Access to Private Deliberations of Administrative Bodies: The Case of The Judicial Service Commission

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Final Dissertation

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Declaration

I, PEACELA CHEROTICH ATIM, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Emmah Wabuke

Abstract

Administrative functions in Kenya are devolved to administrative bodies. Three categories of administrative bodies exist: public bodies, private bodies exercising public functions, and private bodies exercising de facto private functions. Administration by these bodies is governed by certain principles and values. The principles of administration dictate that the processes within the administrative bodies be just and fair. The principle of accountability states that the administrative body should be able to justify its actions and decisions.

The Judicial Service Commission is an independent administrative body; hence, it must be subjected to administrative principles. These principles include legality, fairness and procedural fairness.

This paper aims to determine whether in subjecting the Judicial Service Commission to accountability, private deliberations of the commission can be publicised. The main method of date collection used is review of cases, legal instruments, books, journals and other periodicals.

List of Abbreviations

ATIA	Access To Information Act
FAAA	Fair Administrative Action Act
KNEC	Kenya National Examination Council
JAC	Judicial Appointments Commission
JSC	Judicial Service Commission
PSC	Public Service Commission
SCOTUS	Supreme Court Of The United States
UK	United Kingdom

List of cases

Breen v Amalgamated Engineering Union (1971), The United Kingdom Court of Appeal.

City of Cape Town v South African National Roads Agency Ltd (2013), The Supreme Court of Appeal of South Africa.

Famy Care Limited vs. Public Procurement Administrative Review Board & Another (2012), eKLR.

Garda John Kelly v Commissioner of Garda Siochana (2015), High Court of Ireland.

Helen Suzman Foundation v Judicial Service Commission (2018), Constitutional Court of South Africa.

Helen Suzman Foundation v Judicial Service Commission (2018), The Supreme Court of Appeal of South Africa.

Helen Suzman Foundation v Judicial Service Commission (2018), Western Cape High Court of South Africa.

Hopkins and Another v Smethwick Local Board of Health (1890), The United Kingdom Queen's Bench.

International GMBH v International Trade Administration Commission (2012), The Supreme Court of Appeal of South Africa.

Johannesburg City Council v The Administrator Transvaal (1970), The Supreme Court of Appeal of South Africa.

Joseph Mbalu Mutava v Attorney General & another (2014) eKLR.

J*udicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

Mallak v Minister for Justice, Equality and Law Reform (2012), The United Kingdom Supreme Court.

Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others (2013), eKLR.

Republic v Kenyatta University Ex parte Martha Waihuini Ndungu (2019) eKLR.

R v. Secretary of State for the Home Department, Ex Parte. Fayed and Another (1997), The England and Wales Court of Appeal.

Save Britain's Heritage v. Secretary of State for the Environment (1992), The United Kingdom Court of Appeal.

St. Joseph Stock Yards Co. v. United States (1936), The Supreme Court of the United States.

List of Legal Instruments

Access to Information Act (Act No. 31 of 2016).

Basic Law for the Federal Republic of Germany (1949).

Constitution of Ethiopia (1994).

Constitution of France (1958).

Constitution of Japan (1947).

Constitution of Kenya (2010).

Constitution of the Republic of South Africa (1996).

Constitution of Uganda (1995).

Constitution of the United States (1789).

Constitutional Reform Act (United Kingdom, 2005).

County Government Act (Act No. 17 of 2012).

Fair Administrative Action Act (Act No. 4 of 2015).

Freedom of Information Act (Chapter 36 of the Laws of the United Kingdom, 2000).

Judicial Service Act (Act No. 1 of 2011).

Media Act (Act No. 3 of 2007).

Official Secrets Act (Chapter 187 of the Laws of Kenya).

Promotion of Access to Information Act (Act No. 2 of 2000).

Promotion of Administrative Justice (Act No. 3 of 2000).

Uniform Rules of Court (2009).

CHAPTER ONE

RESEARCH PROPOSAL

1.1 Background of the Study

Administrative bodies make several decisions in the everyday exercise of their various mandates. This mandate is termed as administrative action.[1] The decisions made by administrative bodies in most cases directly affect individuals and their rights. These decisions are meant to be 'efficient, lawful, reasonable and procedurally fair'.[2]

It is imperative that administrative bodies are held accountable for their actions. Accountability in administration means that one is 'obliged to explain and justify their conduct'.[3] This means that the actions of administrative bodies are subject to checks from outside actors.[4] Accountability on some level entails ensuring that there is transparency in the working of these bodies.[5] Transparency and accountability are constitutional principles and values.[6]

Transparency ensures that the everyday businesses of agencies are run in the right manner which in the end diminishes corruption and other such illnesses.[7] However, the lack of or existence of sub-standard transparency mechanisms gives room for these institutions to "have their cake and eat it too."[8]

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[1] Section 2, *Fair Administrative Action Act* (Act No. 4 of 2015).

[2] Article 47 (1), *Constitution of Kenya* (2010). See also: Section 4, *Fair Administrative Action Act* (Act No. 4 of 2015).

[3] Bovens M, *Public Accountability*, Ferlie E, Lynn L & Pollitt C (eds), Oxford University Press, Oxford, 2007, 184.

[4] Aketch M, *Administrative Law*, Strathmore University Press, Nairobi, 2016, 51.

[5] Bugaric B, 'Openness and Transparency in Public Administration: Challenges for Public Law' 22 *Wisconsin International Law Journal* 3, 2005, 493.

[6] Article 10 (2), *Constitution of Kenya* (2010).

[7] Peled R and Rabin Y, 'The Constitutional Right to Information' 42 *Columbia Human Rights Law Review*, 2011, 367.

[8] Mulroy S, 'Sunlight's Glare: How Overboard Open Government Laws Chill Free Speech and Hamper Effective Democracy' 78 *Tennessee Law Review*, 2011, 360.

The principle of transparency is often associated with the right of access to information.[9] The right of access to information is enshrined under Article 35 of the Constitution of Kenya.[10] This right entitles individuals to 'access information held by any person required in the exercise or protection of a right or fundamental freedom'.[11] The right of access to information can perhaps be viewed as a "foundational human right".[12] It is termed as a foundational right in this sense because it is an underlying right through which one is able to properly enjoy other rights.[13] Using the example of the right to a fair trial,[14] an applicant or a defendant needs to be able to access the information that concerns their case in order to prepare a viable defence.[15] Access to information can also be considered as foundational because it is only through this right that one is able to realise whether other rights were violated through, for example, judicial, quasi-judicial or other processes.[16] In other circumstances, the ability to access information enables one to merely have the ability to exercise or enjoy a particular right.[17] The information held by certain institutions is most of the time the only ammunition in one's arsenal enabling one to protect their rights.[18]

On the other hand, independence is an important principle in administration.[19] Independence is key because bodies can only function properly if there are no external interferences and pressures that affect proper administration.[20] The other side of the coin on independence is

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[9] Bugaric B, 'Openness and Transparency in Public Administration: Challenges for Public Law', 487.

[10] Article 35, *Constitution of Kenya* (2010).

[11] Article 35, *Constitution of Kenya* (2010).

[12] Peled R and Rabin Y, 'The Constitutional Right to Information', 364.

[13] Peled R and Rabin Y, 'The Constitutional Right to Information' 364.

[14] Article 50, *Constitution of Kenya* (2010).

[15] Article 50 (2) (j) & (3), *Constitution of Kenya* (2010).

[16] Article 35, *Constitution of Kenya* (2010).

[17] Article 35, *Constitution of Kenya* (2010).

[18] Peled R and Rabin Y, 'The Constitutional Right to Information' 365.

[19] Aketch M, *Administrative Law*, 49.

[20] Aketch M, *Administrative Law*, 49.

that complete autonomy creates a leeway through which administrative bodies may abuse their powers.[21] Therefore, the independence occasioned to administrative bodies must be balanced in a proper manner to avoid abuse.

The legal issue that arises, in this case, is on weighing of the right of access to information against the independence of administrative bodies. The scenario that will be provided in this study is on the ability of applicants to be provided with the transcripts of the private deliberations of administrative bodies, the Judicial Service Commission (JSC) in particular, in a bid to access their right to information. The first position in the debate is that the issuance of transcripts of private deliberations could affect the independence of administrative bodies and infringe on their privacy.[22] On the other hand, arguments exist that transparency in administrative action could be actualised if the deliberations that happen prior to the decisions of administrative bodies were made as public as the decisions themselves.[23]

1.2 Statement of the Problem

Kenya is a short step away from experiencing this instance, where, for example, candidates of national exams may request for their examination papers from the Kenya National Examination Council (KNEC).[24] Another example is where applicants seeking jobs from, for example, the Public Service Commission (PSC) or Teachers Service Commission (TSC), would request for the transcripts of the deliberations that took place before they were denied the positions they had applied for. In as much as the examples of the PSC and TSC are valid, this research chooses to focus on the JSC. An example then would be where candidates of judgeship positions are nominated by the JSC to the President or when the JSC decide to remove a judge from office. When such situations arise, these candidates may opt to make a plea before a court to obtain the recordings or transcripts of the private meetings within the JSC in deciding which applicants to nominate to the President for appointment or why to remove a particular judge from office.

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[21] Aketch M, *Administrative Law*, 49.

[22] See respondents' arguments in *Helen Suzman Foundation v Judicial Service Commission* (2018), Western Cape High Court of South Africa.

[23] See petitioners' arguments in *Helen Suzman Foundation v Judicial Service Commission* (2018), Western Cape High Court of South Africa.

[24] Rutto S, 'Show us our students' KCSE scripts, school now asks KNEC' Saturday Standard, 5 January 2019.

Consequently, the statement of the problem is to investigate to what extent the JSC can yield transcripts and recordings of private deliberations, after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations.

1.3 Research Questions

The overarching question that the research seeks to resolve is:

a. Whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations?

The main question shall be answered by first examining the following secondary questions:

a. Whether the independence and privacy of administrative bodies are adequate in limiting the right of access to information?

b. Whether yielding the transcripts of the deliberations is the only way to ensure transparency in administrative bodies?

1.4 Hypotheses

This research aims to test the hypotheses that:

a. The JSC should yield transcripts and recordings of their private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations.

b. Privacy of administrative bodies is not an adequate reason to limit the right to access information.

c. The furnishing of these transcripts is an integral way in which transparency can be ensured within administrative bodies.

1.5 Objectives of the Study

The objectives of the study are:

a. To determine whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations.

b. To determine whether the privacy and independence of administrative bodies are adequate reasons to limit the right to access information.

c. To determine whether the provision of transcripts of the private deliberations is the only way to ensure transparency in administrative bodies.

1.6 Theoretical Framework

This research will be conducted through the lens of the principle of access to information. Access to information is integral in achieving accountability within administrative bodies. Oversight is a key element within accountability. The oversight theory essentially empowers citizens to hold their governments accountable for their actions.[25] This theme shall be modified into administrative oversight in order to best suit the main research study.

In the same way that government agencies are subjected to scrutiny based on mechanisms in place that are of an oversight nature, administrative bodies should be scrutinised using a similar metric.[26] Sometimes, it is argued that in the oversight theory, access to information should not only be viewed as a human right prescribed by law but also as an important tool in administrative governance.[27] Eventually, this perception of oversight and transparency leads to the establishment of structures that allow for accountability.

The oversight theory recognises that transparency is a vital organ in establishing administrative oversight.[28] Transparency ensures that the everyday businesses of agencies are run in the right manner which in the end diminishes corruption and other such illnesses.[29] Oversight does not need to be justified.[30] This means that it is not only when there are

[25] Peled R and Rabin Y, 'The Constitutional Right to Information' 365.

[26] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

[27] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

[28] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

[29] Peled R and Rabin Y, 'The Constitutional Right to Information' 367.

[30] Peled R and Rabin Y, 'The Constitutional Right to Information' 367.

problems or faults that oversight can be done but also when the systems in place are functional and effective.

1.7 Literature Review

Professor Adam Candeub is of the opinion that an administrative State is established through the principle of transparency.[31] In his article 'Transparency in the Administrative State', he brings out important elements of transparency within public administration. In judicial cases, the deliberations of judicial officers are made public as it is a mandate of their seat.[32] This position is emphasised in Article 50 of the Constitution of Kenya, where an element of fair trial is a public hearing.[33] In situations of public hearings, transparency is easily evidenced. In the administrative process equivalent, the situation becomes murky. For most administrative processes the scenarios are more private than cases instituted in court.[34] The procedure of determination should ideally be very transparent however, the privacy of administrative processes renders this impractical in practice.[35]

Professor Candeub speaks to the transparency of judicial processes as opposed to the privacy in administrative processes. Since the judicial process is already transparent enough, an applicant who intends to appeal a decision of a judge can easily access the deliberations of the judge which are included in the judgment. On the other hand, administrative bodies only publicise the decisions they make but the deliberations remain private. This study aims to elucidate whether these deliberations should be made as public as the decisions themselves.

Professor Kay Mathiesen writes in her article 'Access to information as a human right' about the foundational nature of the right of access to information.[36] Professor Mathiesen claims that the right of access to information is important "in order to live a minimally good life".[37]

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[31] Candeub A, 'Transparency in the Administrative State' 51 *Houston Law Review* 3, 2013.

[32] Candeub A, 'Transparency in the Administrative State', 397.

[33] Article 50, *Constitution of Kenya* (2010).

[34] Candeub A, 'Transparency in the Administrative State', 396.

[35] Candeub A, 'Transparency in the Administrative State', 396.

[36] Mathiesen K, 'Access to Information as a Human Right' Social Science Research Network, 2008.

[37] Mathiesen K, 'Access to Information as a Human Right', 1.

The right of access to information for her is essential in enabling a person to exercise and protect their rights.[38] Professor Mathiesen argues that it is not only states or governments that violate human right but also other persons, organisations or parties.[39] Therefore these other parties should be held to the same standard as the State.[40] She notes that access to information is vital in enabling applicants know whether their rights were violated in the process.[41]

Professor Mathiesen's discussion surrounds the right of access to information. She speaks to the fact that information held by the state or any other body is relevant in determining whether there were violations of rights during the administrative processes.

Despite the importance of access to information, the study seeks to establish whether administrative bodies should avail this information, in form of the private deliberations, to applicants who request for the information keeping in mind the privacy and independence of administrative bodies in the exercise of their mandate.

8. Methodology of the Study

The vast amount of research shall be based on the writings of various scholars in books, journals and other periodicals. The study will also analyse the case law surrounding the overarching research question. These will adequately lay out the information necessitated in order to fully address the research problem.

Newspaper publications and other forms of mass media will also feature in the study. These will provide real-time information on the ground essential to the research.

A comparative study of the of Kenya the UK and South Africa will also be carried out. The comparative study will entail a probe into how the courts of these countries have made determinations on the ability of courts to mandate administrative bodies to issue their private deliberations to applicants attempting to set aside decisions that arise from those deliberations.

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[38] Mathiesen K, 'Access to Information as a Human Right', 2.

[39] Mathiesen K, 'Access to Information as a Human Right', 7.

[40] Mathiesen K, 'Access to Information as a Human Right', 7.

[41] Mathiesen K, 'Access to Information as a Human Right', 2.

9. Chapter Breakdown

This is the chapter breakdown that my dissertation shall be guided by:

a. Chapter 1: Research Proposal.

This chapter proposes the research to be undertaken. The chapter shall include a background to the study, the statement of the problem, the research question and the research objectives. This chapter shall also set out how the research shall be conducted.

b. Chapter 2: Theoretical Framework.

The chapter will carry out an in-depth discussion on the themes that will set the framework through which the study will be shaped and informed.

c. Chapter 3: Review of the research questions.

This chapter seeks to resolve the main question of the research on whether the JSC should provide the full record of the deliberations, after interviews of judgeship positions, from which they base their decisions.

The discourse shall be informed by research based on the questions of whether the independence and privacy of administrative bodies are adequate in limiting the right of access to information; and whether providing transcripts of the deliberations is the only way to ensure transparency in administrative bodies.

d. Chapter 4: Comparative Analysis.

This chapter shall undertake to examine the jurisprudence in South Africa and the United Kingdom (UK) regarding the main research problem and compare it to that of Kenya. The chapter shall also anticipate situations that would happen in Kenya and how this study would help in resolving the issues that would arise.

e. Chapter 5: Conclusion and Recommendations.

This chapter will comprise of an overview of all the findings of the study and conclude the research. Additionally, the chapter shall recommend steps that should be implemented concerning the main research question.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

The previous chapter offered a general introduction to the research. It identified the main questions that the study seeks to resolve, the research objectives, the hypothesis and the problem statement. The overarching question of the study is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations.

This chapter will discuss the theoretical framework of the research. Each study is shaped and informed by different theories or concepts that form the structure of the research. In setting a framework that will act as the lens of this research, it is key that the theories are conceptualised in a manner that best suits this study. To that extent, this chapter undertakes to probe into the theories that will form the framework through which the question on whether the JSC can yield transcripts and recordings of private deliberations to applicants who seek to set aside the decisions arising from those deliberations will be examined.

The theories that are to be tackled in this chapter are the principle of access to information and the doctrine of sovereignty of the people.

2.2 Principle of Access to Information

2.2.1 Origin and content of the theory

The origin of the principle of access to information has been traced back to different eras by different authors. Some claim that it originated from the Chinese Tang Dynasty.[42] Others claim that it was founded in Europe.[43] Nonetheless, most scholars contend that despite the origin of the theory, it started receiving recognition in the last 2 decades.[44]

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[42] Lamble S, 'Freedom of Information, a Finnish clergyman's gift to democracy' 97 *Freedom of Information Review*, 2002.

[43] Solana CG, 'Access to Information: A Fundamental Right, A Universal Standard' Access Info Europe, 17 January 2006 https://www.access-info.org/uncategorized/10819 on 18 September 2019.

[44] Solana CG, 'Access to Information: A Fundamental Right, A Universal Standard' Access Info Europe, 17 January 2006 https://www.access-info.org/uncategorized/10819 on 18 September 2019.

The basic principle of access to information is that one can obtain information held by another person when need be.[45] Despite the general application of this principle, it is often directed towards the State or other public bodies.[46] Information here means all forms of documentation notwithstanding the means in which they are stored.[47]

The subject matter of the theory of access to information is best realised through codification of the principle in statute.

2.2.2 Relationship with other concepts

The principle of access to information is closely related to accountability, transparency and oversight. Accountability is enhanced by transparency and oversight. This section will primarily address oversight as a means of achieving accountability and will touch on transparency towards the end.

Oversight, as the name suggests, denotes a form of check and balance system.[48] Reasonably, for a check and balance system to function appropriately there must be an entity that assesses the actions of the other entity and ensure that they conform with the regulations in place. In governance, it is the people within the state that take up the supervisory role. In essence, oversight empowers citizens to hold their governments accountable for their actions.[49]

Oversight as per this study can be morphed into administrative oversight, which is the supervision of administrative bodies as they exercise their functions. In the same way that government agencies are subjected to scrutiny based on mechanisms in place that are of an oversight nature, is the same way administrative bodies should be treated.[50] Sometimes, it is argued that because of an oversight requirement, access to information should not only be viewed as a human right prescribed by law but also as an important tool in administrative

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[45] Mendel T, *The Public's Right to Know: Principles on Freedom of Information Legislation,* Article 19, London,
1999, 2.

[46] Mendel T, *The Public's Right to Know: Principles on Freedom of Information Legislation*, 8.

[47] Mendel T, *The Public's Right to Know: Principles on Freedom of Information Legislation*, 3.

[48] Peled R and Rabin Y, 'The Constitutional Right to Information', 362.

[49] Peled R and Rabin Y, 'The Constitutional Right to Information' 365.

[50] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

governance.[51] Eventually, this perception of oversight and transparency leads to the establishment of structures that allow for accountability.

Transparency is a vital organ in establishing administrative oversight.[52] Transparency ensures that the everyday businesses of agencies are run in the right manner which in the end diminishes corruption and other such illnesses.[53] Oversight does not need to be justified.[54] This means that it is not only when there are problems or faults that oversight can be done but also when the systems in place are functional and effective.

2.2.3 Access to Information as a Human Right

Access to information is a constitutional right is Kenya.[55] This right stipulates that "every person had a right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom".[56] It is further embedded in statute.[57] One of the purposes of the Access to Information Act (ATIA) is "promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information".[58] The Constitution and the ATIA are the main statutory regulators of access to information in Kenya. Other statutes that embody this principle include the County Management Act,[59] Official Secrets Act[60] and the Media Act.[61]

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[51] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

[52] Peled R and Rabin Y, 'The Constitutional Right to Information' 366.

[53] Peled R and Rabin Y, 'The Constitutional Right to Information' 367.

[54] Peled R and Rabin Y, 'The Constitutional Right to Information' 367.

[55] Article 35, *Constitution of Kenya* (2010).

[56] Article 35 (1), *Constitution of Kenya* (2010).

[57] *Access to Information Act* (Act No. 31 of 2016).

[58] Section 3, *Access to Information Act* (Act No. 31 of 2016).

[59] *County Government Act* (Act No. 17 of 2012).

[60] *Official Secrets Act* (Chapter 187 of the Laws of Kenya).

[61] *Media Act* (Act No. 3 of 2007).

In *Famy Care Limited vs. Public Procurement Administrative Review Board & Another*,[62] the court founded its ratio on the right of access to information as envisioned in Article 35 of the Constitution. The position of this case was further affirmed in a later case of *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others*.[63]

2.2.4 Applicability of the theory to this study

The theory is primarily concerned with obtaining information from persons, the State in this study, in order to protect one's fundamental rights and freedoms.[64] This research seeks to investigate out whether the JSC can give out recordings of its private deliberations. These recordings can be deemed as information that the applicant seeks to obtain in order to protect their rights. Therefore, this theory is directly relevant to this study. The principle will be further discussed and utilised in Chapter 3 of this research.

2.3 Sovereignty of the People

2.3.1. Origin and content of the theory

The idea of sovereignty of the people, colloquially known as popular sovereignty, is deeply entrenched within the modern constitutionalism era. Throughout time, various prominent scholars, including John Locke,[65] Jean-Jacques Rousseau[66] among others, have attempted to untangle the arduous content within the doctrine of sovereignty of the people. These scholars have further demonstrated the importance of this doctrine by illustrating its operation in the state and the vacuum it leaves in its absence. Fundamentally, the doctrine of sovereignty propounds that 'the people are the sole legitimate source of authority and sovereignty'.[67]

James Madison in the Federalist papers examines orthodox governments and recognises that in governance, it is the people who are governed that are at the core of governance.[68] He

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[62] *Famy Care Limited vs. Public Procurement Administrative Review Board & Another* (2012), eKLR.

[63] *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* (2013), eKLR.

[64] Article 35, *Constitution of Kenya* (2010).

[65] Locke J, *The Second Treatise of Civil Government*, Awnsham Churchill, London, 1690.

[66] Rousseau JJ, *The Social Contract*, 1762.

[67] Kangu J.M, '"We the People" as the Sovereign in Theory and Practice' *Moi University Law Journal* 2, 2007, 197.

[68] Madison J, Hamilton A and Jay J, 'Federalist Paper No. 39', *The Federalist Papers*, 1787, 291.

notes that the pivotal constituent of a legitimate government is when the people either directly or indirectly have a say in how they are governed.[69] Direct governance is perspicuous, the people speak on their own behalf and in their own accord.[70] Indirect governance is where delegates act as the mouth piece of the people by representing the people's interests and wishes.[71]

The pioneer in the establishment of sovereignty of the people within its Constitution was the United States. The Preamble to the Constitution of the United States provides that the citizens of the United States 'ordain and establish' the Constitution.[72]

Other countries with Preambles of their Constitutions that are similar to that of the United States and Kenya include: Germany,[73] France,[74] Japan,[75] South Africa,[76] Uganda,[77] Ethiopia[78] among others.[79] These examples display the integration of the doctrine of sovereignty of the people into legal systems.

2.3.2 Relationship with other theories

The doctrine of sovereignty of the people ensues the social contract theory. The social contract theory is the basic idea that citizens of a State cede all their rights to the State in order for the state to offer security, property and other rights.[80] Governance stemming from

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[69] Madison J *et al*, 'Federalist Paper No. 39', 293.

[70] Madison J *et al*, 'Federalist Paper No. 39', 293.

[71] Madison J *et al*, 'Federalist Paper No. 39', 293.

[72] Preamble, *Constitution of the United States* (1789).

[73] Preamble, *Basic Law for the Federal Republic of Germany* (1949).

[74] Preamble, *Constitution of France* (1958).

[75] Preamble, *Constitution of Japan* (1947).

[76] Preamble, *Constitution of South Africa* (1996).

[77] Preamble, *Constitution of Uganda* (1995).

[78] Preamble, *Constitution of Ethiopia* (1994).

[79] Kangu J.M, '"We the People" as the Sovereign in Theory and Practice', 199.

[80] Rousseau JJ, *The Social Contract*.

democracy is the very essence of the social contract theory.[81] Locke in his book succinctly explains the social contract theory.[82] He describes the social contract theory as the abstract contract between the people and their government where the people freely choose to have their rights limited by law and in turn the state protects the people as a unit.[83] The state must act with the common good of the people in mind while on the other hand the people must suppress their selfish interests and follow the law that the state puts in place.[84]

2.3.3 Sovereignty of the people in Kenya

The theory of sovereignty of the people has been implemented in majority of the constitutions in place today.[85] Manifestation of these are found in the preambles of said constitutions. The preamble of the Kenyan Constitution is an example of this. It prescribes *inter alia* that the people of Kenya 'enact and give rise to the Constitution in the exercise of their sovereignty'.[86]

Another instance of the application of sovereignty of the people in Kenya is under Article 1 of the Constitution.[87] All sovereign power belongs to the people not the government.[88] It is the people that elect to cede some power to the government in trust.

2.3.4 Application to the study

This doctrine is essential in this research as it illustrates the significance of the people in governance as they are the central part of it and play the biggest role.[89] Collins Odote notes that the right of access to information is pegged on representative democracy which he

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[81] Kangu J.M, '"We the People" as the Sovereign in Theory and Practice', 211.

[82] Locke J, *The Second Treatise of Civil Government*.

[83] Locke J, *The Second Treatise of Civil Government*.

[84] Locke J, *The Second Treatise of Civil Government*.

[85] Kangu J.M, '"We the People" as the Sovereign in Theory and Practice', 198.

[86] Preamble, *Constitution of Kenya* (2010).

[87] Article 1, *Constitution of Kenya* (2010).

[88] Article 1 (1), *Constitution of Kenya* (2010).

[89] Kangu J.M, '"We the People" as the Sovereign in Theory and Practice', 200.

discusses as sovereignty of the people.[90] Governments, and administrative bodies to that extent, are not intrinsically sovereign but derive this sovereignty from the people whom they govern. [91] Sovereignty of the people stipulates that the government exists as a servient to its people.[92] Since the government is in service of the people, then the information held by the government is held in trust for the people.[93]

Therefore, the sovereignty of the people empowers them to obtain information from the people. This research seeks to find out whether the JSC can give out recordings of its private deliberations. These recordings can be deemed as information that the applicant seeks to obtain in order to protect their rights. The applicant then based on the doctrine of sovereignty of the people is empowered to obtain that information.

2.4 Conclusion

The framework set in this chapter will inform how study is fashioned. The principle of access to information will be key in this research. The guidelines set in this chapter will counsel whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. The principle of access to information, as developed in this chapter, will navigate the extent and boundaries of access to information in relation to this study.

The doctrine of sovereignty of the people is key in every legal system. In this study this doctrine will advise on whether the sovereign power of the people can enable persons to access privately held information and to what extent that information can be obtained.

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[90] Odote C, *Access to Information law in Kenya: Rationale and Policy Framework,* International Commission of
Jurist, Nairobi, 2015, 9.

[91] Ludsin H, 'Returning Sovereignty to the People' 46 *Vanderbilt Journal of Transnational Law*, 2013, 115.

[92] Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, 4.

[93] Kimalel L, 'Access to Information in Kenya: Statutory Enactment of Constitutional Rights' Unpublished LLB Dissertation, Strathmore University Law School, Nairobi, 2017, 9.

CHAPTER THREE

ACCESS TO PRIVATE DELIBERATIONS OF ADMINISTRATIVE BODIES: THE CASE OF THE JUDICIAL SERVICE COMMISSION.

3.1 Introduction

The previous chapter sets the lens through which this research is conducted. It discusses the theoretical framework of the study. The main theories discussed are the principle of access to information and the doctrine of sovereignty of the people. Access to information is a right of every citizen that is enshrined in the constitution. Essentially, every person is empowered to obtain information that may affect their rights if it is held by the State or any public body. Sovereignty of the people states that the State derives its power from the people who it governs. Further, the State holds information in trust for the people. Hence, this information should be available for the people when they wish to access it. As illustrated in the preceding chapter, both theories are relevant and key in shaping this research.

This chapter will be focused on the main question of the research which is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. Additionally, some focus will be shifted onto the JSC and its nature as an administrative body. Thus, arguing that because the JSC is an administrative body it should be bound by the principles of administrative law. The chapter will focus on the overarching issue as situated in Kenya.

3.2 Historical Background of the JSC

In order to adequately tackle the issue of whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations, this section will first examine the establishment of the JSC in Kenya, its functions and its embodiment as an administrative body subject to the principles of administrative law.

3.2.1 The Judicial Service Commission in Kenya

The Judicial Service Commission is a statutory body established under the Constitution.[94] The functions of the JSC *inter alia* are to nominate candidates to the President for appointment as judges; remove judicial officers from office; improving the efficiency of administration of justice; and review and make recommendations on the conditions of service of the judiciary in general.[95]

Professor Migai Akech classifies administrative bodies into three categories: public bodies, private bodies exercising public functions and private bodies exercising *de facto* private functions.[96] The functions that public bodies perform are defined as the principal obligations that the State in primarily mandated to perform.[97] The JSC is a public body as it has been established by the Constitution as discussed above. Also, the JSC performs duties that are the key responsibility of the state as evidenced previously. From this, the JSC can be termed as a public body, an administrative body.

Administrative law has set up various principles that must be present for there to be good administration.[98] Some of these principles include: legality, reasonableness, proportionality, independence and accountability.[99] Further, the Constitution of Kenya provides several national principles and values that State organs, State officers and public officers are employed to utilise in order to achieve good governance.[100] These include *inter alia*, integrity, transparency and accountability.[101] The JSC then as an administrative body and a State organ has to abide by these principles of governance and administration.

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[94] Article 171, *Constitution of Kenya* (2010).

[95] Article 172, *Constitution of Kenya* (2010).

[96] Akech A, *Administrative Law*.

[97] Akech A, *Administrative Law*, 349.

[98] McMillan J, 'Can Administrative Law Foster Good Administration' Whitmore Lecture, 2009, https://www.ombudsman.gov.au/__data/assets/pdf_file/0010/31303/16-September-2009-Can-administrative-law-foster-good-administration.pdf on 27 September 2019.

[99] Akech A, *Administrative Law*, Chapter 2.

[100] Article 10, *Constitution of Kenya* (2010).

[101] Article 10 (2) (c), *Constitution of Kenya* (2010).

Some of the main functions of the JSC include nomination of candidates to the President for appointment as judges and removal of judges from office in cases of misconduct.[102] The procedure of application, interviews, nomination and removal of candidates is contained in the Judicial Service Act.[103] The greatest concern of this study lies between the conduct of the JSC after interviewing the applicants but before nominating candidates to the President. The Judicial Service Act provides that the JSC is to conduct interviews of candidates and on conclusion to deliberate before nominating a candidate to the President for appointment.[104]

The Act neglects to define the meaning of deliberation. However, the assumption is that private deliberations are forums where different members of the commission voice their opinions on each candidate.[105]

This study pre-empts a scenario where a candidate who failed to get nominated by the JSC to the President for appointment as a judge or a judge is removed from office on allegations of gross misconduct, applies to a court for review of the decision by the JSC. In his application, the applicant seeks to be provided with a record of private deliberations held by the JSC in deciding which candidate(s) to nominate or why to remove the judge from office.

3.3 Access to private deliberations of the JSC in Kenya

This section addresses the law as is stands in Kenya concerning the overarching question on whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. In order to sufficiently cover Kenyan law on this issue, this part will propose the main arguments for the positive and negative answers to the question.

3.3.1 Right of Access to Information and examination of the administrative principles within administrative decisions

The main arguments contained in this section is that applicants are empowered by their right of access to information to receive the record of these deliberations. In addition, that the full

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[102] Article 172 (1) (a), *Constitution of Kenya* (2010).

[103] *Judicial Service Act* (Act No. 1 of 2011).

[104] Para 14 of the First Schedule, *Judicial Service Act* (Act No. 1 of 2011).

[105] *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

record of deliberations must be provided for a court of law to examine whether the decision by the JSC bore the administrative principles.

As previously discussed, the right of access to information is enshrined in the Constitution and applies to all citizens of Kenya.[106] It is further embedded in other statutory provisions, for example, the Access to Information Act,[107] Official Secrets Act,[108] County Management Act[109] and Media Act[110].

In this chapter, the right of access to information is tied within administrative law, in particular, fair administrative action. Every Kenyan citizen has a constitutional right to fair administrative action.[111] This action must be in line with certain codified principles.[112] This right is also backed up by legislated statute, the Fair Administrative Action Act (FAAA).[113] The FAAA emphasises the position of the Constitution on the right of persons to efficient, lawful and procedurally fair administrative action.[114] Kenyan courts have determined that this right is inherently tied to national values[115] and principles of the State.[116]

Administrative bodies are required to give reasons for their actions or decisions to persons who are likely to be affected by those actions or decisions.[117] The FAAA goes further to provide that persons who are affected by administrative actions should be provided with the

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[106] Article 35, *Constitution of Kenya* (2010).

[107] *Access to Information Act* (Act No. 31 of 2016).

[108] *Official Secrets Act* (Chapter 187 of the Laws of Kenya).

[109] *County Government Act* (Act No. 17 of 2012).

[110] *Media Act* (Act No. 3 of 2007).

[111] Article 47 (1), *Constitution of Kenya* (2010).

[112] The principles of expedition, efficiency, lawfulness, reasonableness and procedural fairness. These are prescribed in Article 47 (1), *Constitution of Kenya* (2010).

[113] *Fair Administrative Action Act* (Act No. 4 of 2015).

[114] Section 4, *Fair Administrative Action Act* (Act No. 4 of 2015).

[115] Article 10, *Constitution of Kenya* (2010).

[116] J*udicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

[117] Article 47 (2), *Constitution of Kenya* (2010).

information that would be necessary to lodge an appeal or a review of the specific administrative action.[118] In *Joseph Mbalu Mutava v Attorney General & another* the court held that the JSC had a duty to furnish the petitioner with written reasons for their decisions.[119] On appeal this case, the Court of Appeal held that the JSC had administrative discretion in determining what procedures to include in the dispensation of their mandate.[120] However, the court failed to elaborate what administrative discretion means and what standing it has to Article 47 of the Constitution.

Any person who seeks to appeal or conduct judicial review of an administrative decision is empowered to know the reasons for the decision.[121] For a court or any other appeal body to be able to properly discharge its function in appeals or judicial reviews, it must thoroughly audit the reasons behind the decisions or actions that are being appealed.[122] This inference is made as based on the requirement of administrative bodies to provide reasons of their administrative actions which could lead to an applicant's review of said decision.[123] Additionally, the court has a supervisory nature where it must adjudicate whether the decision maker considered all the relevant facts and acted correctly.[124] Provision of reasons create a sort of guideline of the conduct of the same or other administrative body and acts a deterrence to future futile applications.[125]

Therefore, the applicants who seek to appeal or review decisions of the JSC should be furnished with the necessary information required to examine the content of the

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[118] Section 6 (1), *Fair Administrative Action Act* (Act No. 4 of 2015).

[119] *Joseph Mbalu Mutava v Attorney General & another* (2014) eKLR.

[120] *Judicial Service Comission v Mbalu Mutava & another* (2015) eKLR.

[121] 'Administrative Bodies and the duty to provide reasons for determinations' FieldFisher, 6 February 2014 https://www.fieldfisher.ie/kelly-v-commissioner-of-an-garda-siochana/ on 26 September 2019.

[122] 'Administrative Bodies and the duty to provide reasons for determinations' FieldFisher, 6 February 2014 https://www.fieldfisher.ie/kelly-v-commissioner-of-an-garda-siochana/ on 26 September 2019.

[123] Section 4 (3), *Fair Administrative Action Act* (Act No. 4 of 2015).

[124] Ali J.A, 'Duty to Give Reasons- The Way Forward' Guyana Administrative Law Counsel, 2008 https://www.guyaneselawyer.com/article-dutytogivereasons.html on 28 September 2019.

[125] Ali J.A, 'Duty to Give Reasons- The Way Forward' Guyana Administrative Law Counsel, 2008 https://www.guyaneselawyer.com/article-dutytogivereasons.html on 28 September 2019.

administrative action. The transcripts or recordings of the private deliberations of the JSC is such necessary because the decisions that arise are based on those deliberations. Hence, the substance of those deliberations must be subject to examination in order to find out whether the action was *inter alia* lawful, reasonable and procedurally fair.

3.3.2 Record of Private Deliberations as Evidence

The main argument contained in this section is that the full record of deliberations forms part of the evidence that must be shared with all parties to a suit.

Evidence as described by the Evidence Act is a "means by which an alleged fact is proved or disproved; they include observations of the court in its judicial capacity".[126] A key basis of evidence law is that all parties to a suit in a court of law or any other judicial tribunal, must have knowledge of the evidence needed in order to successfully navigate through a suit.

In the circumstance that the JSC has this information but the applicant does not, it creates unequal footing before the court. Each party has a right to evidence that may be used in a suit. This is a fundamental ground of the right to a fair trial.[127] The very essence of evidence law is to create an equal ground where both parties have similar information and can argue out their cases without one party having an advantage over the other. In this sense, it would be unfair that the JSC bears information that the applicant does not. Further, the JSC must adhere to the right to fair trial which is non-derogable in Kenya.[128]

3. Autonomy and independence of the judiciary preventing it from disclosure

The Judiciary in Kenya enjoys a constitutional right to independence.[129] Independence means that the administrative body in question is free from any influence, persuasion or control.[130] Independence encourages unprejudiced decision-making as the administrative body is not

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[126] Section 3, *Evidence Act* (Chapter 80 of the Laws of Kenya).

[127] Article 50, *Constitution of Kenya* (2010).

[128] Article 25, *Constitution of Kenya* (2010).

[129] Article 160, *Constitution of Kenya* (2010).

[130] Geyh CG, 'Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts' 78 *Indiana Law Journal*, 2003, 162.

subjected to do the will of another actor.[131] This in turn promotes the rule of law and good administration.[132] Independence of the JSC in particular will ensure that in future the commissioners speak with candour and do not feel limited or looked at.

Other exceptions to full disclosure are where administrative body may elect not to furnish reasons for administrative decisions if the basis of withholding the information has justifications.[133]

3.4 Conclusion

This chapter tackled the main research question of the study which is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations as it applies in Kenya. This goal was reached by examining the laws in place in Kenya dealing with the right of access to information, just administrative action and the establishment and functions of the JSC.

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[131] Akech A, *Administrative Law*, 49.

[132] Akech A, *Administrative Law*, 49.

[133] *Republic v Kenyatta University Ex parte Martha Waihuini Ndungu* (2019) eKLR.

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF THE UNITED KINGDOM AND SOUTH AFRICA'S ACCESS TO PRIVATE DELIBERATIONS

4.1 Introduction

The previous chapter addressed the main research question which is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. The main themes discussed were on one side access to information and the evidentiary nature of the record of private deliberations and on the other side the independence and autonomy of the JSC. The analysis in chapter three was solely situated in Kenya.

This chapter aims to interrogate how other countries have handled the question of whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. The chapter shall undertake to examine the jurisprudence and statutory provisions in South Africa and the UK regarding the main research problem and compare it to that of Kenya.

4.2 Justification for choice of comparators

The comparators utilised in this chapter are the UK and South Africa. This choice has been influenced by the progressive nature of the UK and South Africa towards human rights. South Africa can be termed as sought of a trailblazer for progressive constitutions in the world.[134] The issues of disability rights, women's rights, gender identity rights and environmental activists rights are but a few that illustrate how South Africa perceives and apply human rights in a progressive manner within its jurisdiction.[135] The progressive implementation and application of human rights is important for this study as it provides a preliminary answer to the main research question which is whether the JSC can yield transcripts and recordings of

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[134] Roth K, 'South Africa: Events of 2018' Human Rights Watch, 2018 https://www.hrw.org/world-report/2019/country-chapters/south-africa on 15 October 2019.

[135] Roth K, 'South Africa: Events of 2018' Human Rights Watch, 2018 https://www.hrw.org/world-report/2019/country-chapters/south-africa on 15 October 2019.

private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. Human rights are important for this study particularly the right of access to information and the right of fair administrative action. Therefore, comparing the statutes and case law of the UK and South Africa to those of Kenya will create a better understanding of the main question and offer recommendations of the law that is to be put in place in Kenya.

4.3 Themes of Comparison

This chapter elects to compare the laws on access to private deliberations of administrative bodies between Kenya, the UK and South Africa.

4.4 Analysis of the laws in Kenya, the UK and South Africa

In Kenya, the Judicial Service Commission is established under the Constitution.[136] The functions of the JSC *inter alia* are to nominate candidates to the President for appointment as judges; remove judicial officers from office; improving the efficiency of administration of justice; and review and make recommendations on the conditions of service of the judiciary in general.[137] Some of the main functions of the JSC include to nominate candidates to the President for appointment as judges and to remove judges from office based of gross misconduct.[138] The procedure of application, interviews, nomination and removal of candidates is contained in the Judicial Service Act.[139]

Every Kenyan citizen has a constitutional right to fair administrative action.[140] This action must be in line with certain codified principles.[141] This right is also backed up by legislated statute, the Fair Administrative Action Act (FAAA).[142] The FAAA emphasises the position of the Constitution on the right of persons to efficient, lawful and procedurally fair

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[136] Article 171, *Constitution of Kenya* (2010).

[137] Article 172, *Constitution of Kenya* (2010).

[138] Article 172 (1) (a), *Constitution of Kenya* (2010).

[139] *Judicial Service Act* (Act No. 1 of 2011).

[140] Article 47 (1), *Constitution of Kenya* (2010).

[141] The principles of expedition, efficiency, lawfulness, reasonableness and procedural fairness. These are prescribed in Article 47 (1), *Constitution of Kenya* (2010).

[142] *Fair Administrative Action Act* (Act No. 4 of 2015).

administrative action.[143] Administrative bodies are required to give reasons for their actions or decisions to persons who are likely to be affected by those actions or decisions.[144] The FAAA goes further to provide that persons who are affected by administrative actions should be provided with the information that would be necessary to lodge an appeal or a review of the specific administrative action.[145]

The first set of laws examined in this section will be the statute relating to the right of access to information. Next, the laws examined will be on the establishment and functions of the body that has the mandate of administrating judicial powers of the judiciary.

In the UK, the Freedom of Information Act is the legislation that deals with all matters relating to the right of access to information.[146] The Act regulates how the information that is held by the state through its public authorities or any other individual can be disclosed to the members of the public seeking to know that information.[147] The Act provides that any person who fulfils all the requirements before requesting for information from public authorities should be furnished with the information upon request.[148]

The main legislation employed in the UK that relates to the judicial commission of the country is the Constitutional Reform Act[149]. The Act establishes a Judicial Appointments Commission (JAC).[150] The JAC has the mandate of nominating candidates for positions of judges to the Lord Commissioner.[151] The JAC may determine its own procedure and any other methods that will aid it in facilitating its functions.[152] Once the Lord Chancellor

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[143] Section 4, *Fair Administrative Action Act* (Act No. 4 of 2015).

[144] Article 47 (2), *Constitution of Kenya* (2010).

[145] Section 6 (1), *Fair Administrative Action Act* (Act No. 4 of 2015).

[146] *Freedom of Information Act* (Chapter 36 of the Laws of the United Kingdom, 2000).

[147] Preamble, *Freedom of Information Act* (Chapter 36 of the Laws of the United Kingdom, 2000).

[148] Section 1, *Freedom of Information Act* (Chapter 36 of the Laws of the United Kingdom, 2000).

[149] *Constitutional Reform Act* (United Kingdom, 2005).

[150] Section 61, *Constitutional Reform Act* (United Kingdom, 2005).

[151] Schedule 12 para 19, *Constitutional Reform Act* (United Kingdom, 2005).

[152] Schedule 12 para 19, *Constitutional Reform Act* (United Kingdom, 2005).

receives recommendation for the candidates, he may choose to accept the decision of the JAC as is or to ask the JAC to reconsider.[153] Whatever decision the Lord Chancellor elects to make he must provide written reasons for his decision.[154]

In the UK, historically the issue of administrative action was linked to the procedures of natural justice.[155] The courts have determined that for the an action to be deemed as a just administrative action, there must be adequate notice to the affected party occasioning a chance for a fair hearing; and that the maker of the decision was an impartial and unbiased umpire.[156]

Now, the issue of just administrative action as extended past the doctrines natural justice and require more from administrative bodies. First, administrative bodies must provide an explanation for their decisions or the decision-making process.[157] Decisions must bear reasons otherwise they lose the appeal of seeming like decisions, as decisions are derived from particular reasons.[158] Lord Woolf notes that "the giving of satisfactory reasons for a decision as being the hallmark of good administration".[159] Additionally, Lord Denning insists that giving reasons is a fundamental principle of public administration.[160] He considers that giving of rational reasons is tied together with the doctrine of natural justice. The Supreme Court of the United States (SCOTUS) states that:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."[161]

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[153] Section 29, *Constitutional Reform Act* (United Kingdom, 2005).

[154] Section 30, *Constitutional Reform Act* (United Kingdom, 2005).

[155] McCormick C, 'Judicial Review of Administrative Action in The United Kingdom: The Status of Standards Between 1890 And 1910' 10 *Italian Journal of Public Law* 1, 2009, 86.

[156] *Hopkins and Another v Smethwick Local Board of Health* (1890), The United Kingdom Queen's Bench.

[157] *Mallak v Minister for Justice, Equality and Law Reform* (2012), The United Kingdom Supreme Court.

[158] *Garda John Kelly v Commissioner of Garda Siochana* (2015), High Court of Ireland.

[159] Woolf H, *Protection of the Public: A New Challenge*, Stevens & Sons, London, 1990, 92.

[160] *Breen v Amalgamated Engineering Union* (1971), The United Kingdom Court of Appeal.

[161] *St. Joseph Stock Yards Co. v. United States* (1936), The Supreme Court of the United States.

Any person who seeks to appeal or conduct judicial review of an administrative decision must be entitled to know the reasons for the decision.[162] Administrative bodies have a mandate inform the court of its decision-making process.[163] Justice Sullivan notes that:

> "If the reasons given are improper, they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons given are unintelligible, this will be equivalent to giving no reasons at all."[164]

For example, situations where the administrative body illustrates that disclosure of reasons for decisions might not be in the public interest.[165] In such instances the administrative body will be exempt from disclosure.[166] Additionally, courts expect decision makers to provide reasons for all determinations unless the decision is so narrow that the reason is self-evident.[167]

The set of laws examined in this section are the laws concerning just administrative action; right of access to information; and on the establishment and functions of the Judicial Service Commission in South Africa.

The right to just administrative action for its citizens is enshrined under Section 33 of the Constitution of South Africa.[168] The Constitution emphasizes that persons affected by administrative actions should be furnished with reasons for those actions.[169] In addition to this, these administrative actions must be legal and procedurally fair.[170] The South African

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[162] 'Administrative Bodies and the duty to provide reasons for determinations' FieldFisher, 6 February 2014 https://www.fieldfisher.ie/kelly-v-commissioner-of-an-garda-siochana/ on 26 September 2019.

[163] *R v. Secretary of State for the Home Department, Ex Parte. Fayed and Another* (1997), The England and Wales Court of Appeal.

[164] *Save Britain's Heritage v. Secretary of State for the Environment* (1992), The United Kingdom Court of Appeal.

[165] *R v. Secretary of State for the Home Department, Ex Parte. Fayed and Another* (1997), The England and Wales Court of Appeal.

[166] *R v. Secretary of State for the Home Department, Ex Parte. Fayed and Another* (1997), The England and Wales Court of Appeal.

[167] *Garda John Kelly v Commissioner of Garda Siochana* (2015), High Court of Ireland.

[168] Section 33, *Constitution of the Republic of South Africa* (1996).

[169] Section 33(2), *Constitution of the Republic of South Africa* (1996).

[170] Section 33(1), *Constitution of the Republic of South Africa* (1996).

Constitution envisions the proper state of governance by administrative bodies by providing these guidelines on administrative actions. Administrative action in South Africa is defined as "any decision or failure to make a decision by a state organ or other person exercising public functions that adversely affect the rights of any person or have a direct or external legal effect"[171]. The definition of administrative action is specified for decisions by the Judicial Service Commission still under the cited provision.[172] The Promotion of Administrative Action Act in South Africa is the relevant statute dealing with administrative law in the country.[173] The Act purposes to "promote efficient administration and good governance by creating a culture of accountability, openness and transparency".[174] Fair administrative practices in South Africa are tailor-made for each arising situation.[175] This means that in addition to the legislated or precedent law, each circumstance that arises involving administrative law is addressed as per in specially suited scenario. Specifically, to the main research question of this study, administrators are required to furnish reasons for their decisions to persons whose rights have been affected requesting for those reasons.[176]

Access to information in South Africa is enshrined under Section 32 of its Constitution.[177] It provides that the right of access to information applies to all citizens and places a burden on the state or other persons holding the information that affects the rights of others to provide held information.[178] This right is further implemented through the Promotion of Access to Information Act.[179] The object of the Act is to "foster a culture of transparency and

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[171] Section 1, *Promotion of Administrative Justice* (Act No. 3 of 2000).

[172] Section 1(gg), *Promotion of Administrative Justice* (Act No. 3 of 2000).

[173] *Promotion of Administrative Justice* (Act No. 3 of 2000).

[174] Preamble, *Promotion of Administrative Justice* (Act No. 3 of 2000).

[175] Section 3 (2) (a), *Promotion of Administrative Justice* (Act No. 3 of 2000).

[176] Section 5, *Promotion of Administrative Justice* (Act No. 3 of 2000).

[177] Section 32 *Constitution of the Republic of South Africa* (1996).

[178] Section 32 (1), *Constitution of the Republic of South Africa* (1996).

[179] *Promotion of Access to Information Act* (Act No. 2 of 2000).

accountability in public and private bodies".[180] The Act further emphasises the position of the Constitution.

In South Africa, the JSC is established under Section 178 of the Constitution.[181] The functions of the JSC *inter alia* advise the President on appropriate candidates for judgeship positions.[182] The JSC has the power to determine the procedure through which it conducts its operations.[183]

Applicants in South Africa are empowered to apply to courts to review the decisions of inferior courts or any other bodies performing judicial or quasi-judicial functions.[184] The JSC is an administrative body that exercises judicial functions. Therefore, the JSC is subject to this provision of the Uniform Rules of Court Act. Applicants may then review decisions of the JSC in the High Court. Further, the judicial bodies are required to provide a record of the proceedings and the reasons that developed the decisions.[185] Hence, the JSC is obligated to furnish the court with a record of proceedings (deliberations) that took place in determining, for example, which judges to nominate to the president.

The main case that relates to the main research question of this study is *Helen Suzman Foundation v Judicial Service Commission*.[186] In this case, the applicants sought to receive the record of private deliberations of the respondents as they made a determination on the nomination of candidates to the president for judgeship positions.[187] The Western Cape High Court and the Court of Appeal were of the opinion that the private deliberations of

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[180] Preamble, *Promotion of Access to Information Act* (Act No. 2 of 2000).

[181] Section 178(1), *Constitution of the Republic of South Africa* (1996).

[182] Section 174(6), *Constitution of the Republic of South Africa* (1996).

[183] Section 178(6), *Constitution of the Republic of South Africa* (1996).

[184] Section 53 (1), *Uniform Rules of Court* (2009).

[185] Section 53 (1) (b), *Uniform Rules of Court* (2009).

[186] *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

[187] *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

administrative bodies should not be made public.[188] However, the Constitutional Court of South Africa was of a different perspective which was that the private deliberations of administrative should be made fully available.[189] The decision of the Constitutional Court is the current and reigning law on the matter in South Africa.

The case began in 2012 when the applicants applied to the Western Cape High Court to set aside the decision of the South African (JSC) to recommend to the President specific candidates for judgeship positions.[190] The applicants sought the full recordings of the deliberations of the JSC to nominate those specific candidates. They relied on Rule 53 (1)(b) of the Uniform Rules of Court,[191] where on request of reasons or recordings of proceedings leading up to decisions, the persons in charge are to provide such records within a specified time.[192] The respondents on the other hand argued that the provision did not require the full recordings of the private deliberations.[193]

The judges at the High Court agreed with the respondents' arguments. The applicants then appealed to the Supreme Court of Appeal. The judges of the Court of Appeal upheld the High Court's decision affirming that the provision of the Uniform Rules of Court did not mean that full recordings had to be offered.[194] The applicants then pursued their last resort which was an appeal to the Constitutional Court. In the Constitutional Court, majority of the judges sided with the applicants.[195] The majority opinion was that the evidence would not be sufficient and

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[188] See *Helen Suzman Foundation v Judicial Service Commission* (2018), Western Cape High Court of South Africa and *Helen Suzman Foundation v Judicial Service Commission* (2018), The Supreme Court of Appeal of South Africa.

[189] *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

[190] *Helen Suzman Foundation v Judicial Service Commission* (2018), Western Cape High Court of South Africa.

[191] Rule 53 (1)(b), *Uniform Rules of Court* (South Africa).

[192] Rule 53 (1)(b), *Uniform Rules of Court* (South Africa).

[193] *Helen Suzman Foundation v Judicial Service Commission* (2018), Western Cape High Court of South Africa.

[194] *Helen Suzman Foundation v Judicial Service Commission* (2018), The Supreme Court of Appeal of South Africa.

[195] *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

for the right to a fair trial to be sufficiently upheld the full recordings of the deliberations had to be given.[196]

The Supreme Court of Appeal of South Africa introduces an important thought that:

> "any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. The content of such deliberations can often be the clearest indication of what the decision-maker considered and what it left out of account. Nothing can be conceived of more relevance than the content of a written record of such deliberations."[197]

Without knowledge of the grounds on which a decision was made, an applicant will have trouble challenging the administrative decisions by administrative bodies.[198] Therefore, applicants must be furnished with a full record of the deliberations in order to properly challenge the content of the decisions by the JSC.

The record of deliberations is considered as evidence regarding the alleged fact in question.[199] The deliberations were the forum in which arguments and information was provided in coming to a conclusion and making a decision.[200] These arguments, evidence, are necessary in making a contention in court about the content or procedure of those arguments.[201]

4.5 Comparison of the laws in Kenya, the UK and South Africa

On just administrative action, the provisions of the statutes in the UK, South Africa and Kenya are similar in their object. They aim to protect the right to administrative action of the citizens. This is achieved through legal and procedural fairness for the most part. The elements of legality and procedural fairness are parallelly drawn from all these provisions on

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196 *Helen Suzman Foundation v Judicial Service Commission* (2018), Constitutional Court of South Africa.

197 *City of Cape Town v South African National Roads Agency Ltd* (2013), The Supreme Court of Appeal of South Africa.

198 *International GMBH v International Trade Administration Commission* (2012), The Supreme Court of Appeal of South Africa.

199 *Johannesburg City Council v The Administrator Transvaal* (1970), The Supreme Court of Appeal of South Africa.

200 *Johannesburg City Council v The Administrator Transvaal* (1970), The Supreme Court of Appeal of South Africa.

201 *Johannesburg City Council v The Administrator Transvaal* (1970), The Supreme Court of Appeal of South Africa.

just administrative action. Just administrative action is aimed at promoting accountability, openness and transparency across the board. The South African statute modify administrative action to specifically suit and apply to its JSC, whereas the Kenyan statute does not have provisions that are tailor-made for its JSC, but all its provisions apply to all administrative bodies in the same way. Further, South Africa also allows for an examination of the situation at hand and the choice of application of the existing regulations of just administrative action as they are or to create specific regulations that suit the arisen situation better.

For the right of access to information, the UK, South Africa and Kenya all aim to disclosing information held by the state through its public authorities or other persons to persons whose rights have been adversely affected by actions or decisions that arise based on that information. Again, this right is useful in fostering a culture accountability, openness and transparency.

The UK, South Africa and Kenya all have commissions that are responsible for the nomination and removal of candidates for judgeship positions to the President or Lord Chancellor. All the commissions are regulated by the specific statutes mentioned above. The general theme here is that these commissions are responsible for creating the procedures and guidelines that they go by. Additionally, the decisions of these commissions must be accompanied by written reasons for those decisions. In South Africa, it is further required that the JSC give a record of the proceedings that gave rise to their decisions. Whereas in Kenya, there is no specific requirement of the provision of the record of proceedings.

The cases from the UK and South Africa have the common feature of requiring reasons for the decisions or administrative actions that took place. The requirement of reasons is important for the affected party to be aware of the basis on which certain decisions were arrived on. In addition, the basis of a decision is important when it comes to appeals. The affected party can choose to appeal or not to appeal when they have full knowledge of the reasons for the decisions. They would then appeal if they disagreed with the reason of the trial umpire. If they elect to appeal, the appellate judge would able to examine the analysis of the trial judge through the reasons and make judgments with that in mind. All in all, reasons for decisions are imperative in just administration.

Although there is no jurisprudence *per se* regarding this issue in Kenya, the South African Constitutional Court, as is their nature, occasions a crucial contention that modern-day administrative law should be concerned with. It shall then be the Kenyan courts mandate to either emulate South Africa's current position or to develop their own divergent jurisprudence.

4.5 Conclusion

This chapter analyses the legal positions of Kenya, the UK and South Africa. First, the chapter justifies the use of the UK and South Africa as ideal comparators to Kenya. The chapter then delves into the theme of statutory provisions. Here, the statutes, Constitution or other Legislation, of the UK and South Africa are discussed. In the UK, the main statutes examined are the Freedom of Information Act and the Constitutional Reform Act. For South Africa, the examination is performed on the Constitution, the Promotion of Just Administrative Action Act, the Promotion of Access to Information Act, the Judicial Commission Service Act and the Uniform Rules of Court. After creating a kernel of the appropriate provisions from the listed statutes, the kernel is analysed side to side with the Kenyan statutes.

Lastly, the case law in the UK and South Africa is examined to find applicable principles to the main research question. These principles are then examined with the principles created by Kenyan jurisprudence on the same matters.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapter served as the matrix of comparison of how to tackle the main research question the study seeks to resolve which is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions that arise from those deliberations. The chapter compared the statutes and case law of the UK and South Africa to those in Kenya.

This chapter is the final chapter. The aim is to conclude the study by discussing the aspects of the main research question as they have been brought out through the various chapters of the research. After discussing these aspects, the chapter will offer a conclusion based on the research based in the previous chapters. The chapter will also offer individual conclusions reached in chapters one to four. Finally, the chapter also aspires to make recommendations on how the issue should be dealt with in Kenya based on various readings and the jurisprudence in the UK and South Africa.

5.2 Conclusion

The research sought to resolve the question of whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. This question was supported by the following secondary questions: whether the independence and privacy of administrative bodies are adequate in limiting the right to access information; and whether providing transcripts of the deliberations is the only way to ensure transparency in administrative bodies.

The following hypotheses were tested: that the JSC should yield transcripts and recordings of their private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations; that privacy of administrative bodies is not enough reason to limit the right to access information; and that

the furnishing of these transcripts is an integral way in which transparency can be ensured within administrative bodies.

The first chapter of this study highlighted the roadmap that the research would take. The chapter gave a background to the study that was being undertaken. It also provided the statement of the problem of the research. Next, the chapter outlined the research questions the study sought to resolve; and the hypotheses that were to be tested throughout the research. The theoretical framework of the research was then outlined. The study would be conducted through the lens of the right of access to information and the doctrine of sovereignty of the people. The chapter also examined the existing literature review on the subject matter of the study. Through the literature review, the chapter distinguished the questions it sought to resolve from the content of existing literature. Finally, the chapter set an outline of how the chapters of the study were divided and what they would deal with.

Chapter two of the study discussed the theoretical framework of the research. Since each study is shaped and informed by different theories or concepts that form the structure of the research, developing a theoretical framework for the study was key. In setting a framework that will act as the lens of the research, it was key that the theories discussed would be conceptualised in a manner that best suits the study. To that extent, the chapter undertook to explore the theories that would form the framework through which the question of whether the JSC can yield transcripts and recordings of private deliberations to applicants who seek to set aside the decisions arising from those deliberations would be examined. The theories that were tackled in this chapter were the principle of access to information and the doctrine of sovereignty of the people.

Chapter three of the study focused on the main question of the research which is whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. Additionally, the chapter studied the JSC and its nature as an administrative body. Thus, arguing that because the JSC is an administrative body it should be bound by the principles of administrative law. The chapter focus on the overarching issue as it is situated in Kenya.

Chapter four of the study interrogated how other countries have dealt with the question of whether the JSC can yield transcripts and recordings of private deliberations after candidates of judgeship positions have been interviewed to applicants who seek to set aside the decisions arising from those deliberations. The chapter examined the jurisprudence and statutory provisions in South Africa and the UK regarding the main research problem and compared it to that of Kenya.

5.3 Recommendations

It has been evidenced that discretion fosters appointments based on diversity or other factors whose implementation solely relies on discretion.[202] Despite this valid point in arguing not to furnish the applicants with the record of private deliberations, there should not be a blanket of secrecy over the information rather non-disclosure should be the exception. Using independence as a defence may be confused with complete autonomy which may result in abuse of said independence.[203] Therefore, in such instances, courts and legislators must tread carefully to avoid creating an arbitrary regime of law.

The rights of the JSC as an administrative body must be weighed against the rights of individual applicants to provide a definitive standpoint. The law then, whether statutory or as developed by courts, must attempt to create a balance between the rights of the JSC and of the applicant.

The law in Kenya should not sit and wait in anticipation for a scenario as described in this study to arise, but it should be at the front line advocating for provisions necessary in either preventing such a scenario or solving this issue once it arises.[204] In promoting good administration, the law should lean towards requiring provision of reasons of administrative decisions.[205] In relation to this study, the provision of reasons is equivalent to the provision of

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[202] Harrington J, 'From the U.K., a lesson on judicial appointments' The Globe and Mail, 29 July 2015 https://www.theglobeandmail.com/opinion/from-the-uk-a-lesson-for-canada/article25733842/ on 14 October 2019.

[203] Akech A, *Administrative Law*, 49.

[204] Ali J.A, 'Duty to Give Reasons- The Way Forward' Guyana Administrative Law Counsel, 2008 https://www.guyaneselawyer.com/article-dutytogivereasons.html on 28 September 2019.

[205] Ali J.A, 'Duty to Give Reasons- The Way Forward' Guyana Administrative Law Counsel, 2008 https://www.guyaneselawyer.com/article-dutytogivereasons.html on 28 September 2019.

recordings and transcripts of private deliberations of the JSC in deciding who to nominate for judgeship positions.

I would therefore recommend that Kenya amends the provisions of the FAAA to specify the mandate of the JSC to furnish a record of private deliberations or proceedings to applicants seeking to set aside decisions arising from those deliberations. Alternatively, the Judicial Service Commission Act could be amended to mandate the JSC, as they hold private deliberations of which candidates to nominate, to keep a record of those deliberations and to provide them to applicants who wish to appeal its decision of not nominating them to the President for appointment as judges.

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