



# ICJ Kenya's Position Paper on the appointment of the next Chief Justice as at Jan 2011

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## **Introduction**

The debate surrounding the appointment of Kenya's next Chief Justice is gaining momentum as the date draw near for the current Chief Justice to vacate office as per the constitutional provisions. The debate, as played out in the media has taken a political angle. Whilst ICJ Kenya is alive to the political context within which the search for the next new Chief Justice is operating, it is however concerned and wishes to reiterate that any appointment process must not undermine the spirit and the letter of the Constitution. For this reason, this paper proposes to analyze the constitutional and legislative provisions that pertain to the appointment of the Chief Justice with the intention of arriving at a reasonable conclusion as a proposed way forward for the country.

Being the head of the Judiciary, the position of the next Chief Justice will be of utmost importance. It will be pivotal in driving the long standing clamor for judicial reforms. Any system of appointment to be adopted or undertaken must neither be open to abuse nor undermine the institutional autonomy of the Judiciary. ICJ Kenya would not want to arrive at a scenario where an individual appointment is not the most deserving. The perception that the Chief Justice appointed is likely to protect the interests of the appointing authority is a legitimate concern is likely to have a knock on effect on public confidence in the new judiciary.

## **Legal Analysis of the relevant provisions relating to the appointment of the Chief Justice**

### ***i) Constitutional Provisions on the appointment of the Chief Justice.***

Under Article 166 (1) the president 'shall *appoint both the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the judicial service commission which shall be subject to the approval of the national assembly*'.

The minimum qualifications of the Chief Justice are set out under article 166(3) which include 15 years experience as a superior court judge or distinguished academic, judicial officer, legal practitioner.

These provisions are clear and are not in despite as they spell out the broad framework with which any future appointment of a Chief Justice must be undertaken in the new constitutional dispensation. However, in the current transitional period of implementing the new Constitution, the above article must be read together with the transitional clauses.



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### ***The transitional clauses***

Under chapter 18 of the Constitution and in particular Article 262, provides the legal authority and basis for interpreting the transitional clauses as follows;

Schedule 6 and specifically article 24 (2), stipulates that;

*'A new Chief Justice will be appointed by President subject to the National Accord and Reconciliation Act in consultation with the Prime Minister and approved by the National Assembly'.*

The transitional clauses confer on the President and the Prime Minister the constitutional mandate to appoint the next Chief Justice but their choice of candidate is subject to the approval of the National Assembly.

### ***ii) The National Accord and Reconciliation Act***

The preamble to the act provides that the coalition government *'must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans'*

The literal interpretation of this provision means that the decisions on the two Principals must at all times bear in mind the *'interest of the Kenyan people'*. Thus in ICJ Kenya's view, the citizenry, having exercised their will through the referendum, expect the Principals to undertake any significant decision, such as the appointment of the next chief Justice, with their concerns in mind.

### ***iii) International best practices on judicial appointments***

A revisiting of the Commonwealth Latimer House<sup>1</sup> principles is necessary to set the standards by which the appointment of the new Chief Justice should be measured. The principles stipulate that in order to secure the independence of the Judiciary, judicial appointments should:

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<sup>1</sup> For Judicial Independence to be guaranteed and preserved, Judicial Appointment, Latimer House Principles provide that: Jurisdictions should have an appropriate independent process in place for judicial Appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary. Judicial appointments to all levels of the judiciary



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- i) be made on the basis of clearly defined criteria;
- ii) be a publicly declared process i.e. judicial vacancies should be advertised;
- iii) ensure equality of opportunity for all who are eligible for judicial office;
- iv) appointment on merit; and
- v) that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination process of appointing

Similar principles are underscored in various other international and regional instruments<sup>2</sup>.

An examination of article 24 (2) shows that the provisions do not outline the process by which the new Chief Justice is to be appointment. With the mounting political intrigue, media discussion of political horse trading, ICJ Kenya is concerned that the political process must not undermine the spirit of the new Constitution. Therefore, specific attention must be paid to the process of appointing the next Chief Justice.

Therefore it is ICJ Kenya's position that:

- i) Appointment of the next Chief Justice must adhere to the values and principles of the new constitution. The concerns raised are informed by Kenya's past experiences of judicial appointments including that of the Chief Justice. Previous judicial appointments have been criticized for being politically motivated and process opaque. Various recommendations have been made on how the processes should be undertaken i.e. the process must be transparent and tailored to identify individuals of the highest integrity for recruitment.
- ii) Only distinguished Judges or Jurists with proven track record of impeccable character as determined by an open and transparent process with the minimum constitutional qualifications should be considered for appointment.
- iii) Nature of the appointment process
  - a) A clearly established transparent appointment process with stated criteria as per the constitutional provisions

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should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

<sup>2</sup> For example, UN Basic Principles on the Independence of the Judiciary, The Universal Charter of Judge, Suva Statement on the Principles of Judicial Independence and Access to Justice August 2004.



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- b) In the spirit of national accord and reconciliation, nothing stops the Principals from considering written recommendations for a Chief Justice from the newly reconstituted Judicial Service Commission whose mandate is derived from the constitutional provisions and in line with the Latimer House guidelines. Such was also the approach and experience of the South Africa during their transition from the apartheid regime.
- c) Vacancy should be advertised the interviews conducted publicly

### **The South African Approach**

At the end of apartheid, the South African Judiciary was exclusively white and male. A new procedure was required to overcome the difficulties inherent in the process of appointment that had been used during apartheid. This meant the restructuring a new Judicial Service Commission.

#### *Composition and functions of the JSC*

Section 178 of the South African Constitution provides for the establishment of a Judicial Service Commission (JSC). The *Judicial Service Commission Act* of 1994 was passed to regulate matters incidental to its establishment.

The JSC is chaired by the Chief Justice and consists of representatives or nominees of all three branches of government as well as the legal profession and a contingent appointed by the President. Although the President appoints the judges and, in the case of vacancies on the Constitutional Court, is given the final choice, it is the JSC that conducts the selection process for all permanent appointments, including most of the promotions to which judges may aspire.

The JSC consists of:

- a) the Chief Justice, who presides at meetings of the JSC;
- b) the President of the Supreme Court of Appeal;
- c) one Judge President designated by the Judges President;
- d) the Minister of Justice or an alternate designated by the Minister;
- e) two practising advocates nominated from within the advocates' profession and appointed by the President;
- f) two practising attorneys nominated from within the
- g) attorneys' profession and appointed by the President;
- h) one teacher of law designated by teachers of law at South African universities;
- i) six members of the National Assembly chosen by it, of whom at least three are to be members of opposition parties represented in the Assembly;



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- j) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six
- k) provinces; and
- l) four persons designated by the President as head of the national executive, after consulting the leaders of all parties in the National Assembly.

The JSC may determine its own procedure, but decisions of the JSC must be supported by a majority of its members. The Minister publishes in the Government Gazette particulars of the procedure adopted by the JSC.

When vacancies arise on the bench, nominations are made; candidates are short-listed and then interviewed by the JSC. The interviews are open to the public and the media, but the deliberations of the Commission take place in private (although the JSC has made available a transcript of its discussions concerning its priorities and its general approach to the selection process). Selection is by consensus or majority vote and the Commission notifies the President of the names of the successful candidates for each vacancy. These are also announced publicly.

### *Appointment Process*

The President as head of the national executive is responsible for the appointment of judges. The senior appointments in the judicial hierarchy oblige him to consult before making the appointments, but also allow him some room for executive preference.

The President appoints the Chief Justice and Deputy Chief Justice after consultation with the JSC and the leaders of parties represented in the National Assembly. He consults the JSC before appointing the President and Deputy President of the Supreme Court of Appeal.

The President appoints the other Constitutional Court judges, after consultation with the Chief Justice and the leaders of parties represented in the National Assembly, from a list of nominees prepared by the JSC. The list must have three more names than the number of vacancies to be filled. The President must advise the JSC if any of the nominees are unacceptable, and must give reasons. The JSC then supplements the list with further nominees and the President must make the remaining appointments from the list so supplemented.

The President's executive discretion is removed in the case of other appointments to the Supreme Court of Appeal and the High Court, including the Judges President of the divisions of the High Court. These other appointments are made on the advice of the JSC. The President appoints the persons selected by the JSC.



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Notwithstanding the latitude given to the President in the appointment of the Chief Justice and the Deputy Chief Justice, the President and Deputy President of the SCA, and the other judges of the CC, the JSC is clearly the key agent in the selection of candidates for judicial office.

### **Conclusion**

ICJ Kenya reiterates that the appointment of the Chief Justice should be open, transparent, and competitive and adhere to the international best practices. Whilst the prerogative is on the two principals, a wrong formula will undermine all efforts that have been put in place to restore the legitimacy of the judiciary in the perception of citizens. The current situation in Kenya is an antithesis to international best practices that require the appointment process to be transparent, competitive and based on merit.