

Judicial Service Commission: Enhancing judicial independence in Sierra Leone, Kenya, and South Africa.

By

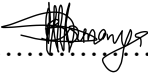
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DECLARATION

I, ***Chernor Mohamed Musa Bounanya Barrie***, hereby declare that this thesis is original and has never been presented to any other University or Institution. I also declare that any secondary information used in the course of doing this research has been duly acknowledged in this thesis.

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Date: 16 June, 2023

DEDICATION

This thesis is dedicated to my beloved wife, Aisha Bounanya Bah, and my precious daughter, Rugiatu Bounanya Barrie, as their unwavering support throughout my academic journey far away from home has been invaluable.

I also extend my dedication to all honorable judges and dedicated judicial officers who tirelessly strive to deliver justice to the underprivileged and marginalized, regardless of the challenging political atmosphere surrounding Sierra Leone's judiciary. I encourage you all to persevere in your noble pursuit for the betterment of our beloved country, Mama Salone.

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ABSTRACT

Judicial Independence, which is closely intertwined with the separation of powers doctrine and the system of checks and balances, is a principle that refers to the extent a country's judiciary is shielded from external pressures, enabling judges to make impartial decisions without fear of interference or retaliation from other branches of government or powerful actors.

While international and regional human treaties, including guidelines and principles, have been developed to define judicial independence yet they did not enforce anything beyond proposing and suggesting some of the most effective means that can be used to enhance it.

This study was embarked on to investigate how the Judicial Service Commission can enhance judicial independence in Sierra Leone, Kenya, and South Africa. Although various elements encompass' judicial independence, the study focuses on only the security of judges' tenure, appointment, and dismissal processes by focusing extensively on the de jure and de facto judicial independence design in all three countries. Sierra Leone is a point of departure to investigate how judicial independence operates in Kenya and South Africa. Where Kenya and South Africa fall short, the study uses international guidelines and principles to recommend enhancing judicial independence in all three countries.

The study reveals that Sierra Leone, compared to Kenya and South Africa, performs relatively poorly in enhancing judicial independence and concludes that, although Kenya and South Africa do have some challenges to enhancing judicial independence, the security of tenure, appointment, and dismissal procedures of judges in Sierra Leone are somewhat not in accordance with international guidelines and standards that promote judicial independence. The study, however, provides recommendations on how to do so.

TABLE OF CONTENTS

Abstract	v
List of acronyms/abbreviations	viii

CHAPTER ONE INTRODUCTION

1.1 Background of the Study	1
1.2 Problem Statement	4
1.3 Literature Review	8
1.4 Overview of the Study	9

CHAPTER TWO JUDICIAL SERVICE COMMISSION IN CONTEXT

2.1 Introduction	11
2.2 Designing a Judicial Service Commission	11
2.3 Composition of the Judicial Service Commission in Sierra Leone, Kenya, and South Africa	13
2.4 The Role and Powers of the Judicial Service Commission in Sierra Leone, Kenya, and South Africa	16
2.5 Conclusion	17

CHAPTER THREE JUDICIAL INDEPENDENCE- SECURITY OF TENURE, APPOINTMENTS, AND REMOVAL PROCEDURES OF JUDGES

3.1 Introduction	18
------------------------	----

3.2 Procedural Appointment of Judges in Sierra Leone, Kenya, and South Africa	18
3.3 Security of Tenure and the removal procedures of Judges in Sierra Leone, Kenya, and South Africa	23
3.4 Bridging theory and practice by examining the practical implementation of security of tenure, appointment, and removal processes for Judges in the laws of Sierra Leone, Kenya, and South Africa	28
3.5 Conclusion	37

CHAPTER FOUR CONCLUSION AND RECOMMENDATION

4.1 Summary of the Findings.....	38
4.2 Conclusion	39
4.3 Recommendation	40
Bibliography	42

LIST OF ACRONYMS/ABBREVIATIONS

CK	Constitution of Kenya.
CSA	Constitution of South Africa.
CSL	Constitution of Sierra Leone.
PSA	Public Service Commission.
SLBA	Sierra Leone Bar Association.
JC	Judicial Council.
JLSC	Judicial and Legal Service Commission.
JSC	Judicial Service Commission.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The independence of the judiciary is a fundamental principle that upholds the rule of law, safeguards individual liberties, and maintains an equitable and just legal system.¹ The principle has been defined as the degree to which a country's judiciary is shielded from external pressures, allowing judges to make impartial decisions without fear of retaliation or interference from other branches of government or powerful actors.² This principle is closely linked to the separation of powers doctrine, which emphasizes the need for a clear division of functions among the executive, legislative, and judicial branches of government, and the system of checks and balances, which provides mechanisms for each branch to restrain the power of the others and prevent any one branch from becoming dominant.³

Most international and regional human rights treaties make provisions for recognizing the right to an independent and impartial judiciary to guarantee the right to a fair trial.⁴ Guidelines and principles have been drafted to define the scope and the meaning of judicial independence, which case laws of some regional human rights courts have also complimented.⁵ Although international standards do not prohibit the involvement of the other arms of government in enhancing judicial independence, it is still recommended to have an independent body to guide the process, as this is necessary to prevent improper motives, including the advancement of their political agenda

¹ The Courts of British Columbia, 'Why Is Judicial Independence Important to You?' Canadian Judicial Council, May 2016. Available at: https://www.bccourts.ca/documents/Why_is_Judicial_Independence_Important_to_You.pdf (Accessed on November 9th, 2022).

² Ibid

³ Ibid

⁴ See, among other things, Article 14 of the International Covenant on Civil and Political Rights (1966); Article 6 of the European Convention on Human Rights and Fundamental Freedoms (1951) (ECHR); Article 7 of the African Charter of Human and People's Rights (1981) (ACHPR); Article 8 of the Inter-American Convention on Human Rights (1978) (ACHR).

⁵ See, among other things, the Universal Charter of the Judge (1999) (the Universal Charter), the European Charter on the Statute of the Judges (1999) (the European Charter); the UN Basic Principles on the Independence of the Judiciary (1985); the Beijing Principles on the Independence of the Judiciary (1995), the Latimer House Guidelines on the Independence of the Judiciary (1998); The Universal Principles of Judicial Independence for the SADC Region (2004); the Bangalore Principles on Judicial Conduct (2002); the Syracuse Draft Principle on Independence of the Judiciary (1981); Montreal Universal Declaration on the Independence of Justice (1983); the case law of the European Court of Human Rights, the African Commission of Human Rights, and the Inter-American Court of Human Rights.

through the interpretation of law or bypassing standard procedures.⁶ While international guidelines and principles do not claim to enforce anything beyond proposing and suggesting some of the most effective practices, it requires that each state have clear guidelines that establish its own method to enhance judicial independence, which should be strict, clear, and transparent.⁷

It is worth noting that judicial independence is a broad principle encompassing different elements.⁸ These includes the formal safeguards for the independence of the judiciary such as constitutional provisions and statutory protections. Another essential element is tenure security, which allows justices to make decisions without fear of repercussions. Financial security is also crucial, as it ensures that judges are adequately compensated and protected from undue influence. In addition, institutional autonomy is required for courts to operate independently and without political interference. Furthermore, the selection processes for justices should prioritize merit-based appointments in order to preserve the integrity of the judiciary. Lastly, a supportive legal culture that respects judicial decisions and upholds the rule of law adds value to the principle of Judicial Independence.⁹

Furthermore, to ensure the effectiveness of these elements and how it matters in many constitutions, including relevant laws, *de jure* and *de facto* are used to analyze and understand judicial independence as both concepts are crucial, albeit in different ways.¹⁰ To explain these concepts, *de jure* judicial independence refers to the way constitutions, as well as pertinent laws and regulations, are designed to enhance judicial independence. It includes structural and legal safeguards to protect the judiciary from inappropriate influence or interference.¹¹ Tom Ginsburg and James Melton argue that *de jure* independence provides the legal basis for judges to exercise their authority and make decisions without the fear of reprisal.¹² In addition, it ensures that judges

⁶ Article 9 of the Universal Charter of the Judge, 1999, International Association of Judge. See also Section 1 of the Latimer House Guidelines for the Commonwealth: Preserving Judicial Independence, 19th June 1998.

⁷ For example, see Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary, 1985

⁸ Melton J and Ginsburg T, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence.' (2014) 2 Journal of Law and Courts 187. Available at: <https://www.cambridge.org/core/journals/journal-of-law-and-courts/article/abs/does-de-jure-judicial-independence-really-matter/> (Accessed on 19th March 2023).

⁹ Ibid

¹⁰ Ibid

¹¹ Epperly, Brad, 'Integrating De Jure Independence' In 'The Political Foundations of Judicial Independence in Dictatorship and Democracy' (Oxford, 2019; online edn, Oxford Academic, 24 Oct. 2019). Available at: <https://doi.org/10.1093/oso/9780198845027.003.0005> (Accessed on March 13th, 2023).

¹² Supra note 8.

are appointed through open and merit-based procedures, have security of tenure, and are protected from external pressures or threats.¹³

However, *de jure* independence is insufficient if there are no mechanisms for determining its actual implementation. *De facto* independence is characterized by the exercise of judicial authority and the absence of practical constraints that would undermine independence.¹⁴ It examines the real-life dynamics that influence judicial decision-making and ensures that political, economic, or social forces do not unduly influence judges.¹⁵ *De facto* independence requires a supportive legal culture, societal respect for the judiciary, and an environment that protects judges from threats and corruption.¹⁶ In essence, *de jure* and *de facto* dimensions must be addressed to enhance judicial independence. Strong legal frameworks and constitutional protections are essential but must be effectively implemented and upheld in practice.¹⁷

Furthermore, while all the other elements play an essential role in strengthening judicial independence, some studies indicate that the procedure for appointing and dismissing judges holds the utmost importance.¹⁸ In the *de jure* sense, transparent and merit-based appointment processes enhance public trust and confidence in the judiciary.¹⁹ The best candidates can be chosen to serve as judges through rigorous selection criteria, including professional competence and integrity. Constitutional provisions establishing clear procedures for appointments, involvement of judicial bodies, and consultation with legal experts promote fairness and, most times, prevent political influence.²⁰ However, *de jure* provisions alone are insufficient as the *de facto* implementation of

¹³ Aydin Cakir, A., & Uysal, D. M. 'Explaining De Jure Judicial Independence: Evidence from two MENA countries.' In V. Ipek, & E. Ilter-Akarcay (Eds.), 'To Democratize or Not? Trials and Tribulations in Postcolonial World' Cambridge Scholars Publishing. (2020) page 81-105.

¹⁴ Voigt, Stefan and Hayo, Bernd 'Explaining De Facto Judicial Independence. *International Review of Law and Economics*. ' (2006). Available at SSRN: <https://ssrn.com/abstract=900336> (Accessed March 18th, 2023).

¹⁵ Hayo, Bernd and Voigt, Stefan 'Judicial Independence: Why Does De Facto Diverge from De Jure?' (2001). Available at <http://dx.doi.org/10.2139/ssrn.3897343> (Accessed on March 19th, 2023).

¹⁶ Gutmann, Jerg & Voigt, Stefan. 'Judicial independence in the EU: A puzzle. *European Journal of Law and Economics* (2020). Available at: https://www.researchgate.net/publication/322873701_Judicial_independence_in_the_EU_a_puzzle (Accessed on March 19th, 2023)

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Elliot Bulmer, 'Judicial Appointments' International Institute for Democracy and Electoral Assistance (Constitution-Building Primer 4, 2nd Edn. 2017). Available at: <https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf> (Accessed on April 9th, 2023)

²⁰ Supra note 15.

appointment procedures is equally critical.²¹ JSCs or similar bodies can enhance the credibility of appointments by ensuring objectivity and inclusivity in the appointment procedures, which will contribute to the judiciary's overall independence.

It is also important for the dismissal process of judges to align with the principles of judicial independence. *De jure* safeguards that establish clear guidelines for removal are essential. These grounds should be limited to serious misconduct, incapacity, or breaches of judicial ethics. The process should include fair hearings, due process, and protection against arbitrary removal.²² By establishing these safeguards, *de jure* provisions prevent executive or legislative branches from exerting undue influence over the judiciary through unfounded removals.²³ Nevertheless, the *de jure* framework alone cannot safeguard judicial independence, as the *de facto* implementation of removal procedures must uphold the same principles.²⁴

This study has been inspired by the fact that judicial independence has emerged as a critical issue in Sierra Leone, Kenya, and South Africa. There are emerging concerns regarding the appointment and removal procedure of judges, including their security of tenure, which is believed to hamper judicial independence in Sierra Leone.²⁵ Understanding these barriers is essential for developing targeted reforms and strategies to strengthen the independence of the judiciary in Sierra Leone, Kenya, and South Africa.

1.2 Problem Statement

The establishment of JSCs in many African countries, especially in common law countries, has become a growing trend to enhance judicial independence.²⁶ While there are no specific

²¹ Ibid

²² Elliot Bulmer, 'Judicial Tenure, Removal, Immunity and Accountability' International Institute for Democracy and Electoral Assistance (Constitution-Building Primer 5, 2nd Edn. 2017). Available at: <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf> (Accessed on April 8th, 2023).

²³ Ibid

²⁴ Supra note 8.

²⁵ See the following: Fatu Adikaibe, 'Judicial Independence and the Rule of Law: A Comparative Study of Sierra Leone and Nigeria.'; Abdul Tejan-Cole, 'The Challenge of Judicial Independence in Sierra Leone: A Case Study of the Supreme Court.'; Bankole Thompson: 'Judicial Independence in Sierra Leone: Challenges and Prospects.'; Ibrahim Abdullah, 'The Role of the Judiciary in Promoting Judicial Independence in Sierra Leone: A Comparative Analysis.'

²⁶ This research did not extensively investigate the number of African countries that have established bodies or commissions to appoint, dismiss, or perform other functions to enhance judicial independence. However, it is important to mention that all common law countries in sub-Saharan Africa have provisions for a Judicial Service Commission. Also, it is worth noting that all Anglophone countries in Africa (with the exception of Liberia, which

recommendations or international guidelines mandating the formation of JSCs, countries can adopt such mechanisms as they deem fit to ensure judicial independence. Nevertheless, it is argued that JSCs can be considered a better strategy to enhance judicial independence due to their potential to insulate the judiciary from external pressures and promote transparency and accountability.²⁷ JSCs can also serve as a valuable tool in enhancing judicial independence for several reasons. To start, these commissions provide a mechanism for appointing and promoting judges based on merit and qualifications rather than political or personal affiliations.²⁸ By establishing transparent and objective criteria for judicial appointments, JSCs reduce the potential for undue influence in the selection process by ensuring that judges are chosen based on their competence and integrity, strengthening the judiciary's independence and impartiality.²⁹ It is also argued that JSCs can play a crucial role in safeguarding the tenure and security of judges by establishing procedures to protect judges from arbitrary removal or transfer, thereby shielding them from political pressures.³⁰

As stated earlier in this chapter, even though other elements encompass judicial independence, this research focuses on two components of judicial independence based on the findings of Melton and Ginsburg, which are the appointments and the removal procedures, including the security of tenure of judges because of its utmost importance among all the other elements.³¹ In this regard, the research does not cover other factors that may undermine judicial independence. The study also focuses on three Anglophone African countries, namely Sierra Leone, Kenya, and South Africa, representing distinct East, West, and Southern African regions. These countries were chosen

follows the American model) also have provisions for a JSC. Although the designated body's name may vary in African countries due to their unique historical backgrounds, this study refers to it as the Judicial Service Commission for ease of understanding.

For the West African context of the JSC, see Babacar Kante and H. Kwasi Prempeh, 'Judicial service commissions' in Böckenförde, Kante, Ngege and Prempeh (eds), *Judicial Review Systems in West Africa: A Comparative Analysis* (IDEA 2016) 67. Available at: <https://www.idea.int/sites/default/files/publications/judicial-review-systems-in-west-africa.pdf> (accessed on the 17th of December 2022).

²⁷ International Federal for Human Rights (FIDH), *Judicial Councils Reforms for an Independent Judiciary: Examples from Egypt, Jordan, Lebanon, Morocco, and Palestine* (2009).

²⁸ How Commonwealth countries have forged a new way to appoint judges. Blog Post (2016). Available at: <https://theconversation.com/how-commonwealth-countries-have-forged-a-new-way-to-appoint-judges-56090> (Accessed on December 5th, 2022).

²⁹ Ibid

³⁰ Violaine Autheman and Sandra Elena, *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, IFES Rule of Law White Paper Series; 2004.

³¹ Supra note 18.

because they are all common law jurisdictions³² and have provisions in their constitutions for establishing a JSC.³³ In Sierra Leone, the President directly appoints most of the members in the JSC. However, Kenya and South Africa have different approaches to selecting JSC members.³⁴ The interpretation of the phrase "*on the advice of the Judicial and Legal Service Commission*" in the constitution of Sierra Leone³⁵ regarding the appointment of judges is debated, as it is argued that the President is not obligated to follow the advice or recommendations of anyone. Nevertheless, in contrast with Sierra Leone, South Africa and Kenya provide a clear interpretation of a similar provision in their constitutions regarding judges' appointment and removal procedures, as it mostly provides a ceremonial role to their presidents during the appointment process.³⁶

Furthermore, despite the potential benefits of JSCs mentioned earlier in this chapter, Sierra Leone's performance compared to Kenya and South Africa in this regard has been poor. Analyzing their performance in terms of judicial independence can provide insights into the strengths and weaknesses of their respective legal systems. It would also help to explain why this study is significant to embark on. The Mo Ibrahim Index offers valuable benchmarks for this comparative study.

According to the Mo Ibrahim Index of African Governance in 2022,³⁷ Sierra Leone scored 57.3 out of 100 for the indicator of '*Impartiality of the Judicial System*,'³⁸ which encompasses *Judicial Independence* as a sub-indicator. In contrast, Kenya scores 75.0 out of 100 in the same category. However, South Africa ranks higher than Sierra Leone and Kenya regarding judicial independence. It scores 98.3 out of 100 on the index, indicating a more robust performance in this area. This suggests that South Africa has well-established legal institutions and mechanisms for safeguarding judicial independence not just compared to Sierra Leone and Kenya but the continent

³² For Sierra Leone, see Bankole Thompson '*Judicial Independence in Sierra Leone: Challenges and Prospects*' (2012). See also s170 (1)(e) of the 1991 Constitution of Sierra Leone. In the Kenya context, See M Meredith (2006) p 92. See Zeffertt & Paizes (2003) p 10-12 for the South African context.

³³ See section 140 of the CSL; see Article 171 of the 2010 CK; see also section 178 of the CSA.

³⁴ For the composition of the commissions in the different jurisdictions, see note 32.

³⁵ See section 135 of the CSL.

³⁶ See section 174 (3)(4) & (6) of the CSA; see Article 166(1) of the CK

³⁷ Available at: <https://mo.ibrahim.foundation/sites/default/files/2023-01/2022-index-report.pdf> (accessed on April 16th, 2023).

³⁸ There are two sub-indicators under this indicator. However, the other sub-indicator '*Judicial Appointment*' ranked Sierra Leone, Kenya, and South Africa 19th, 20th, and 4th, respectively. Although the index suggests that Sierra Leone (ranked 19th) appears to outperform Kenya (ranked 20th) in that sub-indicator, it is the opinion of the researcher that, unlike Kenya, Sierra Leone's higher ranking might be attributed to the absence of any contested judicial appointment processes in their Supreme Court even though many scholars have argued that flaws exist in the process.

by consistently ranking among the top three countries in Africa, which promotes judicial independence.

It is worth noting that several factors could contribute to this disparity. Firstly, the effectiveness of the JSC itself plays a critical role. The commission's composition, mandate, and operational efficiency are crucial for its ability to promote judicial independence.³⁹ If the JSC lacks independence, is subject to political interference, or lacks sufficient resources and capacity, its ability to fulfill its functions may be compromised.⁴⁰ Therefore, it is against this background that the study aims to examine and answer this question.

How will the Judicial Service Commission (JSC) enhance judicial independence in the security of tenure, appointment, and the removal procedure of judges in Sierra Leone, Kenya, and South Africa

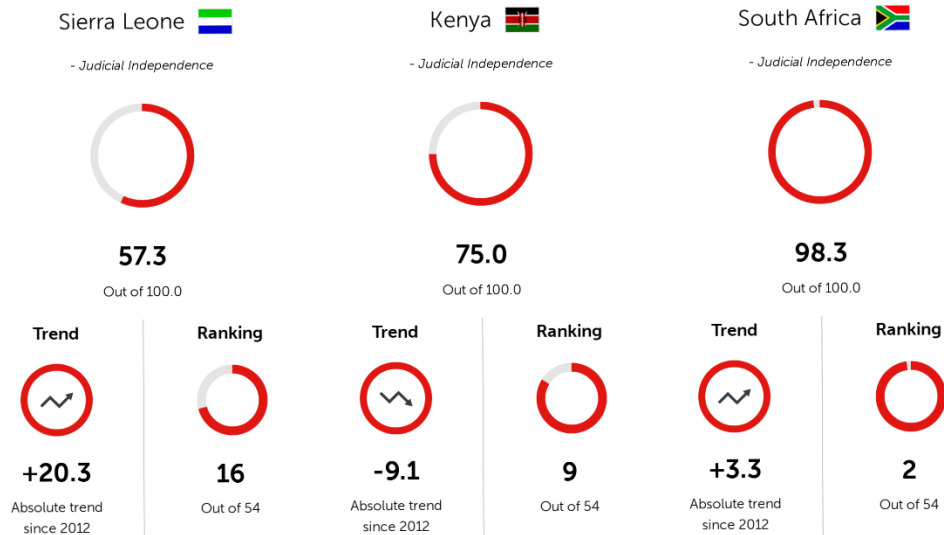
To achieve this goal, the research will adopt a comparative approach by analyzing the various designs of the JSCs and their operation regarding the security of tenure, appointment, and the dismissal of judges in Sierra Leone, Kenya, and South Africa, considered the most vital aspect of judicial independence according to Melton and Ginsburg.⁴¹ The study will also adopt a library desk approach, as it would review and analyze published materials such as books, research papers, statutes, articles, journals, reports, internet sources, human rights treaties, and other international standards on judicial independence. Most importantly, the study will review the constitutions, including relevant laws of Sierra Leone, Kenya, and South Africa, that makes provision for the judiciary to be an essential arm of the government.

³⁹ Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', John M. Olin Program in Law, and Economics. No. 444; (2008).

⁴⁰ L Siyo and JC Mubangizi 'The independence of South African judges: A constitutional and legal perspective' Vol. 18 No. 4 (2015).

⁴¹ Supra note 18.

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1.3 Literature Review

The concept of judicial independence has captured the attention of legal and political scholars, resulting in a substantial body of literature that encompasses books, reports, papers, articles, and commentaries. This literature primarily explores the significance of the JSC in Kenya and South Africa, while the amount of information available on Sierra Leone is scarce. This study aims to address these gaps, expand on, and update the existing literature, and delve into the role of the JSC in promoting judicial independence through the security of the tenure, appointment, and dismissal process of judges in the three countries under examination.

Melton and Ginsburg,⁴² in their work, conduct an experimental evaluation to examine the impact of legal provisions and societal norms on judicial independence. They find that while legal protections are essential, societal norms significantly shape judicial behavior. However, their study

⁴² Supra note 8.

failed to delve into how judicial councils can enhance or promote judicial independence through the de jure or de facto method mentioned in their work.

Garoupa and Ginsburg⁴³ also examine the role of judicial councils in ensuring judicial independence by analyzing the functions and composition of judicial councils in different countries and their impact on judicial decision-making. Although the work provides valuable insights into the potential benefits of judicial councils by extensively looking at the institutional design of judicial councils and their composition, it fails to explore relatively on mechanisms that will avert any undue influence over these councils by the other arms of government or external forces through which these bodies can actively foster independence.

Bola Ajibola and Deon Van Zyl⁴⁴ take a broader approach by examining judicial independence in Africa as a whole. Their work discusses the challenges to judicial independence regarding the appointment of judges in selected African countries. However, it fails to explore how judicial service commissions or councils in common law jurisdictions can ensure judicial independence, particularly regarding the security of judges' tenure, appointment, and removal procedures.

Linda Van De Vijver's⁴⁵ work conducts a comparative examination of judicial institutions in Southern Africa. The book explores the superior courts of various countries in the Southern African region, including South Africa. Among its topics of focus are the constitutional and statutory provisions that impact the judiciary, the process of appointing judges, their security of tenure, and the conditions of their service. However, the book lacks a comprehensive analysis of the flaws within the constitutional provisions concerning the security of tenure, appointment, and removal procedures. It also fails to examine the specific practices adopted by the respective JSCs and the real-world implementation of the discussed countries.

1.4 Overview of the Study

This research is structured and divided into four chapters. Chapter one serves as the road map for how the research is structured and contains a brief introduction of the study, the study's objectives;

⁴³ Supra note 39.

⁴⁴ B Ajibola & D V Zyl (eds), *The judiciary in Africa* (1998).

⁴⁵ LVD Vijver (ed), *The judicial institutions in Southern Africa: A comparative study of common law jurisdictions* (2006).

justification to embark on this research, the scope and structure of the study, a literature review, and the research methodology. Chapter two contextualizes the JSC. It also highlights its composition, roles, and powers in the countries under examination.

Chapter three is a comparative structural analysis of the constitutional provisions of Sierra Leone, Kenya, and South Africa regarding the security of tenure, appointment, and removal procedures of judges. Chapter four brings the research to a conclusion by analyzing the findings of this work. It also provides recommendations that would enhance judicial independence in the security of judges' tenure, appointment, and removal procedures.

CHAPTER TWO

JUDICIAL SERVICE COMMISSION IN CONTEXT

2.1 Introduction

This chapter contextualizes the role of the JSC and then limits the scope to the provisions made in the constitutions, including other relevant laws of Sierra Leone, Kenya, and South Africa for the appointments, security of tenure, and the dismissal of judges. Furthermore, the chapter will also examine by doing a comparative analysis of the composition of the JSC in Sierra Leone, Kenya, and South Africa.

2.2 Designing a Judicial Service Commission

The establishment of a robust including an independent judiciary is essential in maintaining the integrity and legitimacy of the legal system.⁴⁶ To do this, the JSC should be a multi-stakeholder body consisting of representatives from the judiciary, legal profession, executive, legislative, and civil society. This diverse composition ensures that the JSC is accountable to a broad range of stakeholders and is not dominated by any one group.⁴⁷ The appointment process, however, varies depending on the type of members and the jurisdiction of the commission.

To promote proper judicial independence, the JSC should include a significant number of judicial representatives, including the Chief Justice or the most senior judge in the country.⁴⁸ If the majority of the members of the commission are judges, they will be able to make decisions that prioritize the interests of the judiciary and its independence. However, even when judges are not in the majority on the commission, they may still have a dominant role for several reasons. Firstly, most members of a JSC rely on information provided by the judiciary itself. Judges, being intimately familiar with the workings of the judiciary, may be better placed to provide information and advice to other members of the council. They have expertise in judicial matters, and this knowledge can be valuable in making informed decisions in the commission.⁴⁹ Similarly, judges may have

⁴⁶ Kelly, W. F. B., 2002, '*An Independent Judiciary: The Core of the Rule of Law*,' summary of a paper written whilst at the International Centre for Criminal Reform and Criminal Justice Policy in Vancouver.

⁴⁷ Ibid

⁴⁸ Violaine Autheman & Sandra Elena, '*Global Best Practices: Judicial Councils Lessons Learned from Europe and Latin America*'. IFES Rule of Law White Paper Series White Paper #2, Judicial Councils (2004). Page 7-10

⁴⁹ Ibid

particularly strong incentives to represent judicial interests on the council. After their service on the commission, judges will return to their professional careers inside the judiciary. In contrast, non-judges will return to their careers outside the judiciary, which may or may not have any relationship with judicial management issues. Thus, judges have a vested interest in ensuring that the commission's decisions align with the judiciary's needs.⁵⁰

The legal profession should also be well represented on the JSC, with members drawn from the bar association, law society, or other legal bodies.⁵¹ It is generally agreed that these individuals have the necessary knowledge and experience to ensure that the JSC's decisions are based on legal principles and are in the best interest of justice. Furthermore, legal representation on the JSC can help to promote public confidence in the judicial system. When the public sees that the JSC is composed of individuals with legal expertise and a commitment to justice, they are more likely to trust the decisions made by the JSC and the judiciary as a whole.⁵²

Also, to constitute a diverse JSC that will ensure it remains impartial and independent by including a representation from the other two arms of government.⁵³ However, this representation should not be overwhelming or disproportionate.⁵⁴ The executive branch is responsible for enforcing the law. At the same time, the legislature makes the law, and as such, it has a legitimate interest in ensuring that the judicial system operates effectively and fairly.⁵⁵ However, it is important to note that too much influence from the executive or the legislative branch can lead to the commission becoming politicized, compromising the judiciary's impartiality and independence.⁵⁶

Civil Society Organizations (CSO) also play an important role in promoting transparency, accountability, and good governance.⁵⁷ Furthermore, civil society groups can check on the power

⁵⁰ Ibid

⁵¹ Supra note 19.

⁵² Ibid

⁵³ In order to prevent the politicization of the commission, it is suggested that the other two branches of government should only play a role in approving and dismissing judges, rather than being members of the commission itself. For instance, after the JSC has compiled a list of judges, it is proposed that the executive, represented by the President, should appoint judges, subject to the approval of the legislative branch. See Colvin E., *'The Executive and the Independence of the Judiciary'* (1986). 51 Sask. L. Rev. 229. Page 207-211.

⁵⁴ Ibid.

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Bojarski L, "Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020" (2021) 22 German Law Journal 1344

of the government and other powerful interests and help ensure that the commission remains independent and impartial.⁵⁸ By having a presence on the commission, civil society representatives can provide an important counterbalance to the influence of other stakeholders, such as the judiciary. Also, civil society representatives can help ensure that the commission's decisions are made transparently and accountable, which will help build public trust in the judiciary and can contribute to the overall health and vibrancy of the democratic system.⁵⁹

To ensure the integrity and effectiveness of the JSC, members should have the necessary qualifications and experience to serve on the commission.⁶⁰ Finally, commissioners should be appointed through a transparent and inclusive process that ensures the most qualified individuals are selected. This process should be free from political interference or manipulation and guided by the principles of fairness, impartiality, and the rule of law.⁶¹

2.3 Composition of the Judicial Service Commission in Sierra Leone, Kenya, and South Africa

As mentioned earlier in this chapter, the JSC plays a crucial role in appointing, promoting, and removing judges in Sierra Leone,⁶² Kenya⁶³ and South Africa,⁶⁴ and its composition is crucial to ensuring its independence and impartiality. Each of the country's JSC has unique features, which are essential to strike a balance between the various stakeholders involved to promote the independence of the judiciary in its way, as provided in the constitutions of Sierra Leone,⁶⁵

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Garoupa, Nuno, and Tom Ginsburg. "Guarding the Guardians: Judicial Councils and Judicial Independence." *The American Journal of Comparative Law*, vol. 57, no. 1, 2009. Available at: <http://www.jstor.org/stable/20454665> (Accessed May 10th, 2023).

⁶¹ Ibid

⁶² Joseph Koroma: *Examining Judicial Independence and security of tenure of the office for Judges*. 2016. Available at: <https://www.carl-sl.org/pres/examining-judicial-independence-and-security-of-tenure-of-the-office-for-judges/> (accessed on April 14th 2023).

⁶³ Amollo O, 'Independence of the Judiciary in Kenya: A wanting scenario' in Kichana P (ed), *Judiciary watch Report, Judicial Reform in Kenya* (Vol 1 Kenya Section of the International Commission of Jurists, Nairobi, 2005)

⁶⁴ Malan, Koos: *Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa*. Potchefstroom Electronic Law Journal, Vol. 17, No. 5, 2014. Available at SSRN: <https://ssrn.com/abstract=2556236> (Accessed on April 16th, 2023).

⁶⁵ Section 141 of the CSL.

Kenya,⁶⁶ and South Africa.⁶⁷ One striking similarity in all three countries is that the Chief Justice chairs the JSC.⁶⁸

In Sierra Leone, JSC has fewer members, composed of only seven members appointed by the President.⁶⁹ The commission has the Chief Justice as chairperson,⁷⁰ a Court of Appeal judge as the most senior judge of the court,⁷¹ the chairman of the PSA,⁷² one practicing advocate of not less than ten years standing nominated by the Sierra Leone Bar Association but appointed by the President,⁷³ the Solicitor-General,⁷⁴ and two members of the public appointed by the President subject to parliamentary approval.⁷⁵ The Sierra Leone Constitution does not provide any term limit for JSC members,⁷⁶ except for the nominated member from the SLBA and the two members from the public appointed by the President, who are to serve for no more than three years from the date of their appointment.⁷⁷

In contrast, the JSC of Kenya comprises eleven members who are primary stakeholders in the justice sector,⁷⁸ and the Chief Justice acts as the chairperson.⁷⁹ The other judicial members include one judge from the Supreme Court⁸⁰ and the Court of Appeal.⁸¹ The JSC also strives for gender balance in its composition by providing that two Law Society representatives and the two lay presidential appointees with the approval of the National Assembly and the High Court judge and magistrate pair⁸² must each include one man and one woman. While these gender quotas do not

⁶⁶ Article 172 of the CK.

⁶⁷ Section 178 of the CSA.

⁶⁸ For Sierra Leone, see Section 141 (1) (a) of the CSL; For Kenya, see Article 171(2)(a) of the CK; For South Africa, see Section 178(1)(a) of the CSA.

⁶⁹ Except for the Chief Justice and the most Senior Justice of the Court of Appeal, all members of the Commission are Presidential appointees. Also, only the two members of the public appointed by the President in the Commission require parliamentary approval. See section 140 of the CSL.

⁷⁰ Section 140(1)(a) of the CSL.

⁷¹ Section 140(1)(b) CSL.

⁷² Section 140(1)(e) CSL.

⁷³ Section 140(1)(d) CSL.

⁷⁴ Section 140(1)(c) CSL.

⁷⁵ Section 140(1)(f) CSL.

⁷⁶ Section 140(3) of the CSL.

⁷⁷ The constitution did not specifically answer whether these members are eligible for re-appointment or not. See section 140(3)(a) of the CSL.

⁷⁸ Article 171(2) of the CK.

⁷⁹ Article 171(2)(a) CK.

⁸⁰ Article 171(2)(b) CK.

⁸¹ Article 171(2)(c) CK.

⁸² Article 171(2)(d) CK.

guarantee compliance with the constitutional requirement that no more than two-thirds of an elective or appointive state body's members should be of the same gender,⁸³ notwithstanding that, it is a step toward achieving gender equality. Other members of the JSC include the Attorney-General⁸⁴ and one person nominated by the PSA.⁸⁵ JSC members in Kenya, except for the Chief Justice and Attorney-General,⁸⁶ serve a five-year term and are eligible to be nominated for an additional five-year term if they are still qualified.⁸⁷

Compared to Kenya, the President has a strong say in the composition of the Sierra Leone JSC, which is only checked by the requirement for parliamentary approval on the appointment of two members from the public.⁸⁸ Furthermore, it is argued that the composition of the JSC in Kenya is intended to ensure that the Commission is not controlled by the executive branch of government and to prevent the JSC from being influenced by vested interests, as well as to ensure that members maintain their enthusiasm and possibly bring fresh ideas to the Commission.⁸⁹

The South African Constitution, on the other hand, specifically outlines the composition of the JSC, which has 25 members.⁹⁰ The Chief Justice presides over the commission,⁹¹ and other members include the President of the Supreme Court of Appeal,⁹² a Judge President appointed by the Judges President,⁹³ a cabinet member responsible for the administration of justice or an alternate,⁹⁴ two practicing advocates,⁹⁵ and two practicing attorneys both nominated by their designated professions and appointed by the President,⁹⁶ one teacher of law designated by South African university teachers of the law,⁹⁷ six persons designated by the National Assembly,⁹⁸ at least three of whom must be members of opposition parties,⁹⁹ four permanent delegates to the

⁸³ Article 27(8) of the CK.

⁸⁴ Article 171(2)(e) CK.

⁸⁵ Article 171(2)(g) CK.

⁸⁶ Article 171(4) CK.

⁸⁷ Ibid

⁸⁸ Section 140(1) & (4) of the CSL.

⁸⁹ Supra note 63.

⁹⁰ Section 178 of the 1996 CSA.

⁹¹ Section 178(1)(a) CSA.

⁹² Section 178(1)(b) CSA.

⁹³ Section 178(1)(c) CSA.

⁹⁴ Section 178(1)(d) CSA.

⁹⁵ Section 178(1)(e) CSA.

⁹⁶ Section 178(1)(f) CSA.

⁹⁷ Section 178(1)(g) CSA.

⁹⁸ Section 178(1)(h) CSA.

⁹⁹ Ibid

National Council of Provinces,¹⁰⁰ four persons designated by the President as head of the national executive,¹⁰¹ and the Judge President of a specific High Court and the Premier of the province concerned or alternates.¹⁰²

It is important to note that the non-inclusion of active politicians in the Kenyan JSC is a unique aspect that is absent in both the JSCs of Sierra Leone and South Africa, as this is due to the constitution's goal of safeguarding state institutions from the uncertainties of everyday politics.¹⁰³ As mentioned earlier in this chapter, it is argued that a JSC dominated by political appointees is less likely to make independent judgments on prospective judicial candidates and may be influenced by political interests.¹⁰⁴ Furthermore, even though the South African JSC includes representatives from the executive and legislative branches of government, which could result in political and partisan interests influencing the commission's decisions.¹⁰⁵ However, the presence of a legal academic designated by teachers of the law is a unique aspect of the South African JSC as it may enhance its knowledge and expertise, which is absent in the JSCs of Sierra Leone¹⁰⁶ and Kenya.¹⁰⁷ Lastly, the term limits for JSC members, such as those present in Kenya,¹⁰⁸ may also help to prevent the accumulation of power and ensure the rotation of members.

2.4 The Role and Powers of the Judicial Service Commission in Sierra Leone, Kenya, and South Africa

One of the essential functions of the JSC is to ensure that judicial appointments are made based on merit and not on political, ethnic, or any other considerations.¹⁰⁹ In Kenya¹¹⁰ and South Africa,¹¹¹ the commission is responsible for identifying suitable candidates for judicial positions and making

¹⁰⁰ Section 178(1)(i) CSA.

¹⁰¹ Section 178(1)(j) CSA.

¹⁰² Section 178(1)(k) CSA.

¹⁰³ Akinyi, Oganyo Roseline. 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers.' University of Nairobi, School of Law, October 2014.

¹⁰⁴ Eltis, Karen and Gelinas, Fabien: Judicial Independence and the Politics of Depoliticization (2009).)

¹⁰⁵ Budlender G "Transformation of the Judiciary: The Politics of the Judiciary in a Democratic South Africa" 2005. Available at: <https://hdl.handle.net/10520/EJC53674> (accessed on April 19th, 2023).

¹⁰⁶ Section 140 of the CSL.

¹⁰⁷ Article 171(2) of the CK.

¹⁰⁸ Article 171(4) of the CK.

¹⁰⁹ Instruments that promote judicial independence, see <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/> & <https://www.icj.org/category/publications/practitioners-guidesseries/>

¹¹⁰ Article 166 of the CK.

¹¹¹ Section 174 of the CSA.

recommendations to the president for appointment subject to the approval of the National Assembly. Furthermore, the JSC in Sierra Leone,¹¹² Kenya,¹¹³ and South Africa¹¹⁴ also has the mandate to discipline judges who engage in misconduct or fail to uphold the ethical standards of the judiciary. In extreme cases, the JSC's disciplinary actions can range from censure, suspension, or even removal from office. Another important function of the JSC in Sierra Leone,¹¹⁵ Kenya,¹¹⁶ and South Africa¹¹⁷ is to ensure that the judges have the necessary support and resources to carry out their duties effectively. This role is crucial in promoting diversity and inclusivity in the judiciary as it ensures that the judiciary reflects the diversity of the society it serves, including gender, ethnicity, and other factors. It is also essential in promoting access to justice for all members of society and ensuring that the judiciary remains relevant to the changing needs of society.

2.5 Conclusion

This chapter has attempted to contextualize the JSC by highlighting its role and powers as provided by the constitutions of the three countries, including various international guidelines on the appointment, security of tenure, and dismissal process of judges. The chapter also examined the composition of the Commission and ended by doing a comparative analysis of the design of the JSC in Sierra Leone, Kenya, and South Africa.

¹¹² Section 137 of the CSL.

¹¹³ Article 168 of the CK.

¹¹⁴ Section 177 of the CSA.

¹¹⁵ Section 141 of the CSL.

¹¹⁶ Article 172 of the CK.

¹¹⁷ Section 178 of the CSA.

CHAPTER THREE

JUDICIAL INDEPENDENCE- SECURITY OF TENURE, APPOINTMENTS, AND REMOVAL PROCEDURES OF JUDGES

3.1 Introduction

This chapter conducts a comparative analysis of the appointment procedures, tenure security, and removal processes for judges in Sierra Leone, Kenya, and South Africa. The chapter starts by examining the procedural aspects of judicial appointments in these three nations, then exploring the security of tenure and dismissal procedures for judges. Moreover, the chapter goes beyond the constitutional provisions and other relevant laws by delving into the practices and procedures implemented by the respective JSC, including the different stakeholders.

3.2 Procedural Appointment of Judges in Sierra Leone, Kenya, and South Africa

In the context of the three countries being examined, the crucial question revolves around sufficient safeguards against purely political appointments within the appointment process. One common aspect among all three countries is that the President, who heads the executive branch, holds a significant influence in the appointment of judges. However, there are variations in their involvement in the process and the degree to which their decisions are subject to confirmation/approval by the legislatures or the JSCs. It is also worth considering whether the President must act *upon the advice or recommendation* of specialized bodies such as the JSC.

In Sierra Leone, for instance, the appointment of the Chief Justice and other Judges is carried out by the President. However, this appointment process is subject to certain conditions. The President appoints the Chief Justice and other Judges acting “*on the advice of the Judicial and Legal Service Commission,*” subject to parliamentary approval, and the appointment is made through a written document known as a warrant, which the President issues.¹¹⁸ However, in Kenya, the President appoints the Chief Justice, and Deputy Chief Justice, in accordance with JSC’s recommendation and subject to the approval of the National Assembly.¹¹⁹ Notwithstanding that, other judges do not

¹¹⁸ Section 135(1) & (2) of the CSL.

¹¹⁹ Article 166(1)(a) of the CK.

need the approval of the National Assembly to be appointed by the President, but it must be “in accordance with the recommendation of the Judicial Service Commission.”¹²⁰

In contrast, South Africa follows a similar approach but with one significant distinction: the President is granted considerable power over the appointment of four judicial officers, namely the President and the Deputy President of the Supreme Court of Appeal, after consulting the JSC, the Chief Justice, and Deputy Chief Justice after consulting the JSC including all leaders of the parties represented in the National Assembly.¹²¹ The Constitution provides that:

“The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.”¹²²

So, unlike Kenya, the President's consultations in South Africa are not binding for the appointment of the aforementioned four judicial officers, as the President's views at the end of the process supersedes. However, in terms of other judges, South Africa introduces another differentiation between judges of the Constitutional Court¹²³ and those of all other courts¹²⁴ which includes the other judges of the Supreme Court of Appeal and the High Court. The President appoints these judges “on the advice of the Judicial Service Commission” without involving party leaders represented in the National Assembly or the Chief Justice.¹²⁵ This means that the President is solely bound by the advice of the Judicial Service Commission. For other judges of the Constitutional Court, the JSC prepares a list of nominees with an additional three names to be submitted to the President, who should appoint from the list in consultation with the Chief Justice and leaders of parties represented in the national assembly.¹²⁶ If the President does not accept any of the

¹²⁰ Article 166(1)(b) CK.

¹²¹ In October 2009, President Jacob Zuma appointed Chief Justice Sandile Ngcobo, including four other Constitutional Court Justices: Justice Froneman, Justice Jafta, Justice Khampepe and Justice Mogoeng. However, the bone of contention was whether a letter sent to all leaders of the opposition parties represented in the National Assembly could suffice as a consultation. This was not contested in the Constitutional Court, but it is my view that a mere letter sent to someone where no exchange of views happens cannot be regarded as “consultation.”

¹²² Section 174(3) CSA.

¹²³ Section 174(4) CSA.

¹²⁴ Section 174(6) CSA.

¹²⁵ Ibid

¹²⁶ Section 174(4)(a) CSA.

nominees,¹²⁷ the JSC supplements the list with further names from which the President must appoint.¹²⁸ So, in essence, it appears that the President cannot request an additional supplementary list thereafter. The Constitutional Court must always have at least four members who were serving as judges at the time of their appointment.¹²⁹ Compared to Sierra Leone and Kenya, the appointment procedures of judges in South Africa at the Constitutional Court,¹³⁰ the Supreme Court of Appeal, and the High Court¹³¹ is believed to be more transparent and open, as the public can easily access information on how the appointments are conducted in practice.¹³² Notably, unlike Sierra Leone, the JSC in Kenya,¹³³ has the power to determine its procedures, similar to South Africa.¹³⁴

While the interpretation of the phrases “...*acting on the advice*...”, “...*in accordance with the recommendation*...” or “...*after consulting* ...” of the JSC seems contentious or confusing in Sierra Leone, Kenya, and South Africa, respectively, if interpreted in its literal form. Nevertheless, the Ghana Supreme Court decision 2016 that sought the interpretations of the phrases provides a better interpretation that Sierra Leone and, if necessary, Kenya and South Africa can learn from. The Court's decision involved the interpretation of certain terms used in the constitution regarding the President's obligation to seek advice from the Judicial Council before making judicial appointments. The Court defined the word "advice" according to the Black's Law Dictionary, 9th Ed, as “guidance offered by one person to another” and explained that "acting on" according to the context it was used in the constitution to means “stick to, adhere to, or to follow.” When these terms are combined according to the Court, it becomes clear that the advice given by the Judicial Council is not binding. The Court further defined "consult" as asking for advice, considering, or discussing with someone. The Court opined that, although the President is mandated to seek the Judicial Council's advice, yet, they are not bound by it. However, the President cannot bypass the

¹²⁷ Section 174(4)(b) CSA.

¹²⁸ Section 174(4)(c) CSA.

¹²⁹ Section 174(5) CSA.

¹³⁰ Section 167 CSA.

¹³¹ Section 169 CSA.

¹³² Mnyongani FD, *The Judiciary as a Site for the Struggle for Political Power: A South African Perspective*. 2011 Speculum Juris 5-7. Available at: http://www.ufh.ac.za/speculumjuris/files/pdf/SpeculumJuris_2011_Part_2.pdf. (Accessed on April 25th, 2023)

¹³³ Section 13(3) of the Judicial Service Act of 2011 (Act No. 1 of 2011).

¹³⁴ Section 178(6) CSA.

advice to appoint someone else if the Judicial Council did not recommend a specific candidate or nominee. The Court concluded by stating the following:

*“As a matter of fact, the President is not bound by any such advice. The only thing is that the President can also not go outside the names or lists of persons recommended to him by these bodies.”*¹³⁵

Furthermore, the establishment of minimum qualifications for judicial appointments also serves as a limitation on the discretion of those in authority, contributing to the judiciary's independence. In essence, when judges are appointed in a restrictive manner by meeting certain qualifications, the risk of purely political choices is drastically reduced. This is because fewer politically influenced individuals may meet the criteria, which will discourage those in authority from making the appointment from prioritizing political allegiances over the law. So, in essence, the inclusion of minimum qualification requirements in the constitution is an important provision for ensuring an independent judiciary.

In Sierra Leone and Kenya, for instance, to qualify for the position of a Judge in the Superior Court of Judicature, a person must meet specific criteria which include the eligibility to practice as a Counsel in a court with unlimited jurisdiction in both civil and criminal matters in the respective countries or in another country that follows a legal system similar to that of the respective countries, and this must be approved by the respective JSCs.¹³⁶ In addition to Kenya, the person must demonstrate high moral character, integrity, and impartiality.¹³⁷ Furthermore, in Sierra Leone, the individual must have at least twenty years of experience as a Counsel for appointment to the Supreme Court,¹³⁸ fifteen years for the Court of Appeal (the country's second highest Court),¹³⁹ and ten years for the High Court of Justice.¹⁴⁰ An individual is considered eligible to practice as a Counsel if they have been officially recognized, enrolled, or admitted as such and have not been subsequently disbarred or removed from the list of Counsel or Legal Practitioners.¹⁴¹

¹³⁵ *Ghana Bar Association and Others Vs. Attorney General and Others* GHASC 43 (2016). See page 26 of the Court's decision.

¹³⁶ See Section 135(3) of the CSL. For the Kenya context, see Article 166(2) of the CK.

¹³⁷ Article 166(2)(c) of the CK.

¹³⁸ Section 135(3)(a) of the CSL.

¹³⁹ Section 135(3)(b) CSL.

¹⁴⁰ Section 135(3)(c) CSL.

¹⁴¹ Section 135(4) CSL.

Also, holding or acting in any other office does not automatically disqualify a person from practicing in any court in Sierra Leone.¹⁴² However, in Kenya, for appointments to the Supreme Court, the Chief Justice, and other judges must have a minimum of fifteen years of experience as a judge in a superior court,¹⁴³ or alternatively, fifteen years of experience as a distinguished academic, judicial officer, legal practitioner, or in a relevant legal field.¹⁴⁴ Similarly, Judges for the Court of Appeal¹⁴⁵ and of the High Court¹⁴⁶ should have at least ten years' experience as a judge in a superior court, or alternatively, ten years' experience as a distinguished academic or legal practitioner, or in a relevant legal field, respectively. In contrast to South Africa, there are no specified minimum requirements. This may be due to the emphasis on promoting the advancement of historically disadvantaged groups, particularly Black individuals. Therefore, the South African Constitution states that appointees must be "*appropriately qualified*"¹⁴⁷ and that consideration should be given to achieving a judiciary that broadly reflects the racial and gender composition of South Africa.¹⁴⁸ The writer believes that if minimum requirements were included in the Constitution, it would be challenging to achieve racial and gender balance. This rationale explains why South Africa resorts to appointing individuals who are "appropriately qualified."

Although there are differences in the appointment process of Chief Justices and other judges among these three countries, Sierra Leone stands out by requiring parliamentary approval for all judicial appointments made by the president, except for judges on a contractual basis. However, it is the writer's view that the requirement for the President to act based on the advice of the JSC while still subjecting the process to parliamentary approval raises concerns about potential political influence on the appointment process. Therefore, parliament must assert itself as an independent branch of government and have the courage to reject an unsuitable nominee for the courts. Unfortunately, in Sierra Leone, Parliament has not been particularly critical in exercising its approval power since establishing the 1991 constitution, according to the writer's view. The vetting sessions conducted by Parliament for judicial appointments made by the president have been hasty, resulting in the approval of practically all nominees. Several factors contribute to this

¹⁴² Section 135(5) CSL.

¹⁴³ Article 166(3)(a) CK.

¹⁴⁴ Article 166(3)(b) CK.

¹⁴⁵ Article 166(4) CK.

¹⁴⁶ Article 166(5) CK.

¹⁴⁷ Section 174(1) CSA.

¹⁴⁸ Section 174(2) CSA.

situation. Parliament tends to reflect the strength of political parties, with the President usually having a majority in Parliament. In addition, Parliament lacks the necessary research staff to investigate the candidates nominated for positions adequately. In Sierra Leone also, the vetting process in the Appointments Committee of Parliament is heavily biased towards becoming a battleground between the major political parties by focusing on scoring political points. In the end, the government in power usually prevails to get its way.

3.3 Security of Tenure and the removal procedures of Judges in Sierra Leone, Kenya, and South Africa

In Sierra Leone, except for judges who are appointed on a contractual basis and do not require parliamentary approval for their appointment,¹⁴⁹ a judge serves in their position for an indefinite period as long as they maintain good conduct and they are not incapacitated to do their job¹⁵⁰ When a Judge reaches the age of sixty-five, they have the option to either retire¹⁵¹ or step down from their role.¹⁵² However, even after reaching retirement age, a Judge may continue serving for up to three months, specifically to complete ongoing cases or deliver judgments related to proceedings initiated before their retirement.¹⁵³ A Judge of the Superior Court of Judicature can only be removed from office if they cannot perform their duties properly due to physical or mental incapacity or if they engage in serious misconduct.¹⁵⁴ If the JLSC believes that a Judge, excluding the Chief Justice, should be investigated for removal, they must inform the President.¹⁵⁵ In such cases, the President appoints a tribunal in consultation with the JLSC.¹⁵⁶ This tribunal comprises a chairperson and two other members, all of whom must be qualified to hold or have previously held office as a Justice of the Supreme Court.¹⁵⁷ The tribunal is responsible for examining the matter, reporting the facts and findings to the President, and recommending whether the Judge should be removed from their position.¹⁵⁸ When a Judge of the Superior Court of Judicature is under investigation for removal, the President can suspend the Judge from performing their

¹⁴⁹ Section 136(2) & (3) of the CSL. See also Section 136(4) & (5) of the CSL.

¹⁵⁰ Section 137(1) CSL.

¹⁵¹ Section 137(2)(a) CSL.

¹⁵² Section 137(2)(b) CSL.

¹⁵³ Section 137(3) CSL.

¹⁵⁴ Section 137(4) CSL.

¹⁵⁵ Section 137(5) CSL.

¹⁵⁶ Section 137(5)(a) CSL.

¹⁵⁷ Ibid

¹⁵⁸ Section 137(5)(b) CSL.

duties.¹⁵⁹ The President can revoke the suspension at any time, and it automatically ends if the tribunal recommends that the Judge should not be removed.¹⁶⁰ Furthermore, if the tribunal recommends the removal of a Judge,¹⁶¹ the President must do so if a two-thirds majority in Parliament approves this decision.¹⁶² However, the JLSC is not involved in the removal process of the Chief Justice. In the case of the Chief Justice, if the President receives a petition suggesting the need to investigate their removal,¹⁶³ the President, in consultation with the Cabinet, appoints a tribunal consisting of three sitting Justices of the Supreme Court or legal practitioners qualified to be appointed as Justices of the Supreme Court,¹⁶⁴ along with two individuals who are neither Members of Parliament nor legal practitioners.¹⁶⁵ This tribunal investigates the matter, reports the facts and findings to the President, and recommends whether the Chief Justice should be removed from office.¹⁶⁶ The President is obliged to follow the tribunal's recommendations in this regard.¹⁶⁷ If the Chief Justice's removal is under consideration by a tribunal, the President has the power to suspend the Chief Justice from their duties through a written warrant.¹⁶⁸ The President can revoke this suspension at any time, and it automatically ends if the tribunal advises against the Chief Justice's removal.¹⁶⁹ The Chief Justice can only be removed from office if the matter of their removal is referred to a tribunal, the tribunal recommends their removal,¹⁷⁰ and if a two-thirds majority in Parliament subsequently approves this recommendation.¹⁷¹

Like Sierra Leone, judges in Kenya hold office until they attain mandatory retirement. However, in Kenya, it is set for seventy years, but they may choose to retire at any time after attaining the age of sixty-five years.¹⁷² The Chief Justice, however, holds office for a maximum of ten years or until reaching the retirement age subject to whichever comes first.¹⁷³ Nevertheless, judges can be

¹⁵⁹ Section 137(6) CSL.

¹⁶⁰ Ibid

¹⁶¹ Section 137(7)(a) CSL.

¹⁶² Section 137(7)(b) CSL.

¹⁶³ Section 137(8) CSL.

¹⁶⁴ Section 137(8)(a)(i) CSL.

¹⁶⁵ Section 137(8)(a)(ii) CSL.

¹⁶⁶ Section 137(8)(b) CSL.

¹⁶⁷ Ibid

¹⁶⁸ Section 137(9) CSL.

¹⁶⁹ Section 137(10)(a) CSL.

¹⁷⁰ Section 137(10)(b) CSL.

¹⁷¹ Section 137(1)(a) CSL.

¹⁷² Article 167(1) CK.

¹⁷³ Article 167(2) CK.

removed from office under certain circumstances. The grounds for removal include various factors such as the judge's inability to perform their duties due to mental or physical incapacity,¹⁷⁴ a breach of the code of conduct prescribed for superior court judges by an Act of Parliament,¹⁷⁵ bankruptcy,¹⁷⁶ incompetence,¹⁷⁷ or gross misconduct/misbehavior.¹⁷⁸ The removal process begins with a petition by the JSC or by any member of the public to the JSC alleging that a judge has contravened the prescribed grounds for removal.¹⁷⁹ Upon receiving a petition, the JSC investigates to establish whether there are sufficient grounds for removal.¹⁸⁰ The JSC has the power to suspend a judge pending the outcome of the investigation but the directive has to be given to the President, who shall act on the suspension request.¹⁸¹ If the JSC finds grounds for removal, it forwards its findings and recommendations to the President,¹⁸² for which the president is obligated to comply with this recommendation.¹⁸³ The President then constitutes a tribunal consisting of none JSC members to hear the matter.¹⁸⁴ In the case of the Chief Justice, the tribunal consists of the Speaker of the National Assembly, who chairs the tribunal,¹⁸⁵ three superior court judges from common law jurisdictions,¹⁸⁶ an advocate with at least fifteen years of experience,¹⁸⁷ and two individuals knowledgeable in public affairs.¹⁸⁸ For the removal of any other superior court judge, the three superior court judges are replaced by a chairperson and three other members who have served or are qualified to serve as judges of a superior court,¹⁸⁹ including an advocate with at least fifteen years of experience,¹⁹⁰ and two individuals knowledgeable in public affairs.¹⁹¹ The tribunal is obligated to conduct a fair hearing and consider the evidence presented.¹⁹² The judge facing

¹⁷⁴ Article 168(1)(a) CK.

¹⁷⁵ Article 168(1)(b) CK.

¹⁷⁶ Article 168(1)(c) CK.

¹⁷⁷ Article 168(1)(d) CK.

¹⁷⁸ Article 168(1)(e) CK.

¹⁷⁹ Article 168(2) CK.

¹⁸⁰ Article 168(4) CK.

¹⁸¹ Article 168(5) CK.

¹⁸² Article 168(4) CK.

¹⁸³ Article 168(5) CK.

¹⁸⁴ Ibid

¹⁸⁵ Article 168(5)(a)(i) CK.

¹⁸⁶ Article 168(5)(a)(ii) CK.

¹⁸⁷ Article 168(5)(a)(iii) CK.

¹⁸⁸ Article 168(5)(a)(iv) CK.

¹⁸⁹ Article 168(5)(b)(i) CK.

¹⁹⁰ Article 168(5)(b)(ii) CK.

¹⁹¹ Article 168(5)(b)(iii) CK.

¹⁹² Article 168(7) CK.

removal has the right to legal representation and an opportunity to present a defense.¹⁹³ After the tribunal concludes its proceedings, it submits its report and recommendations to the President.¹⁹⁴ The President, having considered the report, is obliged to act according to the tribunal's recommendation¹⁹⁵ pending the expiration of an appeal (if any), which should not be more than ten days by the aggrieved judge under investigation.¹⁹⁶ Thereafter, the judge ceases to hold office immediately upon the President's decision to act on the tribunal's recommendation.¹⁹⁷

Furthermore, in South Africa,¹⁹⁸ Judges of the Constitutional Court are allowed to hold office for a period of 12 years, which is non-renewable, or until they reach the age of 70, whichever occurs first.¹⁹⁹ If a judge has served for 12 years but has yet to complete 15 years of active service, they can continue to perform their duties until the completion of 15 years of active service.²⁰⁰ An act of parliament may extend the Constitutional Court judges' term of office.²⁰¹ The Remuneration and Conditions of Employment Act currently extend the office of judges.²⁰² Suppose a Constitutional Court judge attains the age of 70 but has not completed 15 years of active service; in that case, they may continue to perform their functions until they complete the 15 years of active service or until they attain the age of 75, whichever occurs first.²⁰³ Upon the completion of active service of 15 years, the judges are discharged from active service as judicial officers.²⁰⁴ The South African Constitution also provides that judges of other courts may be retired from active service by an act of parliament²⁰⁵ if they are at least 70 years old and have completed ten years of active service.²⁰⁶ However, if they have not completed ten years of active service by the age of 70, they may continue to serve until they complete the ten years.²⁰⁷ If a judge is 65 years old and has served for 15 years,

¹⁹³ Article 168(8) CK.

¹⁹⁴ Article 168(7)(b) CK.

¹⁹⁵ Article 168(9) CK.

¹⁹⁶ Article 168(8) CK.

¹⁹⁷ Article 168(9)(a)(b) CK.

¹⁹⁸ Section 176 (1) of the CSA.

¹⁹⁹ Ibid

²⁰⁰ Section 176 (1) of the CSA.

²⁰¹ Ibid

²⁰² Judges' Remuneration and Conditions of Employment Act [No. 47 of 2001]. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/a47-010.pdf (Accessed on April 25th, 2023).

²⁰³ Section 4(2) (Supra note 204).

²⁰⁴ Section 4(1) (Supra note 204).

²⁰⁵ Section 176 (2) of the CSA.

²⁰⁶ Section 3(2)(a) (Supra note 202).

²⁰⁷ Ibid

they may request to be discharged from their duties by writing to the Minister of Justice.²⁰⁸ Based on the constitutional provision, the President has the authority to extend the service of a Chief Justice and President of the Supreme Court beyond the age of 70.²⁰⁹ The President determines the duration of the extension, but it ends when the judge reaches the age of 75.²¹⁰ However, this constitutional provision has been struck down by the Constitutional Court citing that, any discretion given to the President to extend the Chief Justice's term in office after reaching the retirement age can be detrimental to judicial independence.²¹¹ The South African constitution also makes provision for the security of tenure for judges which protects them from arbitrary dismissal or removal from office.²¹² As such, judges in South Africa can only be removed from their office before retirement if they are incapacitated or guilty of gross misconduct.²¹³ JSC investigates any such allegations,²¹⁴ and if the judge is found guilty of the aforementioned with at least two-thirds of the National Assembly vote to adopt a resolution calling for their removal,²¹⁵ the President must do so as adopted by the answer.²¹⁶

The security of tenure for judges is critical to ensuring judicial independence, which is essential for a democratic system of government. Without it, judges may be subjected to political pressures, threats, and intimidation.²¹⁷ This, in turn, helps to ensure that the judiciary can carry out its functions without fear or favor. However, there are concerns that the provision allowing the President to extend the term of office of judges may undermine judicial independence.²¹⁸ The President may have political motives for extending a judge's term of office, which could compromise the judiciary's impartiality.²¹⁹

²⁰⁸ Section 3(2)(b) (Supra note 202).

²⁰⁹ Section 8(a) & (b) (Supra note 202).

²¹⁰ Ibid

²¹¹ See the case of *Justice Alliance of South Africa v. President of Republic of South Africa* (2011) ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

²¹² Section 177 of the CSA.

²¹³ Section 177 (1)(a) CSA.

²¹⁴ Ibid

²¹⁵ Section 177 (1)(b) CSA.

²¹⁶ Section 177(2) of the CSA.

²¹⁷ Lautenbach, Geranne, 'Judicial Safeguards,' *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford, 2013; Online Edn, Oxford Academic, 2014).

²¹⁸ Colvin E., "The Executive and the Independence of the Judiciary" (1986). 51 Sask. L. Rev. 229. Page 210.

²¹⁹ Ibid

The provision allowing for the removal of judges before retirement on the grounds of incapacity, gross incompetence, or gross misconduct is another critical safeguard for judicial independence.²²⁰ It ensures that judges are held accountable for their actions, but at the same time, it protects them from arbitrary dismissal. However, the process for removing judges must be fair and transparent, and judges must be given a fair hearing.²²¹

3.4 Bridging theory and practice by examining the practical implementation of security of tenure, appointment, and removal processes for Judges in the laws of Sierra Leone, Kenya, and South Africa

The JSCs in Sierra Leone, Kenya, and South Africa play a significant role in the appointment and dismissal process of judges. All three countries, in the *de jure* perspective makes provision in their constitutions for judicial independence.²²² However, the JSC's role in Sierra Leone is primarily restricted to advising the president on appointing the Chief Justice and other judges.²²³ Furthermore, the JSC is not involved in the removal process of the Chief Justice,²²⁴ as this falls within the president's powers.²²⁵ In consultation with cabinet, the President has the power to establish a tribunal for the dismissal process, raising concerns about the independence of those investigating the issue and the criteria used by the president and the cabinet to form the tribunal are unclear.²²⁶ It is also uncertain whether the president is obligated to follow the JSC's advice in the appointment and dismissal of judges as this provision has not been interpreted by the Supreme Court of Sierra Leone.²²⁷ There are also no set guidelines or rules for the President to follow, and

²²⁰ The Bangalore Draft Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity. This was also revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, on November 25-26, 2002.

²²¹ Ibid

²²² For Sierra Leone, Section 120(3) of the Constitution; For Kenya, Article 160(1) of the Constitution; For South Africa, Section 165(2) of the Constitution.

²²³ Section 135(1) & (2) of the CSL.

²²⁴ Although there is uncertainty regarding whether the literal meaning of the constitutional text allows for the removal of the Chief Justice solely from their office or from the entire Court, there is an argument suggesting that the removal pertains to the Court. This argument is based on the notion that it would be unexpected for a Chief Justice to remain as a judge in the court while being removed for gross misconduct, incapacity, or infirmity as Chief Justice.

²²⁵ Section 137(8) of the CSL.

²²⁶ Section 137(8)(a) of the CSL. See also the blog post of Joseph Koroma. Available at: <https://www.carlsl.org/pres/examining-judicial-independence-and-security-of-tenure-of-the-office-for-judges/> (accessed on April 23rd 2023)

²²⁷ In Ghana, as explained earlier in this chapter, a similar provision was interpreted by the Supreme Court indicating that the President is not bound to follow the advice of the JSC but at the same time, the President cannot go outside the names or lists of persons recommended to him by these bodies to appoint someone else. For contextual analysis

there are no sufficient checks and balances to counter-abuse.²²⁸ Furthermore, although in exceptional cases, the provision in the constitution that allows the President to appoint someone when there is a vacancy, without the need for parliamentary approval, also undermines judicial independence as the appointed judge can serve indefinitely until the President revokes their appointment.²²⁹ This provision raises concerns about the President's unchecked power to appoint or remove judges at will, potentially compromising their independence and impartiality.²³⁰ Therefore, this contractual judicial appointment by the president without the involvement of the JSC or parliament in Sierra Leone makes judges owe their positions to the President, creating an implicit relationship between the judges and the President who appoints them, and this lack of transparency may lead to appointed individuals becoming subservient to the President and his cabinet. Also, unlike Kenya and most importantly South Africa, the appointment process in Sierra Leone is not transparent, and the public do not know what takes place within the JSC during the process of appointing judges.²³¹ It is also unclear whether all judges appointed since the current constitution of Sierra Leone came to force, have been appointed from the list submitted by the JSC to the President (assuming such a list even exists) and there is no recourse for those not appointed, leading to doubts about the appointment process's competitiveness and transparency.²³² One element of independence for the JSC is to have the power to make binding recommendations to the President, as is the case of the other two countries under examination.²³³ However, in Sierra Leone, the President's respect for the recommendations depends on his goodwill and the exercise of his discretion. The legal effect of the recommendations has been debated, but the constitution puts the matter to rest.²³⁴ It states that:

of the provision by the Court, see the case of *Ghana Bar Association and Others Vs. Attorney General and Others GHASC 43* (20 July 2016).

²²⁸ International Commission of Jurists, 'Sierra Leone attacks justice.' Available at: https://www.icj.org/wp-content/uploads/2002/08/sierraleone_attacks_justice_27_08_2002.pdf Page 324-325 (accessed on April 28th, 2023).

²²⁹ Section 136(2) & (4) of the CSL.

²³⁰ Ibid

²³¹ DCAF 'Sierra Leone Justice.' Available at: <https://issat.dcaf.ch/esl/download/48039/758786/Sierra%20Leone%20Justice.pdf> (accessed on April 29th, 2023).

²³² Ibid

²³³ For South Africa, see Section 165(4) of the Constitution. In Kenya, See Article 166(1) of the Constitution.

²³⁴ Section 53(3) of the CSL.

*“Where, by this Constitution or under any other law the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case received or acted in accordance with such advice shall not be inquired into in any court.”*²³⁵

So, it is argued that in the case of judicial appointments, the President is not bound by any such obligation and can choose to appoint judges from a list (if there is any) or not. Due to controversies surrounding the appointment of judges, doubts have been raised about some of the names recommended by the JSC (if any) and if the President is appointing judges in accordance with the recommended names.

In Kenya, the constitution eliminates any ambiguity regarding the selection of Judges as it dictates that once the approval of the Chief Justice and Deputy Chief Justice is granted by both the JSC and the National Assembly,²³⁶ or the approval of all other Judges is granted by the JSC,²³⁷ it becomes duty-bound on the President to make the appointment. Several cases in the Kenyan Court have been decided to support this assertion.²³⁸

Furthermore, there is no law granting the President the discretion to choose whether to appoint individuals who have successfully completed the vetting process and obtained the necessary approval as outlined in the Constitution and relevant Act.²³⁹ To reinforce this point, the First Schedule of the Act,²⁴⁰ specifically Part VI, does not include any provision allowing the President to reject or disapprove individuals recommended for Judgeship. However, the Act outlines the recruitment procedure and subsequent recommendation of candidates for appointment by the President, detailing the steps involved in paragraphs 1-16 of the First Schedule. Thus, the President's role in appointing judges is purely ceremonial and serves to formalize the appointment of individuals recommended by the JSC. In the case of *David Kariuki Ngari & another v Judicial*

²³⁵ Ibid

²³⁶ Supra note 119.

²³⁷ Supra note 120.

²³⁸ See the following cases, *Adrian Kamotho Njenga v Attorney General, Judicial Service Commission & 2 others* HC No. 369 of 2019; *Katiba Institute v President of Republic of Kenya & 2 others, Judicial Service Commission & 3 others* HC Petition No. 206 of 2020; *Zack Kinuthia v Judicial Service Commission, Ngugi Grace Mumbi & 3 others* HC Petition No. 251 of 2019; *David Kariuki Ngari & another v Judicial Service Commission & another, Law Society of Kenya & 2 others* HC No. 427 of 2019; *Law Society of Kenya v Attorney General & 2 others*, HC No 313 of 2014 [2016]. All are available at <http://www.kenyalaw.org> (accessed on May 12th, 2023).

²³⁹ Supra note 133.

²⁴⁰ Ibid

*Service Commission & another*²⁴¹ in which the petitioner sought orders from the Court to declare that the President has the discretion to appoint judges and his role is not ceremonial, the Court held as follows:

*“... the appointment of Judges is anchored in Article 166(1)(b), as read with Article 172(1)(a) of the Constitution, which provide that Judges shall be appointed by the President in accordance with the recommendation of the [JSC]. We also note that under the Judicial Service Act, it is the JSC that is tasked with the mandate to determine suitability and the appropriate constitutional and statutory qualifications for persons to appoint as Judges. **In that regard, the Constitution and the law contemplate no other role for the President, any other authority or body in determining the persons to appoint as judges.**”*²⁴² (Emphasis are mine)

Furthermore, regarding the removal of a judge, the Constitution²⁴³ empowers the President to suspend a Judge within fourteen days of receiving a petition from the JSC. So, in essence, the President's action must be in accordance with the recommendation provided by the JSC as discussed earlier in this chapter. This provision is also exerted by the Kenya court in the *Law Society of Kenya v Attorney General & Others* case, where the President failed to act in a timely after the JSC's recommendation. The Court stated as follows:

*“In determining what is reasonable time therefore, it is our view that the timelines stipulated in the Constitution ought to act as a guide. ...the President is required, within fourteen days after receiving the petition for removal of a Judge, to suspend the judge from office and, acting in accordance with the recommendation of the JSC, appoint a Tribunal.”*²⁴⁴ *...the spirit of the Constitution is that when it comes to matters of national interest, the thread that runs across the constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalization of a decision already substantially made, is that fourteen days period is generally reasonable.*²⁴⁵

²⁴¹ *David Kariuki Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others* HC No. 427 of 2019. Available at <http://www.kenyalaw.org> (accessed on May 12th, 2023).

²⁴² Ibid. See page 17, Paragraph 138 of the Court's decision.

²⁴³ Article 168 of the CK.

²⁴⁴ See Para 94 of the *Law Society of Kenya v Attorney General & another, Mohammed Abdulahi Warsame & another*; Constitutional Petition No. 307 of 2018 [2019].

²⁴⁵ Ibid. Paragraph 95 of the Court's decision.

In South Africa, on the other hand, except for the appointment of the Chief Justice, Deputy Chief Justice, president, and deputy president of the Supreme Court of Appeal, the President's involvement is also ceremonial in appointing judges in the other court. However, in the case of the other judges in the constitutional court, the President has the discretion to request a supplementary list if he still feels uncertain to appoint from the list provided to him by the JSC. In the end, the President is bound to select from the supplementary list, as discussed earlier in this chapter. Furthermore, in South Africa, apart from the procedures provided in the Constitution,²⁴⁶ the JSC determines its procedures for selecting judges based on several requirements that must be adhered to.²⁴⁷ The JSC consists of 23 permanent members, but the number increases to 25 in many cases when it relates to a matter of a specific division of a High Court within the country.²⁴⁸ The JSC's procedures for selecting judges in South Africa are published in the gazette²⁴⁹ and they are bound by law to give reasons if enquired upon as to why a particular candidate is not selected or nominated for judicial appointment.²⁵⁰ The process in South Africa is similar to the process established in Kenya according to the published gazette and it is more transparent and systematic than the process in Kenya. Moreover, unlike South Africa, which telecasts interviews to show the public the appointment process of all judges, Kenya only does the same in appointing Supreme Court Judges.

It is worth noting that, among the three countries under examination, South Africa's JSC is the only commission that has a parliamentary representative in its body. However, the JSC sits without its parliamentary members on matters that concern judicial indiscipline.²⁵¹ Where they decide to remove a judge, the JSC constitutes a tribunal involving two sitting judges and a layperson to conduct the hearing.²⁵² The Tribunal is mandated to furnish its findings in a report to the JSC, which has the discretion (basing its judgment on the findings in the report) whether to refer the

²⁴⁶ Section 178 of the CSA.

²⁴⁷ Section 178(6) the CSA; See also the Judicial Service Commission Act 1994.

Available at <https://www.gov.za/documents/judicial-service-commission-act-code-judicial-conduct> (Accessed on April 23rd, 2023).

²⁴⁸ Section 178(8) of the CSA.

²⁴⁹ The Government Gazette 24596 of 2003. Available at: https://www.justice.gov.za/legislation/regulations/r2003/2003_r423_gg24596-jsc.pdf (Accessed on April 23rd, 2023).

²⁵⁰ *Judicial Service Commission and Another v. Cape Bar Council and Another* (818/2011) (2012) ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013(1) SA 170 (SCA); (2013) 1 All SA 40 (SCA) (14th September 2012).

²⁵¹ Section 178(5) of the CSA.

²⁵² Section 22(1) of the JSC Act 1994.

matter to the National Assembly for appropriate measures.²⁵³ While it may be argued that the JSC in South Africa also has its own flaws, yet the only concern was to explain what constitute “*fit and proper person*”²⁵⁴ to be qualified for appointment as judge. However, in 2010, a research report²⁵⁵ on judicial appointment in South Africa which draws on best practices from several jurisdictions eventually set out a reformation in South Africa’s JSC. Since the JSC has a constitutional power to determine its own procedure,²⁵⁶ the JSC in 2010 decided to publish detailed criteria to guide its main appointment procedure of judges by setting out detailed format in order to interpret the contentious sub-section in the constitution²⁵⁷ which has helped the commission.

Furthermore, one key similarity that poses a challenge to judicial independence across all three countries is the inclusion of a representative from the Ministry of Justice in their respective JSCs. In Sierra Leone, Kenya, and South Africa, the JSCs consist of the Solicitor-General, Attorney-General, and the Minister of Justice & Correctional Services, respectively. The issue arises when these individuals, who are part of the JSCs, also engage in litigation against the decisions made by the JSCs. This creates a conflict of interest as they can access privileged discussions, information, and documents during their services as JSC members. This conflict-of-interest situation, for instance, is present in Kenya and South Africa, where the principal legal defenders of these countries serve as members of their respective JSCs while defending the presidents in procedural violations of the appointment and dismissal of judges, respectively. Also, in Sierra Leone, the Solicitor-General is the Attorney-General's principal assistant.²⁵⁸ Although there has been no contested case in Sierra Leone courts involving the JLSC in the appointment and dismissal of judges, it is my view that the Solicitor-General will face the same conflict of interest when carrying out duties both as a member of the JLSC and as a legal defender for the executive government in court if it involves violations of judicial appointment and dismissal procedures in Sierra Leone.

Also, despite the guarantee of tenure by the constitution of Sierra Leone, immediately after elections and a change of government, the recent practice has been for the new President to order a sitting Chief Justice on "leave to retirement" as a judge of the court and appoint another in their

²⁵³ Section 19, 20, and 33 of the JSC Act 1994.

²⁵⁴ The South African Constitution provides no qualification for judicial appointment. See s174(1) of the CSA.

²⁵⁵ S. Cowen ‘*Judicial Selection in South Africa.*’ Unpublished report (2010).

²⁵⁶ Section 178(6) of the CSA.

²⁵⁷ Supra note 254.

²⁵⁸ Section 65(4) of the CSL.

place which cements the President's control over the judiciary.²⁵⁹ This situation has made the office of Chief Justice the most insecure of all justices, as the President controls the appointment and dismissal of the Chief Justice. It has also made Chief Justices ensure strict discipline among the ranks of judges to protect their job, making them instruments of the regime in effect.²⁶⁰ It is also argued that the de jure control by the President makes the judges owe their appointment to him, creating a tacit relationship between the judges and the President. The judges feel obligated to the President and would want to protect his interest whenever necessary. This framework for appointing and dismissing judges in Sierra Leone facilitates ex-ante control, which betrays judicial independence.²⁶¹

It is recognized that a secretive process can bring in incompetent, dependent, partial, corrupt, or sympathetic judges. Ensuring an effective and efficient JSC is essential for properly administering justice. However, the independence of the judiciary cannot be achieved by the JSC alone. Other government bodies must support the institutionalization of judicial independence. For instance, South Africa's Constitution mandates the State's organs to protect and assist the courts in upholding their independence, impartiality, dignity, accessibility, and effectiveness.²⁶² Achieving judicial independence requires the involvement of all stakeholders, both within and outside the legal fraternity, as justice is a fundamental need for all.

Proper administration of justice is inconceivable if the judiciary lacks independence and impartiality. It is the responsibility of the JSC to safeguard the judiciary. Since the Chief Justice leads the JSC as its Chairperson in Sierra Leone, Kenya, and South Africa as mandated by each constitution, it is expected that the Chief Justice will consistently rebuke any interference or attempts for undermining the judiciary's independence.

TABLE 4.1. Procedural appointment and removal of judges in Sierra Leone, Kenya, and South Africa and whether it enhances judicial independence.

²⁵⁹ President Tejan Kabba and Chief Justice Samuel Beccles-Davies in 2002; President Ernest Bai Koroma and Chief Justice Ade Renner-Thomas in 2007; President Julius Maada Bio and Chief Justice Abdulai Charm in 2018.

²⁶⁰ Francis Ben Kaifala, *The Court on trial: The case against judicial independence in Sierra Leone*. Available at: https://old.sierralii.org/sl_internal/blog/The_Case_against_Judicial_Independence_in_Sierra_Leone.docx

²⁶¹ Ibid

²⁶² Section 165(4) of the CSA.

Country	Procedural Appointment and Removal of Judges	Does it enhance judicial independence?
Sierra Leone	<p>In Sierra Leone, judges of the superior courts are appointed by the President on the advice of the JLSC. The JLSC is a body composed of seven members, including the Chief Justice, the most senior judge of the Court of Appeal (the second highest court in Sierra Leone) & other presidential appointees. According to the constitution, Judges, except the Chief Justice can be removed from office by the President on the recommendation of the JLSC for reasons of incapacity or misbehavior, subject to specific procedures. The President must first consult with the JLSC, and a tribunal must be established to investigate the allegations against the judge. For the Chief Justice, the JLSC is not involved, but the decision is made by the cabinet, and on the advice of the cabinet, the President can set up a tribunal to investigate the Chief Justice, and if necessary, remove the Chief Justice from office.</p>	<p>The appointment process in Sierra Leone has some features that enhance judicial independence, such as the involvement of the JLSC and the legislature in appointing both the Chief Justice and other judges. However, the fact that the President is not bound by the advice of JSC in the appointment of judges raises concerns about the potential for political interference in the process as the legislature, which should assert itself as a third arm of government to check the powers of the President is argued to be a rubber-stamp institution because it has routinely approved all judicial nominees since the adoption of the 1991 constitution. Additionally, there is no procedure to guide the JLSC in the judges' appointment and dismissal process except the provision made in the constitution.</p>
	<p>In Kenya, all judges, including the Chief Justice, are appointed by the President on the recommendation of the J.S.C, but there is a layer of involvement by the</p>	<p>The appointment process in Kenya has several features that enhance judicial independence, such as the involvement of the National</p>

Kenya	National Assembly in appointing the Chief Justice. The JSC is an independent body of eleven members, mainly composed of court officers, including two laymen appointed by the President subject to the approval of the National Assembly. Judges can only be removed from office by the President on the recommendation of a tribunal established by the JSC for reasons of incapacity or misbehavior, subject to certain procedures.	Assembly and the JSC in appointing and dismissing judges. The JSC also determines a process to guide its procedure. The fact that the President has no power to remove judges also helps to insulate judges from political interference. The requirement that judges can only be removed for specified reasons and only by a tribunal appointed by the JSC provides additional protections against arbitrary removal by the President or parliament.
South Africa	In South Africa, judges of all other courts are appointed by the President on the advice of the JSC. However, the President is only required to consult the JSC and leaders of all political parties in the National Assembly in appointing the Chief Justice, Deputy Chief Justice of the Constitutional Court, president, and deputy president of the Supreme Court of Appeal. The JSC is composed of 23 (or 25 when necessary) members, including the Chief Justice, other senior judges, the National Assembly, and other members appointed by the President including other stakeholders. The JSC is responsible for selecting and recommending candidates for	The appointment process in South Africa has several features that enhance judicial independence, such as the involvement of the National Assembly and the JSC in appointing and dismissing judges. Additionally, the process of the JSC is determined by its gazetted procedure. The fact that the President has no power to remove judges also helps to insulate judges from political interference. The requirement that judges can only be removed for specified reasons and only by a tribunal appointed by the JSC provides additional protections against arbitrary removal. However, the fact that the JSC is composed

	appointment by the President except for the four judicial officers mentioned above. Judges can only be removed from office on the grounds of incapacity, gross incompetence, or misconduct, as determined by a tribunal appointed by the JSC.	partly of political appointees raises concerns about the potential for political influence in the appointment process.
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3.5 Conclusion

This chapter has provided a comprehensive comparative analysis of the security of tenure, appointments, and removal processes for judges in Sierra Leone, Kenya, and South Africa. The chapter began by examining the procedural aspects of appointing judges in these three countries, shedding light on the intricacies involved. The chapter also explored the crucial elements of the security of tenure and dismissal procedures for judges, going beyond constitutional provisions to delve into the practical implementation and practices adopted by the respective JSCs.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 Summary of the Findings

The purpose of the study was to assess whether the security of tenure, appointment, and removal procedures of judges in Sierra Leone, Kenya, and South Africa conform to international law and standards. The study also aimed to establish the correlation between de facto and de jure judicial independence and how the two can be used to enhance the independence of the judiciary, particularly in the security of tenure, appointment, and removal processes of judges in the three countries.

The study used South Africa and Kenya as models for Sierra Leone to examine the security of tenure, appointment, and removal processes of judges. Where the two countries fell short, the study relied on established international guidelines and standards that promote judicial independence. The findings of the investigation show that judicial independence is crucial to a democratic government and that it can only attain its full connotation in a democratic state. Societies require it to ensure that the rule of law is safeguarded, and checks and balances are at play as prescribed by the separation of powers. Securing and enhancing judicial independence is a fundamental part of every state, and one way of achieving this is through the appointment and removal procedures of judges in accordance with international guidelines, standards, and principles.

The study revealed that Sierra Leone performs relatively poorly in one key performance indicator, such as the Mo Ibrahim Index, which measures the performance of African countries compared to others that rely on the JSC to enhance judicial independence. The study also shows that the security of tenure, appointment, and dismissal procedures of judges in Sierra Leone are somewhat not in accordance with international guidelines and standards that promote judicial independence. It also found that long-term or non-renewable term of office is a preferred form of security of tenure of judges in international law to enhance and secure judicial independence. However, in Sierra Leone, like Kenya and South Africa, the President has the power to renew judges' term of office of the superior courts after their retirement age, which is contrary to international standards and may undermine judicial independence.

Appointment procedures should be clear, strict, and transparent to conform to international law and standards. Nevertheless, the study reveals that the phrase “*on the advice of the judicial service commission*” provided in the constitution of Sierra Leone seems ambiguous and allows the President to bypass the essence of having a JSC in Sierra Leone, as provided in its powers in the appointment process of judges. The study found that the procedures adopted by the JSC of Sierra Leone are not clear, and no information is available to the public. The appointment procedures are not open to the public, thus lacking transparency. Furthermore, there is a lack of transparency by the President when appointing judges of the superior courts, and no one knows what criterion the President uses in selecting them.

Furthermore, the study found that the procedures for appointing judges in Sierra Leone, Kenya, and South Africa are not very strict because they lack thorough, intensive background investigations of the candidates to be selected. No background information is released on the candidates before they are appointed, as is the case in other countries that are known for exerting judicial independence. It also found that in Sierra Leone, removal procedures of judges may be subject to abuse by the President because they can instigate removal procedures and is so involved in the whole process. This may lead to a lack of independence of the judiciary as the President may use this power to influence judges' decisions, which could undermine the rule of law.

4.2 Conclusion

The study examined the security of tenure, appointment, and removal procedures of judges in three African countries: Sierra Leone, Kenya, and South Africa, focusing on adherence to international law and standards that promote judicial independence. The findings revealed that the current procedures in these countries only partially conform to international guidelines and standards.

To enhance and secure judicial independence, the study recommends the adoption of long-term or non-renewable terms of office as the preferred form of security of tenure for judicial officers. The appointment procedures should be transparent, clear, and strict, with thorough background investigations of the candidates to be appointed. Furthermore, the removal procedures should be free from abuse by the President, and there should be a clear separation of powers, but it should not be strict, as checks and balances between the three government is also important.

The study highlights the importance of implementing these recommendations in the three countries, as it will strengthen their judicial independence, safeguard the rule of law, and ensure checks and balances are in place. The study also emphasizes the importance of judicial independence in a democratic state and the necessity of adhering to international law, guidance, and standards.

The study observed that Kenya and South Africa have reformed their judicial appointment procedures to secure judicial independence. However, Sierra Leone has yet to reform its appointments or removal procedures since adopting the current constitution almost thirty-two years ago in 1991. Sierra Leone inherited the main features of the judicial process of its colonizer, which is not in line with international guidelines and standards.

The challenge, therefore, is for Sierra Leone to reform its procedures to conform to international guidelines and standards that enhance judicial independence. The study concludes that Sierra Leone's security of tenure, appointment, and removal procedures of judges should conform to international law and standards.

The study recommends that judges' appointment and removal procedures should be reformed regularly to enhance judicial independence. The following proposes recommendations on how Sierra Leone can conform to international standards. The study also suggests reforms for Kenya and South Africa where they fall short.

4.3 Recommendation

1. While the presidents of Kenya and South Africa possess the power to appoint or dismiss judges, their role is primarily ceremonial. Consequently, it is suggested that the president of Sierra Leone adhere to the recommendations of the JSC when appointing, suspending, or dismissing judges without deviating from the commission's suggestions.

2. The functions of the JSC in Sierra Leone and their constitutional mandate are solely determined by the provisions outlined in the constitution, as there is no specific procedure for guiding them. However, as provided to South Africa's JSC, the JSC in Sierra Leone should be granted the authority by law to establish its procedures. This recommendation aims to ensure clarity, transparency, and accessibility of the JSC's procedures to the public. Furthermore, these

procedures should be officially published (gazette), allowing public scrutiny, considering that the individuals appointed serve the public interest. Moreover, the South African JSC should openly conduct all deliberations, particularly when selecting judges, and clearly define the criteria employed for judicial appointments.

3. Although the transparency of Kenya's JSC procedures is not on par with South Africa's, it surpasses that of Sierra Leone. Therefore, it is also recommended that the JSC in Kenya augment its transparency by conducting public interviews for all judicial nominees and not just for Supreme Court Judges, similar to the practice in South Africa. South Africa's procedures have garnered commendation compared to Sierra Leone and Kenya.

4. Similar to Kenya and South Africa, it is vital to engage in consultative processes in Sierra Leone involving all three branches of government, as well as other stakeholders, including the JSC. The objective is to determine the most effective means of enhancing transparency within the appointment procedures, eliminating any suspicions surrounding the appointment of judges lacking integrity, and dignity, and promoting political agendas.

5. Preserving the security of tenure for judges is crucial for upholding judicial independence. Sierra Leone's constitution includes provisions safeguarding the security of tenure for judges. It is recommended that this provision be respected, and the current practice of the President forcing judges on leave or into retirement during government transitions should be discontinued, as it undermines judicial independence.

6. The Presidents of Kenya and South Africa should also adopt transparency by providing reasons for their nominations and selections of judges, such as the Chief Justice, Deputy Chief Justice, and Supreme Court judges, as is necessary in the case of Sierra Leone. It is further recommended that the constitution of Sierra Leone show have clear provisions to avoid ambiguity in the interpretations on the appointment and dismissal process of judges. The provision should provide that the President must only proceed with the appointment after transparent vetting procedures have been conducted, including media coverage, JSC interviews after undertaking thorough background investigations, and a parliamentary vote (where support from at least half of the opposition party members in parliament is required).

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