Justice be our shield and defender." Words of the full anthem in English and Swahili are available at <http://www.kenya-travel-packages.com/kenya-national-anthem.html>.

public about the Chief Justice and Deputy Chief Justice, since little was publicly known about the candidates. This was a refreshing and bold move since it had never been done in Kenya's history and was particularly useful for the public to get to know those who applied to these posts. The JSC should develop a policy on its relations with the media, including information commissioners can and cannot divulge from their meetings. The present commissioners are setting the pace for the conduct of other commissioners who will replace them in future. It will be good for their successors to find a policy document that guides them in their conduct because they will be new to the post. It will also make the learning curve smoother for successive commissioners.

Additionally, the JSC will have to grapple with the issue of seniority. This particularly affects judicial officers who have served in the judiciary for more than five years. The judicial culture has decided promotions and status based on the number of years served. Thus, career judicial officers have been held with high prestige. It was the prevailing culture that appointment to become a judge or elevation to the Court of Appeal was based on seniority. This is not a feature unique to the Kenyan judiciary. It happened in Australia in 1966 with the establishment of the New South Wales Court of Appeal, which replaced the former court and changed the seniority of judges within the court structure. This caused discomfort among some of the more senior judges.<sup>358</sup>

Culture takes time to change.<sup>359</sup> There is not much action the JSC commissioners can take in addressing the issue of seniority, apart from recognizing that it exists in the psyche of many judicial officers who have served for a long time. Many of them are motivated, work hard, have made difficult personal sacrifices, and have given their best to the judiciary.<sup>360</sup> In an attempt to focus on merit, the JSC should not discount

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358. See generally Hon. J. Michael Kirby, *Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal*, 30 SYDNEY L. REV. 177 (2008). ("The creation of the new Court of Appeal for New South Wales, with effect from 1 January 1966, and the consequent passing over of the commissioned judges of the Supreme Court of the State who were not appointed to the new appellate court, produced sharp feelings of resentment amongst many of those judges. Suddenly and unexpectedly their seniority within the Supreme Court was disturbed, affecting the work they did and perceptions of their status in the legal profession and the community.").

359. *Id.* at page 177. ("In our legal tradition, such disturbance of seniority amongst the judges ("supersession") other than by appointment of a judge to the separate office of the Chief Justice, is a relatively rare and constitutional step. Citizens and some lawyers may wonder what all the fuss is about. However, the basic reason for the concern has to do with the independence of courts, the integrity of their internal arrangements affecting already appointed judges and the convention that those arrangements will normally be left to the courts themselves, once their members are commissioned.").

360. *Id.* at page 183. ("Many of those judges superseded would have considered that they had been demoted in rank in a very public way. This destabilized the manifest independence of the

these factors. Indeed the challenge to the JSC is to see how to ensure that these judges and magistrates who were dependent on seniority for promotion, remain motivated and apply for vacancies when they arise and fit the description.

Does the JSC have an appeal process for a candidate dissatisfied with the outcome, and if so, is the process known to candidates? Are there clear grounds in which one can appeal or is it based on the subjective understanding of the candidate? The Judicial Service Act of 2011, which regulates the JSC, does not have any procedure in place for a candidate to appeal. In the Kenyan system of justice, the JSC is subordinate to the High Court, and therefore a candidate who feels mistreated has the option to appeal to the High Court. However, this takes time and can cripple the work of the JSC if for example, the candidate was to seek an injunction against the JSC and it was granted. However, the JSC should consider having regulations that address a candidate's dissatisfaction internally before going to the High Court because it is more cost effective, attracts less publicity, and models that justice starts within the judiciary.

Training council members is a practice that the JSC should incorporate as one of its core activities to be carried out in a year. A study conducted by USAID in April 2004 draws on lessons from judicial councils in Europe and Latin American and recommends several best practices, one of which is training council members.<sup>361</sup> The study explains that the purpose of the training is to help council members carry out their roles better and “reduce their vulnerability to pressure.”<sup>362</sup> Training is absolutely necessary since JSC Commissioners are from different backgrounds, and furthermore, this may be their first time sitting in such a high position.

Another recommendation the USAID study mentioned is for judicial councils to identify weak spots, referred to as “sources of interference.”<sup>363</sup> One of these sources, covered quite extensively in other chapters of the study is political interference. The JSC needs to identify

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State's highest judges. It was therefore not a trivial or purely personal affair. Unless judges are vigilant in cases of such disturbance, the government and Parliament might use such a precedent to diminish Supreme Court judges to mere public servants rather than constitutional office holders with vital duties as guardians of the public against the misuse of government power.”)

361. See Violaine Autheman & Sandra Elena, *Global Best Practices: Judicial Councils: Lessons Learned from Europe and Latin America*, IFES RULE OF LAW WHITE PAPER SERIES (April 2004), available at <http://www.ifes.org/Content/Publications/White-Papers/2004/Global-Best-Practices-Judicial-Councils-Lessons-Learned-from-Europe-and-Latin-America.aspx>.

362. *Id.* at 17.

363. *Id.*



its areas of weakness and protect itself from these influences. Consequently, JSC commissioners should strive to avoid all forms of affiliation with political parties in Kenya. This is possible since the political scene in Kenya is different from the United States or England and Wales, where there are two main parties and a judge is labeled either conservative or progressive. Behind closed doors, it is advisable for the JSC to have candid discussions about certain political classes lobbying the JSC in hopes that it will make decisions in favor of certain candidates. The JSC should publicly reiterate the objective basis by which it makes decisions as a way of sending a subtle message to the ruling political class that it will not tolerate political lobbying. One consequence of this will be that the public becomes aware that the political class has no control over the JSC (or its choices) and will speak out when decisions are made contrary to procedure. This is precisely what happened in January 2011 after President Kibaki attempted to appoint a Chief Justice unilaterally without participation from the JSC. Kenyans resoundingly rejected his choice for not following the process set out in the Kenya Constitution of 2010 and the JSC embarked on its first litmus test of finding a Chief Justice.<sup>364</sup> It successfully passed this test and in doing so raised the bar for other government institutions in the manner of making appointments.

Yet another recommendation the JSC may want to implement from the USAID study on judicial councils in Europe and Latin America is developing its relationship with civil society.<sup>365</sup> My recommendation is that the JSC should develop strategic partnerships with different sectors of society including academics and the media as already mentioned earlier in this chapter.<sup>366</sup> These collaborations are good for the JSC because they keep communication channels between the JSC and other parts of society open.

The JSC ought to aim as much as possible to keep its internal disagreements away from the limelight and hidden from media attention.

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364. See Michael Gichuki, *JSC Rejects Kibaki's List Of Nominees*, KBC NEWS, January 31 2011, available at <http://www.kbc.co.ke/news.asp?nid=68674> (showing the JSC's disapproval); See also Ken Kahugu, *Court Says Kibaki Nominees Illegal*, THE DAILY NATION, February 4, 2011, available at <http://thedailynation.blogspot.com/2011/02/court-says-kibaki-nominees-illegal.html>; See generally *Marende Rejects Kibaki's Nomination*, KATIBA SASA CAMPAIGN!, <http://www.katibasasa.org/2011/02/18/marende-rejects-kibakis-nominations/> (for a view from the Parliament's reaction to Kibaki's actions); See also Henry Wanyama, *Civil Society Group Lauds Kibaki*, THE STAR NEWSPAPER, February 28, 2011, available at <http://www.the-star.co.ke/national/national/15846-civil-society-lobby-group-lauds-kibaki> (for civil society's response to Kibaki withdrawing the names).

365. Autheman & Elena, *supra* note 361, at 17.

366. See *supra* at pg. 64.

This is not to say the JSC should pretend, but public confidence of its ability to select judges is based upon the cohesiveness of the JSC. The more united the JSC projects to the public, the greater the esteem the public will have for JSC commissioners. This reflects back to rising public trust in judges and magistrates and ultimately, the judiciary.

The JSC may opt for an alternative route instead of keeping its deliberations from the limelight. A recent report on judicial commissions in the United States posits, “Although written voting procedures can significantly enhance the legitimacy and fairness of the process, a number of commissions have been known to operate on the basis of consensus or other ad-hoc decision making-making procedures.”<sup>367</sup> Irrespective of the method it chooses, the goal of the JSC’s deliberation and voting procedures should be “to enhance the integrity of the process, avoid the appearance of favoritism or ‘panel-stacking’ and help ensure that the public, the applicants, and the governor [the appointing authority] can feel secure in the knowledge that the process functions to staff the court with the best qualified judges.”<sup>368</sup>

Establishing a plan for the judiciary to ensure that it is ready for the demands of the twenty-first century, as well as Kenya’s growing population is a crucial function of the JSC. This will be uncharted water for the new judiciary because the pre-2010 JSC did not have this function, since it was the judiciary’s role to formulate two strategic plans. However, it may be worthwhile to have the JSC work together with the judiciary to come up with the next strategic plan. The JSC will have an advantage in suggesting direction for the judiciary while judges and magistrates can provide input with a view from the ground.

It would also be worthwhile for the JSC to have a report prepared by a local consultant on the assessment of the JSC’s work and its impact on the judiciary every ten years. This report would provide an objective view of the work carried out by the JSC, the challenges it has faced, and recommendations on how to overcome these hurdles. The report would be a public document available as a reference book for the JSC but also for anyone interested in the progress and work of the JSC.

With regard to training of judges and magistrates, the JSC is mandated under Article 172 (1)(d) of the Kenya Constitution 2010 to devise

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367. Rachael Paine Caufield, *Inside Merit Selection-A National Survey of Judicial Nominating Commissions*, AMERICAN JUDICATURE SOCIETY 33 (2012), available at [http://www.judicialselection.us/uploads/documents/JNC\\_Survey\\_ReportFINAL3\\_92E04A2F04E65.pdf](http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf).

368. *Id.*

training programs. I would add that the JSC should also craft a policy on how to handle the nomination or appointment of a sitting judge or magistrate to an international court, commission, or tribunal while still serving as a Kenyan judicial officer.

As a practical matter and step toward independence, the JSC should have a separate postal address from the Kenyan judiciary. Since the secretary to the JSC is also the chief registrar of the courts it may, for logistical purposes, be easier to have the mail processed using one address. But if the eventual aim of the JSC is independence then the Siamese relationship between the judiciary and the JSC, which has existed ever since Kenya's independence, must be brought to an end.

## VII. CONCLUSION

Judicial councils are one method of selecting judges to serve in a country. For both Kenya and England, this system has increased the public's confidence in the judicial system. A judicial council existed in Kenya prior to 2010, but was an extension of the executive branch of government since most of the members in the pre-2010 JSC were residential appointments. In England and Wales, it is a new phenomenon introduced by the Constitutional Reform Act of 2005.

Both judicial councils are recommending bodies. They advertise and interview candidates before coming up with a list of who, in their view, should be appointed to the bench. In England and Wales, the Lord Chancellor appoints judges based on recommendations from the JAC. In both Kenyan and English judicial councils, judges are the minority and there is no representation from the legislature on the judicial council. Both judicial councils have a good representation of men and women.

The chairperson of the JAC is a layperson while the chairperson of the JSC is the Chief Justice. The JAC is made up of 15 members while the JSC has 12 members, though the secretary of the JSC has no voting rights. With the exception of judges and lawyers, all members of the JAC apply for their positions through a competitive process. The JSC commissioners sit part-time.

In both Kenya and England and Wales, there are visible differences of candidates selected to join the bench in the form of increased diversity. Most notably there are more women judges, which sends a positive message to society on the role of women, particularly that women can be leaders and hold senior posts in an institution. In Kenyan society, this is a paradigm shift. There are also more candidates applying outside the traditional pool of applicants. In the case of Kenya, more lawyers from

outside the three major cities are applying, and in the case of England and Wales, more women, solicitors, disabled, and minority candidates are applying.

Judicial councils have their faults too. They may be covertly hijacked for political purposes. No matter how much judicial councils try to reach a just recommendation, they are not immune from criticism about candidates they present for appointment. Judicial councils may also suffer from internal wrangling and this can have a negative impact on the selection process. They are not a workable solution for every jurisdiction, for example Bolivia. Judicial councils do not produce the same results of accountability and independence in every jurisdiction.

The most important part of judicial councils is their composition. When there is transparency about how commissioners are selected, this translates into confidence from the public that judicial councils will make the best selection. The selection of commissioners also provides a shield from political influence to some extent, but in some instances, particularly in the selection of judges for the the final appellate court in the land, judicial councils may make selections taking political impact into account on who shall sit as judge in the highest court of the land.

The post-2010 JSC is not a transplant of the JAC in England and Wales. Rather it was born out of the need to limit the reach of the executive branch of government on the judiciary. The reform in the JSC and ultimately in the appointment of judges and magistrates was driven by the need to strengthen the judiciary and change the perception that judges are beholden to do the will of the executive at all times. In England and Wales, the reform was brought about because of the need to modernize the way judges were appointed to the bench due to the expanding influence of decisions from the European Court of Human Rights. There was also a measure of dissatisfaction with the appointment system of judges through recommendations of the Lord Chancellor which led to the bench being comprised of elite, male, and white judges.

The JAC has been operational for more than five years while the JSC in Kenya is only a year old. It is my hope that the recommendations in this article will enhance the operations not only of the JSC, but of any other judicial council that wants to achieve independence and accountability in its system of judicial appointments.