



**MEMORANDUM TO THE JUDICIAL SERVICE COMMISSION (JSC) ON THE
RECRUITMENT OF
THE CHIEF REGISTRAR OF THE JUDICIARY, THE REPUBLIC OF KENYA**

SUBMITTED BY:

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Introduction

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit, non-partisan, and member-based organisation founded in 1959. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya, and has a membership drawn from the Bar and the Bench. ICJ Kenya works to promote human rights, democratic governance, justice, and the rule of law in Africa. ICJ Kenya believes in and is guided by the ideals of Inclusivity, Integrity, Commitment, and Professionalism. In furtherance of the institution's ideals and mandate, ICJ Kenya submits its memorandum to the Judicial Service Commission (JSC).

Background

The Chief Registrar of the Judiciary is the Chief Administrator and Accounting Officer of the Judiciary. Section 8 of the Judicial Services Act, 2011, provides the functions and powers of the Chief Registrar. The contractual term of service for the position lasts five (5) years of the contract and is renewable, subject to satisfactory performance.

On Oct 23 2023, the Judicial Services (JSC) Commission advertised the position of the Chief Registrar of the Judiciary following the exit of the Honourable Anne Amadi who held the position for ten (10) years. Hon. Anne Amadi handed over to Hon. Paul Ndemo as Acting Chief Registrar on Jan 12 2024 following Hon. Ndemo's appointment by the JSC to Act as Chief Registrar pending recruitment. Hon. Paul Ndemo has served as Deputy Chief Registrar of the Judiciary for the last five years. On Feb 16 2024, the JSC issued a statement that it has received a total of forty-three (43) applications for this position. Out of the total number of applications received, the Commission shortlisted seven (7) candidates. The interviews for the shortlisted candidates are scheduled for Mar 18 2024.

The importance of the Chief Registrar of the Judiciary

The operations of Kenya's Judiciary are primarily financed from the Consolidated Fund as appropriated by the National Assembly. The budget process is anchored on Article 173 (3) of the Constitution of Kenya, which requires the Chief Registrar of the Judiciary to prepare estimates of expenditure for the Judiciary each financial year. The Constitution of Kenya, Public Finance Management (PFM) Act, 2012, the PFM Regulations, 2015, the Judicial Service Act, 2011, the Judiciary Fund Act (JFA), 2016, the Judiciary Fund Regulations 2019, and the circular on operationalisation of the Judiciary Fund provide guidelines on the budgeting process and specific timelines for submission of the estimates to the Judicial Service Commission (JSC) and the National Assembly.

Safeguarding every facet of judicial independence, including financial independence, is fundamental to promoting the rule of law. The Chief Registrar serves as Chief Administrator and Accounting Officer of the Judiciary and is expected to work very closely with the Chief Justice in managing the Judiciary. The office of the Chief Registrar of the Judiciary plays a key leadership role within the judiciary, responsible for overseeing administrative functions, court management, resource allocation, and policy development. The individual appointed to this position will significantly impact the efficiency, effectiveness, and integrity of Judicial financial independence in Kenya. As such, the Judicial Service Commission ought to ensure that the principles and values of the Constitution are upheld in the appointment process. The CRJ must be a judicious person with the experience and gravitas to be a respected and revered accounting officer able to work closely with the Chief Justice to lead the judicial arm of government.

Issues to consider during the recruitment process:

1. Transparency and Public Participation in Recruitment

Transparency is a core principle in recruiting the Chief Registrar of the Judiciary to ensure the recruitment process's integrity, legitimacy, and accountability.

As a commission of Jurists, we appreciate that the advertisement on the vacancy was publicly advertised in October 2023, and as such, Kenyans were well aware of the process and were invited to apply. However, we posit that even as the Commission undertook shortlisting of the candidates, there ought to have been robust engagement with Kenyans on the role of the CRJ and the qualifications of the office holder. This kind of engagement would have been a precursor to the invitation for the written memorandum on the suitability of the seven candidates. Further, JSC ought to have published the full list of applicants alongside the 7 shortlisted candidates.

Notably, whereas the framework to engage the process exists, it is considered complicated. Kenyans would wish to interrogate the recruitment framework; many did not participate in the process due to a lack of understanding of the engagement framework. In this regard, the JSC ought to guarantee a transparent, constructive, and meaningful public participation process in recruiting the next Chief Registrar of the Judiciary.

ICJ Kenya appreciates the deliberateness that JSC made to ensure the fulfilment of the Constitutional requirement for public participation in the appointment of the Chief Registrar of the Judiciary by putting in place the stakeholder forum on Mar 14 2024, but also notes that the engagement is coming 2, working days to the interview. Further we note that a stakeholder engagement does not necessarily constitute public participation in the true definition envisioned in the Constitution of Kenya. We strongly recommend that such an important engagement be held 21 days before the interviews to allow stakeholders to interrogate and give feedback on the process.

2. Adverse Comments and Submissions

ICJ Kenya acknowledges and appreciates that the Chief Registrar of the Judiciary interviews will be conducted publicly. As a commission of jurists, we urge the JSC to ensure questions posed to the candidates are respectful and well-meaning. The JSC should provide adequate opportunity for the candidate to respond to the questions posed. If a matter is private/sensitive in nature, the JSC ought to create mechanisms for the candidate to respond to the questions in camera without jeopardising the legitimate public interest in the interview. The interviews should be conducted in a respectful manner that safeguards the dignity of the candidates but also tests the professional competencies of the candidates who have applied for the position.

3. Equality and Inclusion Principle.

ICJ Kenya acknowledges the special role that women play within the judiciaries, in similar or comparable capacities to their male counterparts, and the need to strengthen their contribution to the administration of justice. This will be in line with regional protocols, including the Maputo Protocol.¹

Article 10 of The UN Basic Principles on the Independence of the Judiciary declares that judicial appointments may not be based on discrimination on the grounds of ‘race, colour, sex, religion, political or other opinions, national or social origin, property, birth or status.’² This includes the appointment of the Chief Registrar of the Judiciary. According to the *Commonwealth Latimer House Principles, Principle IV(a)*,³ judicial appointments should be made based on clearly defined criteria and by a publicly declared process. The process should ensure:

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

JSC should ensure gender equality as articulated under Goal 5 of the Sustainable Development Goals, which recognises the need for the provision of women and girls with equal access to education, health care, decent work, and representation in political and economic decision-making processes. All candidates must be treated equally, and no discrimination ought to be applied, particularly because the previous officeholder was a woman. The seven candidates should be considered on their own merits. JSC should ensure that equality and inclusion principles are key considerations in recruiting the Chief Registrar of the Judiciary and that the

¹ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, (the Maputo Protocol), was adopted on July 11, 2003 to complement and strengthen the articles of the African Charter related to the protection and promotion of women’s rights. It is an important instrument of reference given its broad provisions that seek to protect the rights of women, and it is a symbol of the commitment of African States’ to end discrimination, violence, gender stereotypes against women and other violations against women.

² Art 10. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, art A.4.(j), the Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region, art 13 and the Committee of Ministers of the Council of Europe, Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities, para 45

³ Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice <https://thecommonwealth.org/sites/default/files/press-release/documents/Compendium%20on%20Judicial%20Appt%20Tenure%20and%20Removal%20in%20the%20Commonwealth.pdf>

appointment is neutral, unbiased, and inspires public confidence in the judicial institution and the Country.

4. The Diversity Question

ICJ Kenya recognises the efforts JSC made in the shortlisting process to ensure that all genders and ethnic and regions are represented. It also acknowledges the need for JSC to ensure that the judicial administration reflects the society in all respects and may actively prioritise the recruitment of appointable candidates who enhance the diversity of the senior management of the Judiciary. However, JSC must be careful in applying diversity and avoid ethnical bias and politics. Further, whereas diversity is an essential consideration in selecting the next Chief Registrar of the Judiciary; it is critical to factor in numerous other qualities.

5. Independence of the Commission and Access to information under Article 35

The Constitution 2010 established the Judicial Service Commission (JSC) to safeguard the judiciary's institutional independence and accountability. The JSC has a crucial role to perform in appointing and removing the Chief Registrar of the Judiciary. It recommends the name of the successful candidate for appointment by the President. These dual roles make the JSC an influential actor in controlling the Judiciary in the Kenyan context.

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

“... the composition of the judicial appointing commissions matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges,”⁴

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

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

The JSC should safeguard the Commission's independence and observe provisions provided for in the Constitution and regional and international principles in recruiting the Chief Registrar of the Judiciary because the administration of this office has a critical role in the administration of the judiciary. The process of appointment must also be **legitimate** in the eyes of the public if the courts are to build and retain the trust and secure the voluntary cooperation of the public in sufficient numbers to ensure the orderly administration of justice.

⁴ Annual Report 2009 (n15), para 28.

A legitimate process may be achieved partly through the demonstrable quality of the transparency of the selection process and the provision made for **scrutiny and review in individual cases**. Therefore, it is against this background that ICJ Kenya would like to request the scorecards to be appreciated and to interrogate the Commission's final decision.

6. Leadership and Integrity of the Chief Registrar of the Judiciary

Kenyans have expectations of what the next Chief Registrar of the Judiciary in Kenya should address. These include providing leadership in the management of funds, Financial independence of the judiciary from interference and influence of other organs of state, resource mobilisation and allocation, and eradicating corruption in the Judiciary. The JSC should recommend candidates who can provide sound leadership, good ethics, courage, boldness, and proficiency in the management and administration of institutions.

Like those chosen to serve in any other state offices, persons appointed to be Chief Registrar of the Judiciary must be suitable for the role they are to perform. Their responsibility for upholding good management of the administration of funds contributes to the promotion of judicial independence and the rule of law. The multiple qualities are required, as the *Commonwealth Latimer House Principles recognise in the opening sentence of Principle IV – Independence of the Judiciary* states that:

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

The qualities of independence, impartiality, honesty, and competence of the Chief Registrar relate to the independence of judges to uphold the rule of law and dispense justice by performing their daily tasks of controlling court proceedings, with effective and efficient resources. The selection criteria and processes in place must be a reliable means of identifying candidates with these characteristics.

7. Qualities and Characteristics of the Incoming Chief Registrar of the Judiciary

Diplomacy and Political astuteness

ICJ Kenya is cognisant of the political context that the incoming Chief Registrar will be required to navigate. On 27 January 2024, the National Assembly Majority Leader, Kimani Ichung'wa, issued a stern warning, threatening to withhold budget allocations to the Judiciary in response to what he perceives as continuous obstruction of government initiatives⁵. This call was amid numerous public utterances by the Executive to clamp down on the Judiciary.

⁵ <https://www.capitalfm.co.ke/news/2024/01/majority-leader-ichungwah-threatens-judicial-budget-over-affordable-housing-project-dispute/>

The Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence of 1999 state:

“Funding Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.”

“The provision of adequate funding for the Judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of Justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available”

In light of the nuanced political environment, ICJ suggests that the JSC should consider a Chief Registrar of the Judiciary who can engage with the Executive and the Legislature but maintain the independence of the Judiciary. The Chief Registrar should not isolate the Judiciary from other arms of government, particularly for development agenda and funding, but should only engage and be guided by spirit of collaboration and cooperation towards furthering access to justice for all within Kenya

Resource mobilisation and development

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

Administrative and Accounting Management

The Chief Registrar should be a people manager and as such, should be firm but kind and approachable to staff and the public at large.

The Chief Registrar must be a leader who will serve in a conglomerate of organisations, i.e., the management of the day-to-day operations of the Judiciary, be the Secretary to the NCAJ and the Secretary to the JSC. The person should be able to mobilise resources, manage finances, administer the offices, troubleshoot problems, and trigger development and relationships within and without the institutions. To aspire for excellence, the candidate must be a proven manager who can manage multiple offices.

8. Monitoring of the Recruitment Process

National partners should be given clearance to monitor the recruitment of the Chief Registrar of Kenya and report whether the process conforms to relevant constitutional, regional, and international guidelines and provisions. The JSC ought to seek targeted public participation on the evaluation sheet/interviewer guide for feedback. The interviewer guide should cover the candidate's academic and professional qualifications, values, aspirations, and ethos. The qualifications should mirror the provisions espoused in the International frameworks, including but not limited to, the *UN Basic Principles on the Independence of the Judiciary*⁶, the *Bangalore Principles*⁷, *IBA Minimum Standards of Judicial Independence*,⁸ the *Latimer House Principles*,⁹ the *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers*, the *Constitution of Kenya 2010* and the *Judicial Service Act (First Schedule)*.

Regionally, the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers¹⁰ comprise fifteen core underlying principles. The main principles include merit, fairness, transparency, and rationality of the appointment. These provide critical indicators for institutions monitoring the process.

Conclusion

The JSC needs to ensure that the recruitment process of the Chief Registrar of the Judiciary in Kenya adheres to the functions of the Judicial Services Act and fulfills the constitutional requirements. When appointing the candidate, the JSC should ensure that the person aligns with all the requirements and understands the intersectionality of the role with judicial independence.

ICJ Kenya notes that there is a need to ensure that the right person is chosen for the position of Chief Registrar of the Judiciary to promote judicial independence and other matters that affect human rights in Kenya. It is in this regard that ICJ Kenya highlights the following rallying call, to the JSC:

1. Develop and circulate the Advisory to the public on the candidate's suitability presented to the President and National Assembly. This will bolster the transparency and legitimacy question; and
2. Makes public the deliberations of the Commission and final results.

⁶ <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>

⁷ https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

⁸ IBA Minimum Standards of Judicial Independence, retrieved from <https://bit.ly/3eHWaJV>

⁹ <http://kenyalaw.org/treaties/treaties/57/Commonwealth-Latimer-House-Principles-on-the-Three>

¹⁰ The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers, retrieved from <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf> The principles which were adopted by the Southern African Chief Justices' Forum in 2018 and supported by the Global Judicial Integrity Network in 2018-2019.