

PRESS STATEMENT ON THE AMENDMENT TO SECTION 30 (3) OF THE JUDICIAL SERVICE ACT 2011 VIDE THE STATUTE LAW (MISCELLANEOUS AMENDMENT) ACT 2015

We the undersigned human rights organizations strongly condemn the amendment to Section 30 (3) of the Judicial Service Act 2011 vide the Statute Law (Miscellaneous Amendment) Act 2015. The amendment deleted subsection (3) of the Act and substituted it with a new section that provides that the Secretary of the Judicial Service Commission (JSC) shall forward the names of 3 qualified persons for each vacant position to the president. The amendment is a blatant violation of the constitution as it infringes on the independence of the JSC and the judiciary.

We wish to remind the nation why the drafters established the Judicial Service Commission under Article 176. During previous regimes, the judiciary was at the beck and call of the executive as judges were appointed directly by the President. The Judicial Service Commission was established to entrench judicial independence by removing the power of judicial appointments from the executive hands of the President. The Judicial Service Commission is distinct from other constitutional commissions as it oversees an independent branch of the government.

Article 166 provides that the President shall appoint 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. The role of appointment therefore vests exclusively within the Judicial Service Commission. The president is only meant to play a ceremonial role of receiving the name from the JSC and forwarding it to parliament. The president is not meant to exercise any discretion, choice, or active role in the appointment process.

We strongly reiterate that the constitution of Kenya under Article 1 (3) recognizes the doctrine of separation of powers as a sacrosanct principle of governance. There must be a clear separation of powers between the judicial, executive and legislative arms of the government for purposes of checks and balances. The head of one branch of government cannot exercise direct control in the selection of the head of another branch of government.

Many Kenyans may wonder, “What is the big fuss? Is there the difference between forwarding one name to the President and forwarding three names?” When one name is forwarded to the President he does not participate in the appointment process. When three names are forwarded to the President and he selects the name to forward to parliament, *he becomes the appointing authority*. Requiring the JSC to forward three names fundamentally violates the doctrine of separation of powers. It is tantamount to requiring the national assembly to vote for three candidates for the position of speaker so that the president can select the candidate of his choice amongst the three to head the legislature.

The wounds of the 2007 Post Election Violence are still fresh in our souls and minds. We avoided violence in 2013 because the country had confidence in the Supreme Court. It is in public realm that the offices of the Chief Justice and Deputy Chief Justice are about to become vacant. The incumbent President has indicated interest in vying for the 2017 elections. The amended section 30 (3) of the JSC Act gives him powers to actively participate in the appointment of the next Chief Justice and Deputy Chief Justice. In case there is a presidential electoral dispute, it will be difficult to

have confidence in a Court whose head will be perceived to be a sympathizer to the incumbent President. Our country may burn again.

We would like to point out that the amendments raise eyebrows as they were passed when the Chief Justice and Deputy Chief Justice are about to vacate office. This is evidence of mischief as the amendments do not affect the appointments of the other judges of the Supreme Court, Court of Appeal, and the High Court. Moreover the amendments were only introduced on the floor of the House. They were not contained in the Bill that was published on 18th September 2015. This deprived the citizenry of the right to public participation and debate.

Finally, we firmly denounce the rogue usage of the Statute Law (Miscellaneous) Amendment Act to water down the constitution. The purpose of the Statute Law (Miscellaneous) Amendment Act is to make minor amendments to various statutes. The current national assembly has converted it into a tool of legislative cheating. The Statute Law (Miscellaneous) Amendment Act is nowadays being used to make legislative changes that would necessitate a constitutional amendment.

We therefore demand:

1. That the amended Section 30 (3) of the Judicial Service Act be annulled.
2. That Parliament ceases the usage of the Statute Law (Miscellaneous) Amendment Act to water down the constitution.
3. That the Executive respects the doctrine of separation of powers and desists from tampering with judicial independence.
- 4.

Signed by:

George Kegoro,

Kenya Human Rights Commission - Executive Director

On behalf of:

1. Constitution & Reform Education Consortium (CRECO)
2. Katiba Institute
3. Kenya Human Rights Commission (KHRC)
4. Kenyan Section of the International Commission of Jurists (ICJ-Kenya)
5. Kenyans for Peace with Truth and Justice (KPTJ)
6. National Civil Society Congress, and others