

**From Shackles to Safeguards: the Role of Historical
Narratives in Shaping the Judicial Service Commission's
Autonomy**

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By

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Declaration

I, Rimsha Adnan Firozdin, 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.

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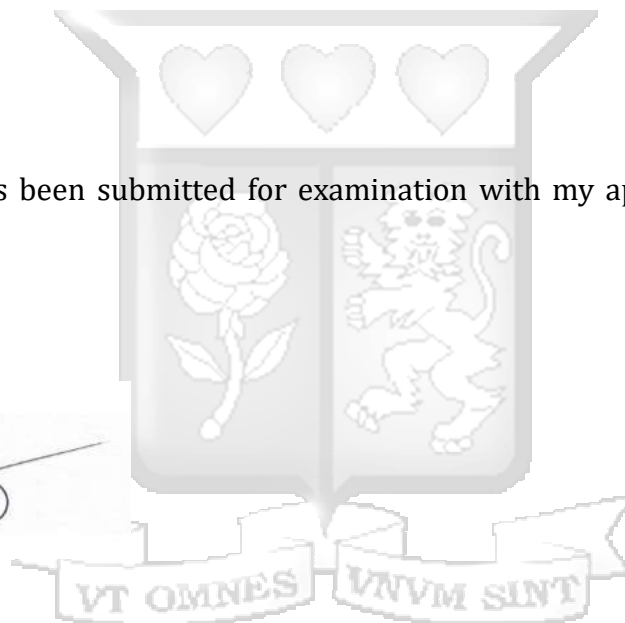
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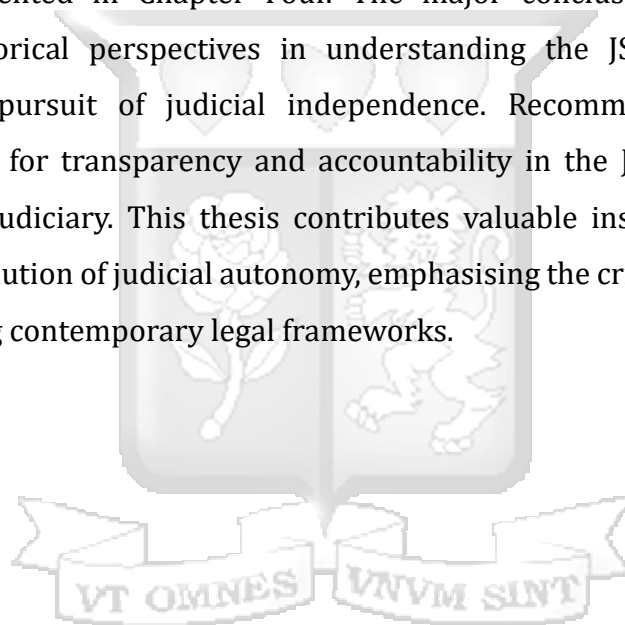
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Abstract

This thesis undertakes a nuanced examination of the Judicial Service Commission's (JSC) strategic use of historical narratives within the context of previous regimes' abuses. The research delves into the comprehensive historical period marked by executive dominance over the legal system, tracing its impact on the Commission's pursuit of autonomy. Employing a systematic exploration, the study assesses the motivations driving key changes, elucidates the JSC's current protected status, and examines how courts leverage interpretive tools to safeguard the JSC. The objectives encompass unravelling the intricate relationship between historical abuses, the JSC's autonomy, and the protective role played by the courts. The findings highlight the selective use of history as a crucial factor shaping the assertions presented in Chapter Four. The major conclusion underscores the significance of historical perspectives in understanding the JSC's decision-making processes and its pursuit of judicial independence. Recommendations put forth emphasise the need for transparency and accountability in the JSC's actions to instil public trust in the judiciary. This thesis contributes valuable insights to the broader discourse on the evolution of judicial autonomy, emphasising the critical role of historical narratives in shaping contemporary legal frameworks.



List of Abbreviations

COK - The Constitution of Kenya

IEBC – Independent Electoral and Boundaries Commission

JSC – Judicial Service Commission

KANU – Kenya African National Union



List of Cases

Gladys Boss Shollei v Judicial Service Commission & another [2014] eKLR.

JRN v Judicial Service Commission [2019] eKLR.

Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR).

Law Society of Kenya v Attorney General & 4 others (Petition 45 of 2019) [2023] KESC 19 (KLR) (31 March 2023).

Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR.



List of Legal Instruments

Constitution of Kenya, 2010.



1.0 Introduction

1.1 Background

The Judicial Service Commission (JSC/ the Commission) was reincarnated as an empowered and independent body with the ratification of the Constitution of Kenya (the Constitution) in 2010. The Commission is established under Article 171 of the Constitution.¹ Article 249 (2) fortified its position as an independent body, subject only to the Constitution and the law, with no entity having the authority to control or direct its functions.² This independence holds immense significance due to the Commission's function of promoting and facilitating the independence and accountability of the judiciary for the efficient and transparent administration of justice.³

Judicial independence and integrity are fundamental principles that are enshrined within our Constitution.⁴ During the reigns of Presidents Jomo Kenyatta and Moi, these principles were severely undermined, with the judiciary perceived as subservient to the Executive.⁵ Through the repealed Constitution, the JSC was wholly under the influence of the President, who appointed the commissioners.⁶ This led to a widespread perception that the judiciary lacked impartiality.⁷

Therefore, it is no surprise that restoring public faith in the competence of the judiciary became a top priority for the new Constitution.⁸ Establishing an independent Judicial Service Commission, that was insulated from political interference, aimed to foster judicial legitimacy, and restore public faith within the third arm of government.⁹ The JSC

¹ Article 171, Constitution of Kenya (2010).

² Article 249 (2), Constitution of Kenya (2010).

³ Article 172, Constitution of Kenya (2010).

⁴ Article 160, Constitution of Kenya (2010).

⁵ <https://katibainstitute.org/the-tunoi-business/> on 17 September 2023.

⁶ Ochieng W, 'The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective' Ghai J (ed), *Judicial Accountability in the New Constitutional Order*, 12ed, International Commission of Jurists Kenya, Nairobi, 2016, 49.

⁷ Ochieng, 'The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective', 49.

⁸ <https://katibainstitute.org/the-tunoi-business/> on 17 September 2023.

⁹ Ochieng, 'The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective', 49.

was now responsible for the appointment, disciplining, and removal of judicial officers and staff.¹⁰

However, to recognise the legitimacy of any state institution their accountability to the public is crucial.¹¹ To ensure that the autonomy within the Commissions is not usurped, Kenyan law has shifted to a culture of justification where accountability is demanded from those who wield public power at every turn.¹² A view gaining traction is that the judiciary is above accountability.¹³ This is alarming as if any state organ is left unchecked, it can run amok and perpetrate the very ills it is mandated to curb.¹⁴ It is essential to note that accountability and independence are not mutually exclusive; rather, they go hand in hand within a democracy.¹⁵

The level of independence granted to the JSC is unprecedented. Consequently, there is an increasing pattern of belligerent refusals on their part to be overseen the way every other public officer and body is.¹⁶ Their recruitment processes, such as of judges and even the Chief Justice, along with their dismissal procedures are veiled in ambiguity. Through judicial review the Commission is regularly accused of unfair dismissal,¹⁷ questionable recruitment processes,¹⁸ and even a refusal to be held answerable.

In 2016, when shortlisting applicants for the positions of Chief Justice, Deputy Chief Justice, and Supreme Court Judge the Commission denied the public crucial information on how the candidates were recruited. Subsequently, proceedings were commenced due

¹⁰ Article 172, Constitution of Kenya (2010).

¹¹ Ochieng, 'The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective', 64.

¹² Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

¹³ Sing'oei K, 'Reasons why judicial accountability is critical to credible justice' Standard Media, 2018 <https://www.standardmedia.co.ke/commentary/article/2001257048/reasons-why-judicial-accountability-is-critical-to-credible-justice> on 19 September 2023.

¹⁴ Ochieng, 'The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective', 65.

¹⁵ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

¹⁶ Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

¹⁷ JRN v Judicial Service Commission [2019] eKLR.

¹⁸ <https://nation.africa/kenya/news/jsc-sued-over-opaque-appointment-of-high-court-boss-4321850> on 18 September 2023.

to several legal violations such as the right to access information.¹⁹ According to the court, in its analysis, the JSC ought to be afforded leeway to decide the criteria for appointing judges if the process is transparent.²⁰ They posited that any interference within the process would open it to “contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism ... with the current one that is meant to espouse the values and principles of governance set out in Article 10”.²¹ The court used a purposive interpretation of the Constitution to state that the JSC should be granted leeway through a historical reading which concluded that any interference within the process would be a transportation to previous abuses.²²

In a similar manner, in 2013 the JSC refused to appear before the committee on justice and legal affairs of the National Assembly when summoned to “deliberate on the process, issues and circumstances surrounding her suspension (Gladys Shollei, former Chief Registrar of the judiciary) and the general state of the Judiciary.”²³ They cited independence as a justification of refusal stating that by requiring them to appear the committee was undermining the doctrine of separation of powers.²⁴ By relying on this doctrine, the Commission aimed to bring the historical motivation for adopting the doctrine to the forefront, as a reminder of the ills it cured: curtailing the abuse and concentration of power.²⁵

The JSC, like other constitutional commissions and independent offices, is a vehicle for delivering values and aspirations of the Kenyan people such as respect for human rights and engendering a culture of accountability in governance and respect for constitutionalism.²⁶ By acting questionably they place the legitimacy and sanctity of the

¹⁹ *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR.

²⁰ *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR.

²¹ *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR.

²² *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR.

²³ *Gladys Boss Shollei v Judicial Service Commission & another* [2014] eKLR.

²⁴ *Gladys Boss Shollei v Judicial Service Commission & another* [2014] eKLR.

²⁵ <https://www.investopedia.com/terms/s/separation-powers.asp> on 4 October 2023.

²⁶ Ochieng, ‘The Composition, Functions, and Accountability of The Judicial Service Commission From a Comparative Perspective’, 52.

judicial branch as a whole on the line.²⁷ Their actions threaten to plunge both the delicate reputation of the Commission and the judiciary back into the post-independence realm of doubt, suspicion, and lack of public trust.

The recent Supreme Court ruling is yet another depiction of how history is used to justify the JSC's lack of accountability. It was ruled that there is no legal basis for a member of the Judicial Service Commission nominated under the Constitution to be approved by the National Assembly before appointment.²⁸ In arriving at this conclusion, the Justices drew upon the lessons of constitutional history to argue that the JSC was meant to be independent of executive interference. It was held that "to give the President power to appoint or even to "appoint" by mere gazettelement of names is to forget our history and the mischief Article 171 was intended to cure".²⁹ It can be concluded that the role of the Constitution is to limit executive aggrandisement and, thus, the Constitution must be interpreted to advance that goal.³⁰

In a more encompassing sense, regarding constitutional interpretation, there is widespread consensus that the Constitution cannot be interpreted solely as a legal-centric document.³¹ Article 259(1)(a) mandates a purposive approach to constitutional interpretation where what the Constitution was designed to achieve ought to be at the forefront.³² This implies using historical arguments as a tool when the court is executing its interpretative powers.³³ Courts have utilised history as a source for deriving the meaning of Constitutional provisions in cases involving questions about the separation of

²⁷ [Sing'oei K](https://www.standardmedia.co.ke/commentary/article/2001257048/reasons-why-judicial-accountability-is-critical-to-credible-justice), 'Reasons why judicial accountability is critical to credible justice' Standard Media, 2018 <https://www.standardmedia.co.ke/commentary/article/2001257048/reasons-why-judicial-accountability-is-critical-to-credible-justice> on 19 September 2023.

²⁸ *Law Society of Kenya v Attorney General & 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR) (31 March 2023).

²⁹ *Law Society of Kenya v Attorney General & 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR) (31 March 2023).

³⁰ <https://indconlawphil.wordpress.com/2023/03/31/executive-power-and-the-judicial-service-commission-as-a-fourth-branch-institution-the-judgment-of-the-supreme-court-of-kenya/> on 18 September 2023.

³¹ Mutunga W, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions' *Speculum Juris*, 2015 - <https://www.saflii.org/za/journals/SPECJU/2015/6.html> on 3 October 2023.

³² Manji A, 'The BBI Judgment and the Invention of Kenya' *Verfassungsblog*, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

³³ Mutunga W, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions' *Speculum Juris*, 2015 - <https://www.saflii.org/za/journals/SPECJU/2015/6.html> on 3 October 2023.

powers and individual rights, especially when the text does not provide a clear answer.³⁴ In the highly acclaimed BBI judgment, the inclusion of the historical context within the court's ruling served two purposes: lending authority to Kenya's constitutional history and ensuring that this history could not be amended in the future by documenting it in writing.³⁵

The use of historical arguments in interpretation is the subject of ongoing debate. Proponents argue that history, as an interpretive tool, helps clarify ambiguity within the supreme law of the land.³⁶ Additionally, it serves as an objective and neutral basis for decision-making, promoting predictability in the outcomes of legal cases.³⁷ On the other hand, opponents caution against potential risks, stating that reliance on historical arguments may lead to selective application by both parties in court, as well as by judges.³⁸ The JSC often cite separation of powers and independence as the bedrock of their fervent refusal to be held accountable. This alludes to history being selectively applied to further a certain motive.

1.2 **Problem Statement**

The age-old adage “who guards the guardians?” aptly summarises the dilemma. The Judicial Service Commission was envisioned as an independent body that would foster the administration of justice through transparency, fairness, and efficiency. However, the copious situations they have acted questionably in threatens to propel judicial integrity into a crisis where public confidence dwindles. Many may presume that the unprecedented levels of independence offered to the Commission is due to the historical need to protect judicial independence. This study aims to examine how such a presumption is a limited reading of historical facts, as history also counsels that we ought to hold the Commission accountable.

³⁴ Murill B, ‘Modes of Constitutional Interpretation’ Congressional Research Service, 15 March 2018 <https://sgp.fas.org/crs/misc/R45129.pdf> on 3 October 2023.

³⁵ Manji A, ‘The BBI Judgment and the Invention of Kenya’ Verfassungsblog, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

³⁶ Manji A, ‘The BBI Judgment and the Invention of Kenya’ Verfassungsblog, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

³⁷ Murill B, ‘Modes of Constitutional Interpretation’ Congressional Research Service, 15 March 2018 <https://sgp.fas.org/crs/misc/R45129.pdf> on 3 October 2023.

³⁸ Murill B, ‘Modes of Constitutional Interpretation’ Congressional Research Service, 15 March 2018 <https://sgp.fas.org/crs/misc/R45129.pdf> on 3 October 2023.

1.3 **Research Objectives**

1. To illustrate why the independence of the Commission is of the foremost importance by chronicling the era of executive dominance over the JSC.
2. To investigate whether the degree of autonomy granted to the Judicial Service Commission is unique, with the rationale of demonstrating how it might lead to potential abuses of power.
3. To establish whether the current legal approach to autonomy for the JSC forecloses historical facts that ought to be taken into account.

1.4 **Research Questions**

1. How has the degree of presidential control over the JSC evolved over time? How does the historical development lead to the current status of judicial independence?
2. How does the level of autonomy granted to the Commission align with the principles of accountability and transparency?
3. Does the current legal approach to autonomy for the JSC foreclose historical facts that ought to be taken into account?

1.5 **Hypothesis**

My hypothesis is that the use of historical justifications by the Judicial Service Commission to legitimise their belligerent refusal to be held accountable is a limited reading of historical facts, as the same facts counsel on the necessity of holding them accountable. The proponents of an independent judiciary and Commission use the usurping and concentration of power during the eras of Presidents Kenyatta and Moi as an unassailable justification for the Commission's innumerable questionable acts not being contested/scrutinised. However, reflections from past experiences depict how any power that remains unchecked or is deemed 'above the law' may proceed to then exploit their mandate and sustain the wrongs it was designed to battle. In this case, it will result in a widespread perception that the arm of government is unreliable and biased.

1.6 **Justification**

This study will be useful to judges on matters of constitutional interpretation and judicial review where the JSC may rely on a historical basis for their unaccountability as it would debunk this limited interpretation of history and propel the body into a new realm of

transparency and fairness. In addition, other researchers working on the use of historical interpretations in law or on the Commission itself may find this study useful.

1.7 **Conceptual Framework: Full Historical Narratives**

History is a chronological record of significant events, often accompanied by an explanation of their causes.³⁹ It has evolved into a profession grounded in sources, marked by thoroughness, and systematic inquiry.⁴⁰ Owing to this, its function is to present a detailed and comprehensive account of historical occurrences while destroying interpretations based on particular interests.⁴¹ Diligent analysis is essential, as policymakers and administrators often root their decisions in historical events. Consequently, history should be wielded carefully, akin to the proverbial two-edged sword, since it has the potential to both inform and misinform the assessment of current issues and events.⁴²

Despite its relevance to the present, when constructing comprehensive historical accounts, historians strive to study history from the lens of the past rather than the lens of the present.⁴³ It is crucial that they avoid promoting narratives about the past driven by contemporary agendas.⁴⁴ Greek historian Thucydides astutely put forth that the relevance of history lies in knowing the plain truth.⁴⁵ Ergo, utilising or conveying a complete account of a past event is of the utmost importance.

Numerous interpretive approaches to utilising history have developed in a bid to mend the discrepancies of preceding theories, which can be classified into three central categories: empiricism, relativism, and postmodernism. Empiricism is a scientific principle relying on the sheer analysis of primary sources rather than interpretation.⁴⁶ Proponents like Elton posit that historians “establish facts rather than interpreting

³⁹ Merriam Webster Dictionary, 4 ed.

⁴⁰ Evans R, In Defense of History, W.W Norton, New York, 1999, 151.

⁴¹ Evans R, In Defense of History, 151.

⁴² Wyszomirski M, ‘Thinking in Time: The Uses of History for Decision Makers. by Richard E. Neustadt, Ernest R. May’ 49 The Journal of Politics 2, 1987, 604.

⁴³ Scarborough D, ‘Why is it important to study history?’ Open Access Government, 2 November 2022 <https://www.openaccessgovernment.org/important-to-study-history-historical-research/146829/> on 17 December 2023.

⁴⁴ Scarborough D, ‘Why is it important to study history?’ Open Access Government, 2 November 2022 <https://www.openaccessgovernment.org/important-to-study-history-historical-research/146829/> on 17 December 2023.

⁴⁵ Goh C, ‘The Relevance of History to Our Lives Today’ 10 Teaching and Learning 1, 1988, 77.

⁴⁶ Gilchrist C, ‘A Brief Review of Historical Approaches’ Academia, 2016, 3.

them”.⁴⁷ This approach was regarded as elitist, leading to the development of interpretive approaches to address its shortcomings.⁴⁸ E.H Carr, a relativist believed that historical facts are always “refracted through the mind of the recorder” and never come to the reader “pure”.⁴⁹ Inevitably, history is “an unending dialogue between the present and the past”.⁵⁰ The most recent theory that emerged is postmodernism, it rejects metanarratives and is largely philosophical, asserting that there is no ultimate truth.⁵¹ There is a significant possibility of error within such interpretations due to its absolute rejection of empiricism.⁵²

Unveiling full historical narratives involves a blend of several of the theories above. Complete narratives are a “complex matrix of events and their causes seen within the frame of their societal context and within a “stream of time.” It should also include an appreciation of the personal histories of individuals and the institutional histories of governmental organizations”.⁵³ Historian Richard Evans emphasises the importance of presenting the complete story by articulating that consequences, along with contextualisation, are just as important as causes.⁵⁴ In doing so he advocates for comprehensive chronicles and repudiates postmodernism with its inherent scepticism.⁵⁵ The manipulation of history facilitates the manipulation of the present.⁵⁶ It occurs when the narrator describes the past as they would like to imagine it to convey messages about

⁴⁷ Robson E, ‘Review: Richard J. Evans - In Defence of History’ Medium, 16 November 2022 <https://medium.com/@elliotrobson/review-richard-j-evans-in-defence-of-history-19ce632694e1> on 16 December 2023.

⁴⁸ Ahmed A, ‘What Can We Learn from History?: Competing Approaches to Historical Methodology and the Weberian Alternative of Reflexive Understanding’ 54 Polity 4, 2022, 740.

⁴⁹ Robson E, ‘Review: Richard J. Evans - In Defence of History’ Medium, 16 November 2022 <https://medium.com/@elliotrobson/review-richard-j-evans-in-defence-of-history-19ce632694e1> on 16 December 2023.

⁵⁰ Robson E, ‘Review: Richard J. Evans - In Defence of History’ Medium, 16 November 2022 <https://medium.com/@elliotrobson/review-richard-j-evans-in-defence-of-history-19ce632694e1> on 16 December 2023.

⁵¹ Ahmed A, ‘What Can We Learn from History?: Competing Approaches to Historical Methodology and the Weberian Alternative of Reflexive Understanding’, 741.

⁵² Ahmed A, ‘What Can We Learn from History?: Competing Approaches to Historical Methodology and the Weberian Alternative of Reflexive Understanding’, 741.

⁵³ Wyszomirski M, ‘Thinking in Time: The Uses of History for Decision Makers. by Richard E. Neustadt, Ernest R. May’, 605.

⁵⁴ Evans R, In Defense of History, 135.

⁵⁵ Evans R, In Defense of History, 135.

⁵⁶ Scarborough D, ‘Why is it important to study history?’ Open Access Government, 2 November 2022 <https://www.openaccessgovernment.org/important-to-study-history-historical-research/146829/> on 17 December 2023.

the world we live in.⁵⁷ This results in flawed public decision-making, as decision-makers are either ignorant of the lessons history may hold or draw incorrect lessons from history by utilising incomplete or inappropriate analogies.⁵⁸ By virtue of this, the concept of full historical narratives will be used to initially highlight how the JSC is manipulating historical facts, as the full narrative would stress the importance of accountability. Subsequently, a comprehensive narrative would portray how the Commission's refusal to be held accountable sets a dangerous precedent and may transport the nation back into the era of unaccountability and usurping of powers.

1.8 **Literature Review**

Scholarly inquiries into the autonomy of the JSC predominantly centre on the imperative for safeguards, emphasising its role in preserving and upholding judicial independence.⁵⁹ The consensus regarding the necessity of ensuring the Commission's independence can be categorised into two key aspects. Firstly, scholars delve into the historical context that necessitated an independent Commission, specifically focusing on the era characterised by executive interference.⁶⁰ Secondly, they examine the JSC's role in ensuring the maintenance of an impartial and independent judiciary.⁶¹ While recognising that the Commission enjoys a considerable degree of autonomy, most authors ground this allowance in its subservient role during past regimes.⁶²

1.8.1 Contemporary Perspectives on Judicial Independence and Accountability

The cornerstone of any discourse on judicial independence and accountability in Kenya lies in its constitutional embodiment, intended to shield the judiciary from executive aggrandisement.⁶³ A plethora of discussions concerning these principles finds their roots

⁵⁷ Scarborough D, 'Why is it important to study history?' Open Access Government, 2 November 2022 <https://www.openaccessgovernment.org/important-to-study-history-historical-research/146829/> on 17 December 2023.

⁵⁸ Wyszomirski M, 'Thinking in Time: The Uses of History for Decision Makers. by Richard E. Neustadt, Ernest R. May', 605.

⁵⁹ Ochieng W, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 47-71.

⁶⁰ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

⁶¹ Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 341-394.

⁶² Oganyo A, 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 18-67.

⁶³ Article 160(1), Constitution of Kenya (2010).

in Kenya's historical struggle against judicial subservience.⁶⁴ Researchers, scholars, and judges consistently harken back to an era where the separation of powers was illusory, underscoring the contemporary significance of judicial independence.⁶⁵

In the current landscape, judicial independence and accountability are perceived as interconnected facets essential for maintaining an effective and impartial judiciary.⁶⁶ Many authors and researchers engage in discourse about the transformation from subservience to autonomy. Some scholars approach this transformation by examining how the judiciary increasingly bases its decisions on the law and its merits, marking a departure from the past where it yielded to executive desires.⁶⁷ Others, such as Ochieng, delve into the establishment of a system of checks and balances, leading to constitutional supremacy and fostering equality between the executive and judicial branches.⁶⁸

Despite varied perspectives, there is a consensus that judicial independence and accountability are not mutually exclusive; instead, they synergistically contribute to enhancing public trust and confidence in the judiciary.⁶⁹ Their unwavering protection in contemporary times aligns the nation's judicial system with international best practices and principles on judicial independence.⁷⁰

1.8.2 Kenya's Political History

Legal and historical scholars extensively delve into Kenya's political history, tracing its roots from colonial legacies through the autocratic era to the eventual attainment of democracy.⁷¹ This multifaceted exploration serves dual purposes: comprehending the nation's tumultuous past and analysing various institutions and spheres of life that

⁶⁴ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya' 23 Human Rights Quarterly 1, 2001, 96-118.

⁶⁵ Makau M, Justice Under Siege, 96-118.

⁶⁶ Ghai J, 'An Overview of the Kenyan Judiciary' in Ghai J (ed) Judicial Accountability in the New Constitutional Order, 12 ed, ICJ Kenya, Nairobi, 2016, 23-45.

⁶⁷ Journalists for Justice and ICJ Kenya, '60 Days of Independence: Kenya's Judiciary Through the Lens of Three Election Petitions', ICJ Kenya, Nairobi, 2019, 1-50.

⁶⁸ Ochieng W, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Fombad C (ed) Separation of Powers in African Constitutionalism, Oxford University Press, Oxford, 2016, 286.

⁶⁹ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

⁷⁰ Ghai J, An Overview of the Kenyan Judiciary, 23-45.

⁷¹ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

endured different forms of abuse.⁷² Within the judicial context, particular emphasis is placed on the era of judicial subservience, elucidating how the judiciary underwent a transformation into a conduit of the executive branch.⁷³

This examination illuminates instances of executive abuse,⁷⁴ corruption within the judiciary,⁷⁵ and the overall state of the Judicial Service Commission.⁷⁶ Scholars chronicle these historical dynamics to elucidate why the current Constitution incorporates robust safeguards to uphold the principles of separation of powers and fortify fourth branch institutions.⁷⁷

Kenya's tumultuous past becomes a fervently cited tool to advance specific objectives, and scholars approach it through various lenses to achieve diverse ends. The imperative of democracy in the contemporary era and the safeguarding of constitutionalism,⁷⁸ reflections on autocratic governance regimes under previous leaders,⁷⁹ and the enduring impacts of colonialism on the nation's governance structures are all integral aspects of this comprehensive exploration.⁸⁰

Contribution

The existing body of literature regarding the autonomy granted to the JSC has followed three discernible approaches: delving into the justifications for this model, scrutinising the legal frameworks and methods through which such discretion is exercised, and outlining the potential hazards associated with this considerable leeway. However, my study aims to make a distinctive contribution by shedding light on why this leeway becomes alarming when viewed through a historical lens. This research endeavours to

⁷² Ghai J, *An Overview of the Kenyan Judiciary*, 23-45.

⁷³ Nyanjong A and Dudley O, 'Rethinking Judicial Independence and Accountability Under a Transformative Constitution: Kenya Post-2010' in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 1-21.

⁷⁴ Ochieng W, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Fombad C (ed) *Separation of Powers in African Constitutionalism*, Oxford University Press, Oxford, 2016, 286.

⁷⁵ Ghai, 'Constitutions and Constitutionalism', 208.

⁷⁶ Throup D, 'Daniel Arap Moi and one-party rule (1978-1991)', in Cheeseman N (ed), *The Oxford Handbook of Kenyan Politics*, Oxford University Press, London, 2020, 62.

⁷⁷ Ghai, 'Constitutions and Constitutionalism', 208.

⁷⁸ Nyanjong A and Dudley O, *Rethinking Judicial Independence and Accountability Under a Transformative Constitution*, 1-21.

⁷⁹ Throup D, 'Daniel Arap Moi and one-party rule (1978-1991)', 62.

⁸⁰ Nyanjong A and Dudley O, *Rethinking Judicial Independence and Accountability Under a Transformative Constitution*, 1-21.

unearth the comprehensive narrative frequently manipulated or disregarded by the JSC and its proponents. By doing so, it aspires to construct a cautionary tale against the prevailing system.

1.9 Methodology

This study will mainly rely on qualitative data to arrive at its main claim. This involves both primary sources including the Constitution, the Judicial Service Act of 2001, and work by legal historians, and secondary sources like case law, articles, chapters in books, and reports. The study will utilise a deductive approach with chapters two and three detailing the premises through which the main claim in chapter four will be derived from.

Chapter two involves a historical analysis on the adoption of the doctrine of separation of powers and checks and balances in Kenya. The purpose of this will be to demonstrate the reasons why it was necessary to adopt the doctrine: to curtail the abuse of power. Chapters three includes a doctrinal analysis of court decisions on the powers and functions of the Commission. Judges are using the historical motivation behind the creation of the JSC to broadly interpret its powers as an all-encompassing independence, this will form the genesis of my claim in the fourth chapter. Subsequently, chapter four will enlist a deductive approach by combining the conclusions in the previous chapters to make my claim.

1.10 Chapter Breakdown

Chapter one constitutes the introductory section of the study. It details the research questions and objectives along with the justification and thus forms the keystone for the ensuing chapters. Chapter two will highlight why the principle of judicial independence is staunchly protected. It dives into the historical need for an independent Commission based on previous abuses of the doctrine of separation of powers by the executive. Chapter two and three discuss some of the essential elements that culminate into the claim in chapter four. Chapter three examines the autonomy granted to the Commission and addresses issues related to this discretion. Chapter four is an inquiry into how the existing legal framework for the JSC's autonomy limits the consideration of important historical facts. Chapter five will conclude the study by highlighting how the lack of accountability is risky and, paradoxically, stands in contrast to the Commission's functions.

2.0 The Kenyan State: A History of Autocracy

2.1 Introduction

This chapter will pore into the history of Kenyan governance, specifically surveying the scenarios where various state officials and institutions, entrusted by the citizenry with powers for social welfare and development, operated ultra vires or demonstrated dubious conduct. The intention is to bring to the forefront how such conduct engendered a culture of impunity within other authorities and successive governments, culminating in a widespread perception that state players and their organs were not subject to the law. The state of affairs triggered decades of unaccountability, that serve as a constant reminder of the environment we risk plunging back into unless transparency and respect for the law are fiercely protected. The bewildering assertion by the then Attorney General Amos Wako in 1991, pronouncing that “no man apart for the president is above the rule of law”,⁸¹ offers a concise overview of the anarchy that prevailed at the time. The section will aim to unearth the full history, which will eventually serve as the foundation to support the study’s claim in Chapter four. To achieve this, it employs a three-pronged approach- beginning with a discussion on what accountability is, to inform the subsequent exploration of prominent instances showcasing the lack of accountability in our past. Finally, it shall conclude by revealing the norms and structural enablers that resulted to such an unfortunate system of affairs.

2.2 Deciphering Accountability: Understanding its Essence and Implications

“When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation, and indignation”.⁸² The Veracity of this statement is undeniably apparent in Kenya’s autocratic history. At every juncture, one encountered the pervasive ills of corruption, subjugation, and indignation. These historical horrors have fuelled the nation’s pursuit of an era marked by accountability, ushered in through the transformative Constitution. This portion will elucidate the principle to exemplify its historical absence thus, emphasising its vital contemporary significance. It serves as a cornerstone to the posterior subsection, as the recognition and comprehension of the

⁸¹ Makau M, ‘Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya’ 23 Human Rights Quarterly 1, 2001, 100.

⁸² <https://www.shsu.edu/academics/mass-communication/democracy-day/> on 02 January 2024.

prior deficit of accountability becomes apparent after a thorough understanding of what the principle embodies.

Without jargon, accountability is defined as a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other.⁸³ Within the context of this thesis, accountability is a principle of governance in which all persons and institutions, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated.⁸⁴ It requires measures to ensure adherence to certain principles like the supremacy of the law, equality before the law, the separation of powers, and transparency.⁸⁵ Through the lens of this definition, two fundamental facets of answerability come to the fore. Firstly, it underpins the presence of specific norms and values that officials are obligated to uphold.⁸⁶ Secondly, it highlights the imposition of clear sanctions as a form of reproach in cases of non-compliance.⁸⁷ In essence, accountability is the apparatus that ensures power is legitimately exercised.

Independence and accountability are commonly viewed as two sides of the same coin: while independence represents the freedom and capability to make decisions, accountability focuses on the responsible utilisation of that freedom.⁸⁸ It serves as the driving force behind bolstering public confidence and trust in any exercise of power, by facilitating the exposure of unjust or illegitimate uses of authority.⁸⁹

Many nations, particularly those with a tradition of authority misuse, are progressively transitioning to establishing a governance system rooted in constitutionalism, this

⁸³Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 345.

⁸⁴Nyanjong A and Dudley O, 'Rethinking Judicial Independence and Accountability Under a Transformative Constitution: Kenya Post-2010' in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 3.

⁸⁵Nyanjong and Dudley, *Rethinking Judicial Independence and Accountability Under a Transformative Constitution: Kenya Post-2010*, 3.

⁸⁶ Odhiambo C, 'Public Service Accountability and Governance in Kenya Since Independence' 8 *African Political Science* 1, 2003, 115.

⁸⁷ Odhiambo C, 'Public Service Accountability and Governance in Kenya Since Independence', 115.

⁸⁸Nyanjong and Dudley, *Rethinking Judicial Independence and Accountability Under a Transformative Constitution: Kenya Post-2010*, 10.

⁸⁹Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability', 346.

necessitates a commitment to upholding the supremacy of the Constitution.⁹⁰ Within this paradigm, power is vested in state offices, rather than in the individuals who wield that power, regardless of their elevated status.⁹¹ This analysis highlights that the purpose and manner in which power should be exerted are now explicitly anchored in the law.⁹² Ensuring that all individuals exercising such power are subject to legal scrutiny.⁹³ In such a setup, accountability is exalted through its enshrinement within the Constitution as a national principle, thereby commanding adherence from all state officers.

Article 10 of the Constitution explicitly asserts that all state action must be justified based on the national values and principles of good governance, integrity, and transparency.⁹⁴ As the previous eons within our records bear testimony, without accountability human rights will be denied, crime will flourish, and impunity for previous wrongdoings will persist, undermining legitimacy.⁹⁵ Ergo, it is plausible that the drafter's intended to secure compliance by endowing answerability with legitimacy through its express incorporation within the supreme law of the land.

The preceding discussion functioned as a conceptual framework, elucidating the core of accountability and its specific application within the Kenyan context. This introductory section, coupled with the exemplifications of impunity that are detailed in the subsequent discourse, vividly convey the pressing need for answerability in every aspect of state power.

2.3 Learning from History: Instances of Blanket Immunity

In Kenya, the level of accountability in the management of public affairs has consistently dwindled since independence.⁹⁶ Transparency International has regularly ranked Kenya among the top ten most corrupt countries globally since 1997.⁹⁷ In 2001, Kenya's rating

⁹⁰ Ghai Y, 'Constitutions and constitutionalism' in Cheeseman N (ed), The Oxford Handbook of Kenyan Politics, Oxford University Press, London, 2020, 208.

⁹¹ Ghai, 'Constitutions and Constitutionalism', 208.

⁹² Ghai, 'Constitutions and Constitutionalism', 208.

⁹³ Ghai, 'Constitutions and Constitutionalism', 208.

⁹⁴ Article 10(2)(c), Constitution of Kenya (2010).

⁹⁵ <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/accountability-the-law#:~:text=Without%20accountability%2C%20human%20rights%20will,legitimacy%20and%20prospects%20for%20reconciliation>. On 5 January 2024.

⁹⁶ Odhiambo C, 'Public Service Accountability and Governance in Kenya Since Independence', 114.

⁹⁷ Odhiambo C, 'Public Service Accountability and Governance in Kenya Since Independence', 114.

was 2.0, which dropped to 1.9 in 2022.⁹⁸ This reveals that the culture of impunity within our autocracy has markedly intensified with the passage of time rather than becoming a distant memory. Contrary to public optimism, the reintroduction of multipartyism in 1991 did not yield improved good governance. Corruption persisted as an evil, ingrained in the veins of most officials, adding gravity to the both humorous and painfully cutting statement that “in Kenya everyone is corrupt, including grandmothers”.⁹⁹ Five factors are identified as central in keeping Kenyan institutions weak: a powerful executive, corruption, ethnic polarisation, poorly enforced property rights, and violence.¹⁰⁰ These factors will feature in the illustrations of corruption in the preceding parts.

No individual or official is above the law or can act in defiance of constitutional prescriptions. This is where the difference between tyranny and freedom, democracy and undemocratic states lies.¹⁰¹ The examples that follow act as a stark reminder of the risks associated with permitting any entity or individual to operate under the mistaken belief that they are exempt from the law or that it merely exists as a tool to serve personal gain. Granting even a single entity the license to operate with impunity can have a domino effect, toppling the delicate formation that the Constitution installed to protect the citizenry.

The three illustrations presented below are chosen with the intent of exploring how bygone eras were replete with ubiquitous unaccountability, infiltrating all realms of public life. Opening with the judiciary, the branch entrusted with ensuring accountability was ironically consistently listed as one of the most corrupt institutions in the country.¹⁰² Shifting to the lawmakers who seldom used their powers for development, viewing it more as ‘their turn to eat’. Finally, the discussion will close with a look into how independent institutions under the 2010 Constitution still grapple with the ghosts of past

⁹⁸ Odhiambo C, ‘Public Service Accountability and Governance in Kenya Since Independence’, 114.

⁹⁹ Wrong M, ‘Everyone Is Corrupt in Kenya, Even Grandmothers’ Foreign Policy, 6 May 2014 <https://foreignpolicy.com/2014/05/06/everyone-is-corrupt-in-kenya-even-grandmothers/> on 5 January 2024.

¹⁰⁰ Damdinjav M, Garcia I, et al., ‘Institutional Failure in Kenya and a Way Forward’, Journal of Political Inquiry, 2013,1- https://www.jpinyu.com/wpcontent/uploads/2015/01/institutional_failure_in_kenya_and_a_way_forwar_d1.pdf on 5 December 2023.

¹⁰¹ Makau M, ‘Justice Under Siege: the Rule of Law and Judicial Subsistence in Kenya’, 97.

¹⁰² Odhiambo C, ‘Public Service Accountability and Governance in Kenya Since Independence’, 114.

practices. This will be explored through the lens of persistent concerns about electoral fraud.

The rationale behind selecting these illustrations is to showcase just how deeply rooted answerability challenges were in our nation, spanning from the top to the bottom, with far-reaching implications on the public as well.

2.3.1 *Unravelling Unaccountability in the Judicial Branch*

A book by former CJ, Abdul Majid Cockar, leaves an impression of a judiciary riddled with incompetence, self-indulgence, nepotism, lack of professionalism, subservience to the executive, and corruption.¹⁰³ It is quite intriguing that, despite the narrative being crafted around the early years of independence, its revelations still echoed until the period of the judicial overhaul in 2010. The Kenyan judiciary stood out as the most corrupt institution in the nation.¹⁰⁴ Various reports ranging from the Kwach Report, the Ringera Report, The Final Report of the Task Force on Judicial Reforms, to The Judges and Magistrates Vetting Board (JMVB) Report, will be discussed below. Despite being published during different turns in our history, their key contentions appear to align.

Extending from as early as the Kwach report of 1988 to the inaugural report of the JMVB in 2013, instances of petty and grand corruption were repeatedly reported as the predominant challenge, serving as the underlying justification for the establishment of these inquiry commissions. The Kwach report of 1998 disclosed a systematic pattern of corruption within the judiciary. The malpractice manifested in various forms, ranging from inducing court officials to misplace files, and deliberately prolong trials, judgements, and rulings, to the actual payment of money to judges and magistrates to influence their decisions.¹⁰⁵ The subsequent Ringera Report, which played a pivotal role in informing the highly criticised radical surgery policy, closely mirrored the findings of the Kwach report.¹⁰⁶ It commenced by underscoring how corruption within the judiciary posed a significant obstacle to justice and the rule of law, prompting the establishment of the

¹⁰³ Ghai J, 'An Overview of the Kenyan Judiciary' in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 32.

¹⁰⁴ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005, 17.

¹⁰⁵ International Commission of Jurists, 'Kenya: Judicial Independence, Corruption, and Reform', 15.

¹⁰⁶ International Commission of Jurists, 'Kenya: Judicial Independence, Corruption, and Reform', 15.

‘integrity and Anti-Corruption committee of the Judiciary’.¹⁰⁷ Released in 2003, it laid out evidence of corruption, unethical conduct, and other offences at the highest levels, implicating five Appeal Court justices, 18 High Court justices, and 82 magistrates as involved in corrupt practices.¹⁰⁸ Despite the ‘surgery’, the final Report of the Task Force on Judicial Reforms, published in 2010, continued to highlight corruption as the largest impediment to the judiciary.¹⁰⁹ Similarly, the initial report by the JMVB in 2012 succinctly encapsulates a situation that appears to have only deteriorated since independence “The judiciary rivals’ politicians and the police for the most criticised sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence”.¹¹⁰

Despite the insidious influence of corruption infiltrating the branch like a leech, this phenomenon could also be attributed to a majority of judicial staff and appointees being recruited more for political reasons than merit. Judges, akin to Caesar’s wife should be beyond suspicion.¹¹¹ In Kenya, however, this ideal was reduced to mere fantasy, as judicial officers were constantly accused of discourtesy, rudeness, tardiness, and laxity.¹¹² This precipitated into the negative perceptions that the judiciary is diligently working to overcome. Judicial officers are expected to be beyond reproach, scrupulously impartial, and fair in both their judicial functions, and their public and private lives.¹¹³ Achieving these goals seemed like a distant dream as the judicial officers and staff, were appointed and promoted based on political patronages, coupled with notions of nepotism, tribalism, and favouritism.¹¹⁴ Patronage became a means of rewarding or punishing targeted

¹⁰⁷ International Commission of Jurists, ‘Kenya: Judicial Independence, Corruption, and Reform’, 15.

¹⁰⁸ Parliament of Kenya Library, The Report of the Integrity and Anti-Corruption Committee of the Judiciary, September 2013, 46.

¹⁰⁹ Kenya Law, Final Report of the Task Force on Judicial Reforms, July 2010.

¹¹⁰ First Report of the Kenya Judges and Magistrates Vetting Board [2012] eKLR.

¹¹¹ 6 Ochieng P, ‘Striking a Balance Between Judicial Immunity, Independence and Accountability: The Kenyan Situation’ The Elephant, 11 April 2019 <https://www.theelephant.info/analysis/2019/04/11/striking-a-balance-between-judicial-immunity-independence-and-accountability-the-kenyan-situation/> on 8 December 2023.

¹¹² Kenya Law, Final Report of the Task Force on Judicial Reforms, July 2010, 21.

¹¹³ Kenya Law, Final Report of the Task Force on Judicial Reforms, July 2010, 2.

¹¹⁴ Kenya Law, Final Report of the Task Force on Judicial Reforms, July 2010, 2.

judicial officers and staff, through selective deployment, recall or transfers, as well as their stationing strategic positions.¹¹⁵

Consequently, within a system that was highly flawed and devoid of proper governance structures, the individuals exposed to it had no option but to conform and adapt to its inherent flaws. Culminating in an endless cycle of corruption and judicial impunity. The complicity in the torture during the Mwakenya trials, where accused persons were tried outside court hours without the right to counsel, is merely a drop in the ocean depicting how politically subservient the judiciary became.¹¹⁶ Rather than staunchly upholding the laws and defending human rights, they submitted to political emasculation and turned a blind eye to any wrongdoings perpetuated by the executive.

The manner in which the JSC conducted the hearings of the 82 allegedly corrupt magistrates, as indicted in the Ringera Report, reveals how unaccountability contaminated every system within the judicial branch. The magistrates were afforded an opportunity to furnish defences to the Commission regarding the allegations.¹¹⁷ Soon after, in Mid-March, 70 of the implicated magistrates were retired in 'public interest'.¹¹⁸ Upon inquiries by the LSK into the processes used, no explanations were provided.¹¹⁹ The above spectacle highlights how accountability tools were weaponised against the judiciary.

The misbehaviour by this branch is the most pertinent to subsequent discussions. While it is acknowledged that they may have been compelled into compliance, as discussed in the next chapter, judicial officers were also largely complicit in corruption and played a significant role in cementing their own perception, leading to a lack of public faith. This suggests how any system, when allowed to function without proper accountability and transparency mechanisms in line with its mandates, can perpetuate the very ills in society that it is mandated to curb.

¹¹⁵ Kenya Law, Final Report of the Task Force on Judicial Reforms, July 2010, 2.

¹¹⁶ Ochieng P, 'Striking a Balance Between Judicial Immunity, Independence and Accountability: The Kenyan Situation' The Elephant, 11 April 2019 <https://www.theelephant.info/analysis/2019/04/11/striking-a-balance-between-judicial-immunity-independence-and-accountability-the-kenyan-situation/> on 8 December 2023.

¹¹⁷ International Commission of Jurists, 'Kenya: Judicial Independence, Corruption, and Reform', 15.

¹¹⁸ International Commission of Jurists, 'Kenya: Judicial Independence, Corruption, and Reform', 15.

¹¹⁹ International Commission of Jurists, 'Kenya: Judicial Independence, Corruption, and Reform', 15.

2.3.2 *Unchecked Power: Examining the Unaccountability of High-Ranking Officials*

The Goldenberg and Anglo-leasing scandals are just two illustrations of the lack of accountability that exists within the nation, with far-reaching impacts upon various domains, from the economy to national security, as evidenced in each scandal.¹²⁰ Both these instances involved state leaders engaged in fraudulent activities that exclusively benefited a few elite individuals. While corruption under Moi's rule can be attributed to the authoritarian dominance of the single-party state, Kibaki's presidential victory promised responsible and accountable governance.¹²¹ However, upon assuming office, he adopted methods reminiscent of the autocratic regimes, albeit with a more calculated approach.

The longest running case of massive high-level corruption in Kenya was exposed in 1993, known as the Goldenberg scandal.¹²² Kamlesh Pattni, a businessman, devised a scheme where it is reported that key players received fifty million dollars annually, "in exchange for a monopoly on gold and diamond exports from Kenya".¹²³ Kenya is not a large exporter of either gold or diamonds.¹²⁴ According to most observers, evidence suggests that President Moi and his senior aides were involved in the sordid affair, which siphoned off over 10 percent of the country's annual GDP.¹²⁵

In the Anglo-Leasing case, the government was making payments to a non-existent company for public goods and services that were never delivered, under the guise of party and electoral financing.¹²⁶ This scandal encompassed 55 billion shillings in bogus state security contracts, involving 18 separate contracts entered into by the government—13 under Moi's administration and 5 under Kibaki's.¹²⁷ Primarily focusing on government

¹²⁰ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 116.

¹²¹ Damdinjav M, Garcia I, et al., 'Institutional Failure in Kenya and a Way Forward', 4.

¹²² Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 116.

¹²³ <https://core.ac.uk/download/pdf/304991797.pdf> on 5 January 2024.

¹²⁴ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 116.

¹²⁵ Franchesci L, 'A history of state capture in Kenya: The Anglo Leasing scandal' Nation, 29 November 2019 <https://nation.africa/kenya/blogs-opinion/blogs/dot9/franceschi/a-history-of-state-capture-in-kenya-the-anglo-leasing-scandal--227530> on 20 December 2023.

¹²⁶ Damdinjav M, Garcia I, et al., 'Institutional Failure in Kenya and a Way Forward', 6.

¹²⁷ <https://baselgovernance.org/news/case-study-upholding-unexplained-wealth-judgement-kenyas-anglo-leasing-affair> on 5 January 2024.

procurement in the security sector, the scandal took the form of lease finance and supplier's credit agreements.¹²⁸

These scandals underscore how Kenya's history is marred by numerous controversies that continue to impact the country to this day. They reveal the complicity of many high-ranking officials, and any pursuit of justice appears more as an attempt to pacify the public rather than a genuine effort to hold individuals accountable. In response to each scandal, we appointed sterile and impotent commissions whose main task was to prevent the taking of any substantive steps but pretending to quench the thirst for justice from infuriated citizens.¹²⁹ This highlights the prevailing culture of 'it's our turn to eat,' which has permeated Kenyan society.

2.3.3 An Overview of Electoral Processes within Kenya

Elections in Kenya have consistently grappled with issues of fairness, independence, and credibility. During both Kenyatta's and Moi's single-party rule, the elections were plagued with allegations of fraud and manipulation to sustain one-party rule.¹³⁰ The advent of multipartyism did not improve matters; the 1992 and 1997 elections were tainted by irregularities, violence, and manipulation casting doubt on the whole electoral process. The lack of accountability and trust in the government to curb election fraud became a major factor in the violence during the 2007 elections.¹³¹ Furthermore, the erosion of public faith in the accountability institutions boiled over into street protests, with international intervention becoming the only viable means to diffuse tensions.¹³² The heightened calls for a new Constitution was informed by this backdrop, aimed at preventing the recurrence of tragedies witnessed.

With the adoption of the 2010 Constitution, the Independent Electoral and Boundaries Commission (IEBC) was established as one of the independent offices and

¹²⁸<https://baselgovernance.org/news/case-study-upholding-unexplained-wealth-judgement-kenyas-anglo-leasing-affair> on 5 January 2024.

¹²⁹ Franchesci L, 'A history of state capture in Kenya: The Anglo Leasing scandal' Nation, 29 November 2019 <https://nation.africa/kenya/blogs-opinion/blogs/dot9/franceschi/a-history-of-state-capture-in-kenya-the-anglo-leasing-scandal--227530> on 20 December 2023.

¹³⁰ Throup D, 'Daniel Arap Moi and one-party rule (1978–1991)', in Cheeseman N (ed), The Oxford Handbook of Kenyan Politics, Oxford University Press, London, 2020, 62.

¹³¹ Damdinjav M, Garcia I, et al., 'Institutional Failure in Kenya and a Way Forward', 4.

¹³² Damdinjav M, Garcia I, et al., 'Institutional Failure in Kenya and a Way Forward', 4.

commissions,¹³³ representing a key reform aimed at enhancing accountability and transparency in the election process. Despite these efforts, the 2013 and 2017 elections came under scrutiny, due to concerns on credibility. Fortunately, these allegations were addressed before the courts, avoiding resorting to violence as seen in the past. The 2013 petitions were handled cautiously by the Supreme Court, seemingly under fear of executive persecution.¹³⁴ However, the 2017 election petition finally marked a turning point for the judicial branch, as the Supreme Court bravely nullified the results, citing irregularities in the transmission of results and non-compliance with the law, thereby raising critical doubts on the accountability and transparency.¹³⁵ Despite the notable advancements within the judiciary highlighted above, it underscores the ongoing challenge faced by the nation and the electoral commission in breaking free from a past marked by executive meddling and interference. This suggests that certain arms of the government might be compelled to maintain a system of unaccountability and questionability in their operations, despite earnest efforts to rectify past wrongs. Fears of an all-powerful executive continue to cast a shadow over all institutions in the country today, eliciting divergent reactions: some institutions seek refuge in existing laws and safeguards to prevent a return to the past, while others proceed cautiously to avoid confrontations.

2.4 Digging the Roots: Structural Enablers and Norms Fuelling Accountability Gaps

The objective is to delve into the prevalent cultures, practices, systems and structures that were either inherent to Kenya or established, to foster a deeply ingrained system of acting with impunity and evading accountability. The discussion will span across various epochs, starting with the colonial structures and practices inherited, where the remnants of colonialism manifested into a system of repression and exploitation to advance specific agendas. It will extend to constitutional amendments and the manipulation of the legal system. Additionally, cultural factors such as ethnicity and a lack of civic engagement will

¹³³ Article 88, Constitution of Kenya (2010).

¹³⁴ Journalists for Justice and ICJ Kenya, '60 Days of Independence: Kenya's Judiciary Through the Lens of Three Election Petitions', ICJ Kenya, Nairobi, 2019, 16.

¹³⁵ Journalists for Justice and ICJ Kenya, '60 Days of Independence: Kenya's Judiciary Through the Lens of Three Election Petitions', 17.

be explored. The aim is to underscore the risks of regressing into such a system or era, emphasising the imperative of upholding and abiding by the law.

2.4.1 *The Colonial Legacy*

Kenya's 1963 independence Constitution was inherently liberal, envisioning a multiparty democracy and guaranteeing judicial independence.¹³⁶ This framework aimed to protect and advance human rights and derive legitimacy from democratic principles.¹³⁷ However, the post-colonial state, rather than accomplishing these ideals, adopted an autocratic stance. It inherited the laws, cultures, and practices of the colonial state.¹³⁸ The nation had only been acquainted with a form of power exercise that teemed with abuse and manipulation, serving the interests and selfish desires of a privileged elite. Thus, the descent into this pattern becomes apparent when considering the limited exposure to alternative models or cultures.

In the political arena, electoral processes during colonialism i.e. 1957 and 1958 were closely orchestrated to advantage government loyalists.¹³⁹ When laying the bricks for neo-colonialism, colonial leaders meticulously hand-picked the individuals to endorse for wielding power in the newly independent regime.¹⁴⁰ It is a well-established fact that under Moi's repressive state, elections were tainted by rigging, malpractices, and intimidation.¹⁴¹ This highlights that numerous autocratic practices that plunged the country into an era of tyranny persisted from the colonial period.

Separation of powers was conspicuous by its absence - especially when it came to the divergent judicial systems that existed, one for the natives and another for the Europeans.¹⁴² This was a blatant violation of principles such as equality and the rule of law. The Mau Mau period clearly depicts this through the severity of treatment, the use of detention without trials, and the biased nature of the legal system.¹⁴³ The application of

¹³⁶ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 100.

¹³⁷ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 100.

¹³⁸ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya', 100.

¹³⁹ Peterson D, 'Colonial rule and the rise of African politics (1930–1963)', in Cheeseman N (ed), *The Oxford Handbook of Kenyan Politics*, Oxford University Press, London, 2020, 35.

¹⁴⁰ <https://africanphilanthropy.issueLab.org/resources/19699/19699.pdf> on 4 January 2024.

¹⁴¹ Throup D, 'Daniel Arap Moi and one-party rule (1978–1991)', in Cheeseman N (ed), *The Oxford Handbook of Kenyan Politics*, Oxford University Press, London, 2020, 62.

¹⁴² Ghai J, 'An Overview of the Kenyan Judiciary', 26.

¹⁴³ Ghai J, 'An Overview of the Kenyan Judiciary', 26.

different standards to natives and colonialists highlights the selective enforcement of laws, wherein laws were employed for suppression in one instance and empowerment in another.

The colonial state centralised, racialised, and ethnised power. This administrative set up, save its racial trappings, was wholly inherited by the post-independence regime.¹⁴⁴ In a fundamental sense, post-colonial governance became even more autocratic. Unlike the governor who was accountable to the House of Commons, Kenya's post-colonial presidents have hardly been accountable to Parliament.¹⁴⁵ Constitutional reforms since independence have transformed Kenya into a patrimonial and autocratic presidential system.¹⁴⁶ Thus, independent Kenya inherited and worsened the colonial crisis of governance with dire human rights and economic consequences.¹⁴⁷

2.4.2 *Constitutional Amendments and the Legal System*

The independence Constitution envisioned a highly liberal state with protections to ensure the Separation of powers and the respect for human rights.¹⁴⁸ Through constitutional amendments and legal tools, these protections and structures were rapidly dismantled, paving the way for an autocratic state. President Kenyatta's first order of business was transitioning from a parliamentary system, as prescribed by the Constitution, to a presidential system.¹⁴⁹ What ensued is a history of manipulation by the of the judiciary and, consequently, the legal system to concentrate power within the presidency.¹⁵⁰

Almost all the constitutional amendments carried out during this period aimed to transfer state powers from the other branches of government, namely the legislature and the judiciary to the executive.¹⁵¹ In 1988, President Moi removed the security of tenure for judges, eroding their autonomy and ability to decide cases solely on the law. Most decisions were now made in accordance with Executive desires, undermining due process

¹⁴⁴ Peterson D, 'Colonial rule and the rise of African politics (1930-1963)', 33.

¹⁴⁵ Peterson D, 'Colonial rule and the rise of African politics (1930-1963)', 33.

¹⁴⁶ Peterson D, 'Colonial rule and the rise of African politics (1930-1963)', 37.

¹⁴⁷ Peterson D, 'Colonial rule and the rise of African politics (1930-1963)', 36.

¹⁴⁸ Ghai, 'Constitutions and Constitutionalism', 210.

¹⁴⁹ Throup D, 'Jomo Kenyatta and the creation of the Kenyan state (1963-1978)' in Cheeseman N (ed), *The Oxford Handbook of Kenyan Politics*, Oxford University Press, London, 2020, 44.

¹⁵⁰ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subsistence in Kenya', 101.

¹⁵¹ Public Service Accountability and Governance in Kenya Since Independence

protections and the independence of the judiciary.¹⁵² These changes were implemented without parliamentary debate or resistance.¹⁵³ President Moi's motivations were rooted in his insecurities at the time, following attempted coups. Concentrating power within himself and reducing judicial power was an attempt to ensure that the body that could have kept him in check would be powerless to do so.

The Waki Report notes that checks and balances, normally associated with democracies, were very weak in Kenya, deliberately so.¹⁵⁴ Laws such as sedition laws, the Public Order Act which had long been used to restrict public assembly, essentially making Kenya a de jure one party state, are legislation that enabled the abuse.¹⁵⁵ During this period, the judiciary often aligned with the executive's interests, as seen through inaction during the Goldenberg affair and trials where political desires were fulfilled.

2.4.3 *Cultural Factors*

In the lead up to independence, the nation was highly fragmented along ethnic and tribal lines, a legacy of colonial powers emphasising and exploiting the divide-and-rule system to maintain control.¹⁵⁶ Thus, upon gaining self-governance, these divisions played a significant role, with each successive leader resorting to nepotism and tribalism. Governance was often seen as a personal entitlement rather than a public trust for the common good. The public, having experienced minimal civic engagement during the colonial era and faced with autocratic regimes, had little reason to believe that their involvement would bring about meaningful change, as dissent was often stifled.¹⁵⁷

Due to ethnic differences, attempts at uniting the citizenry for demanding any changes proved fruitless, allowing autocratic regimes to persist unchecked. Instead of finding strength in our diversity, the nation was often divided by ethnic lines, facilitating the prolonged dominance of dictatorial regimes for decades. This division became evident in

¹⁵² Throup D, 'Daniel Arap Moi and one-party rule (1978–1991)', 57.

¹⁵³ Makau M, 'Justice Under Siege: the Rule of Law and Judicial Subsistence in Kenya', 98.

¹⁵⁴ Damdinjav M, Garcia I, et al., 'Institutional Failure in Kenya and a Way Forward', 12.

¹⁵⁵ Muhula R, 'The limits of multi-partyism (1992–2005)' in Cheeseman N (ed), *The Oxford Handbook of Kenyan Politics*, Oxford University Press, London, 2020, 74.

¹⁵⁶ <https://africanphilanthropy.issuelab.org/resources/19699/19699.pdf> on 4 January 2024.

¹⁵⁷ Throup D, 'Daniel Arap Moi and one-party rule (1978–1991)', 79.

the post-election violence of 2007, a pivotal moment that spurred significant efforts in demanding and necessitating change.

2.5 **Conclusion**

This chapter has addressed the inquiry into the prevalence of executive interferences and oversteps in previous regimes. The objective of this exposition is to present a comprehensive narrative and historical context that will serve as the foundation for the assertions made in chapter four. This has been achieved by delineating examples of unaccountability across the nation and elucidating the norms and structures that propagated this culture. Chapter three will delve into executive dominance within the judicial branch, examining its ramifications on the current state of the Judicial Service Commission, and exploring how courts provide extensive protection to the Commission.



3.0 Judicial Independence: the Journey from Control to Autonomy

3.1 Introduction

This segment shall illuminate the era of judicial subservience to posit what courts and the Commission itself are citing as they contend that the JSC should be granted discretion. The objective is to delineate how historical developments have engendered the current protected status for the Commission, and how this selected narrative is being forwarded to advance certain goals. The chapter will encapsulate a systematic exploration of the period of executive dominance over the legal system to premise the current status of the Judicial Service Commission. It will momentarily assess the rationales motivating these changes before deliberating on what is occurring in reference to history today – how the courts utilise their interpretive tools to protect the JSC when they behave askew. The desire behind this will be to pinpoint the selective use of history that shall be utilised in developing an assertion in Chapter Four.

3.2 An Era of Executive Dominion over the Judicial Branch

The maxim “all rights secured to citizens under the Constitution are worth nothing and are a mere bubble, except when guaranteed to them by a virtuous and independent judiciary”,¹⁵⁸ is easily proved with a glimpse into the history of lawlessness that reigned supreme in Kenya. Resulting from judicial subjugation, human rights were an illusion, and the judicial system was reduced to a forum for the wealthy to settle their personal vendettas.¹⁵⁹ In this day and age, judicial independence is treated as a collective national good.¹⁶⁰ It functions as a buffer line preventing the country from degenerating into absolute tyranny.¹⁶¹ If abrogated there is no guarantee that the executive will respect the rule of law and perform within the ambits of established legal norms, processes, and institutions.¹⁶² The previous epoch of judicial subservience, along with an entire spectrum of abuses by the executive, seems to demonstrate this forewarning. Not even

¹⁵⁸https://www.brainyquote.com/quotes/andrew_jackson_401401#:~:text=Andrew%20Jackson%20Quotes&text=All%20the%20rights%20secured%20to%20the%20citizens%20under%20the%20Constitution.an%20independent%20and%20virtuous%20Judiciary. on 18 February 2024.

¹⁵⁹ Ghai J, An Overview of the Kenyan Judiciary, 33.

¹⁶⁰ Makau M, Justice Under Siege, 98.

¹⁶¹ Imanyara G, ‘The State of Judicial Independence in Kenya: A Persistent Concern’ The Elephant, 30 July 2021 <https://www.theelephant.info/opinion/2021/07/30/the-state-of-judicial-independence-in-kenya-a-persistent-concern/> on 4 January 2024.

¹⁶² Makau M, Justice Under Siege, 100.

the façade of independence had been spared in Kenya.¹⁶³ Ergo, learning from history, the judiciary and the public are keen to uphold the principle of autonomy to ensure that history does not repeat itself. This sub-chapter outlines the nation's tragic past that necessitated a complete overhaul and revamping of the legal system. Culminating in the creation of strong safeguards to prevent the third arm from revisiting an era of powerlessness. The central focus shall be on how the judiciary was made into an instructed agency of the Office of the President.¹⁶⁴

In colonial days the judiciary was both, de facto and de jure, an instrument for the perpetuation of colonial power.¹⁶⁵ Designed to administer the colonised population with limited rights.¹⁶⁶ This system was inherited by the post-colonial leaders of the yesteryears. The judiciary in post-colonial times was more or less a handmaiden of the dictatorial regime and incapable of operating effectively as the guardian of the Constitution, bulwark against human rights violations, or neutral arbiter of the rule of law. Further, even with the existence of written Constitutions, post-colonial governance was largely marked by its failure to check the exercise of power or entrench itself as the grundnorm of the legal system.¹⁶⁷

Constitutionalism and the Rule of Law are the central features of any democracy that respects human rights. An independent judiciary, the essential guardian of the rule of law, is the linchpin of the system of checks and balances through which the separation of powers is ensured.¹⁶⁸ Where courts defer to a state organ, there is no means of ensuring that human rights obligations are adhered to by that state organ.¹⁶⁹ Owing to this, the judiciary was transformed into a captive instrument of repression by Kenyatta and Moi.¹⁷⁰ The preceding discussion will shine light on the specific ways in which the judicial system

¹⁶³ Makau M, *Justice Under Siege*, 97.

¹⁶⁴ Makau M, *Justice Under Siege*, 118.

¹⁶⁵ Nyanjong A and Dudley O, 'Rethinking Judicial Independence and Accountability Under a Transformative Constitution: Kenya Post-2010' in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 5.

¹⁶⁶ Nyanjong A and Dudley O, *Rethinking Judicial Independence and Accountability*, 5.

¹⁶⁷ Ghai Y, *Constitutions and constitutionalism*, 210.

¹⁶⁸ Ochieng W, 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya' *Young African Research Journal*, 2013, 1-21 - https://www.researchgate.net/publication/331399155_The_Judicial_Service_Commission_Independence_of_Judges_and_Enforcement_of_Human_Rights_in_Kenya on 5 January 2024.

¹⁶⁹ Ochieng W, *The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights*, 19.

¹⁷⁰ Makau M, *Justice Under Siege*, 98.

was undermined. It shall study three thematic areas: the elimination of security of tenure- this was the first step in weakening the judiciary, leaving them wholly vulnerable to enduring the executive wrath lest they submit to his desires. The next area of focus will be the subjugation of the JSC, since appointments were presidential neither real nor perceived independence existed. It shall conclude by briefly discussing the safeguards ushered in through the new regime with the 2010 Constitution. Through this methodical assessment the intention is to highlight the rationale for the staunch protections offered to the judiciary and the Commission today.

3.2.1 Abolishing the Security of Tenure and Subsequent Dismissals

The UN Basic Principles on the Independence of the Judiciary, along with numerous other international and national instruments, stress the importance of security of tenure for judges.¹⁷¹ The intention behind this safeguard is to ensure that judges can make decisions based solely on the law and the merits of a case rather than premised on external and internal pressures hindering the administration of justice.¹⁷² It provides judges with a guaranteed tenure until they reach the retirement age or succumb to an inability to perform.¹⁷³ In Kenya, however, rather than being embraced as a safeguard, this principle was weaponised against the judiciary, undermining its intended purpose.

During the colonial era, judges served at the pleasure of the crown.¹⁷⁴ To spearhead change, the independence Constitution provided a complex process for the removal of judges, deliberately insulating them from executive power.¹⁷⁵ Removal of a judge was now only possible after a presidentially appointed tribunal had considered the matter and made recommendations.¹⁷⁶ It could solely be based on the grounds of an inability to perform the functions of office or misbehaviour.¹⁷⁷ However, in 1988 Moi passed a constitutional amendment that abolished security of tenure for judges. This only lasted

¹⁷¹ UN Basic principles for Independence of Judges, 1985, 12.

¹⁷² <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html#:~:text=Security%20of%20tenure%20is%20intended,on%20the%20judge%20himself%2Fherself> on 5 February 2024.

¹⁷³ UN Basic principles for Independence of Judges, 1985, 12.

¹⁷⁴ Makau M, Justice Under Siege, 102.

¹⁷⁵ Makau M, Justice Under Siege, 101.

¹⁷⁶ Makau M, Justice Under Siege, 101.

¹⁷⁷ International Commission of Jurists – Kenya Section, ‘Kenya: Judicial Independence, Corruption, and Reform’, International Commission of Jurists, Nairobi, 2005.

two years as, in 1990, due to both national and international pressure he had to reinstate it. An Africa Watch accurately termed the move 'cosmetic'.¹⁷⁸ By then, however, the damage had already been done; judges were left in a state of fear, knowing that removal from office not only meant loss of position but also the prohibition from practicing further.¹⁷⁹

When it came to magistrates the situation was even more dire. Governed by JSC regulations which were devoid of guidance or adherence to the principles of Judicial independence. Magistrates, under the purview of the JSC, were treated as civil service employees, subject to rigorous supervision and deemed lacking in the capacity for independence. The JSC had the power to hire, discipline, promote and dismiss magistrates on various grounds specified in the regulations.¹⁸⁰ In contrast to judges, magistrates were not even afforded a removal procedure dominated by the president.¹⁸¹ Consequently, anticipating an independent magistracy, free from executive influence and capable of avoiding moral, professional, and financial corruption, proved futile.¹⁸²

It appears that the measures were insufficient to satiate the Presidents desires, evidenced by the enlistment of judges on a contractual basis. The exercise of hiring judges on renewable contracts goes against international best practices, as it fosters a culture of serving the 'employers' interests rather than dispensing justice. Kenyatta adopted this approach, and since these individuals could never attain such prestigious positions and comfort in their home countries, they were jittery to attract the government's wrath.¹⁸³ They ruled in favour of Kenya African National Union's (KANU) where their actions were challenged as undemocratic, unconstitutional, or illegal.¹⁸⁴ An Africa Watch publication astutely observed that the lack of an independent judiciary was at the heart of the human rights crisis.¹⁸⁵

By disposing of security of tenure, any manifestation of independence by a judge was instantaneously sanctioned through termination, administrative action, or professional

¹⁷⁸ Ghai J, An Overview of the Kenyan Judiciary, 178.

¹⁷⁹ Makau M, Justice Under Siege, 106.

¹⁸⁰ Makau M, Justice Under Siege, 106.

¹⁸¹ Makau M, Justice Under Siege, 107.

¹⁸² Makau M, Justice Under Siege, 107.

¹⁸³ Makau M, Justice Under Siege, 107.

¹⁸⁴ Makau M, Justice Under Siege, 108.

¹⁸⁵ Ghai J, An Overview of the Kenyan Judiciary, 33.

ruin.¹⁸⁶ Cases of relocations, ‘retirements’, and, in severe cases, threats and deaths became routine.¹⁸⁷

Tampering with security of tenure marked the initial move to erode judicial independence. The executive, having seized institutional, operational, and functional liberties entirely, left the judiciary as a mere skeleton. The discussion on institutional subjugation will be explored further in the next section on the Commission.

3.2.2 The Presidentially Constituted Judicial Service Commission

The Constitution of 1969 consolidated all previous amendments. It stipulated that the JSC would consist of the Chief Justice as the chair, the Attorney General, a judge from the Court of Appeal, a judge of the High Court, and the chairperson of the Public Service Commission.¹⁸⁸ All members were appointed by the president, either directly or indirectly, without mandatory input from other relevant stakeholders.¹⁸⁹ The overbearing influence of the President fostered a perception among Kenyans that judicial officers lacked impartiality, leaving the public vulnerable to government tyranny.¹⁹⁰

Its responsibilities were restricted to merely ‘advising’ the president on the appointment of judges and maintaining disciplinary control over the registrar of the High Court, magistrates, Kadhis, and other employees of the Judiciary.¹⁹¹ This excluded essential roles typically entrusted to Judicial Service Commissions such as policy making roles for the judiciary, disciplinary role over judicial officers and judges, performance management and evaluations.¹⁹²

The constitutional amendments during this period, particularly the Constitution of Kenya (Amendment) Acts of 1986 and 1988, systematically eroded the security of tenure for

¹⁸⁶ Makau M, *Justice Under Siege*, 118.

¹⁸⁷ Makau M, *Justice Under Siege*, 108.

¹⁸⁸ Akech M, ‘Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability’ 18 *Indiana Journal of Global Legal Studies* 1, 2011, 350.

¹⁸⁹ Akech M, *Abuse of Power and Corruption in Kenya*, 351.

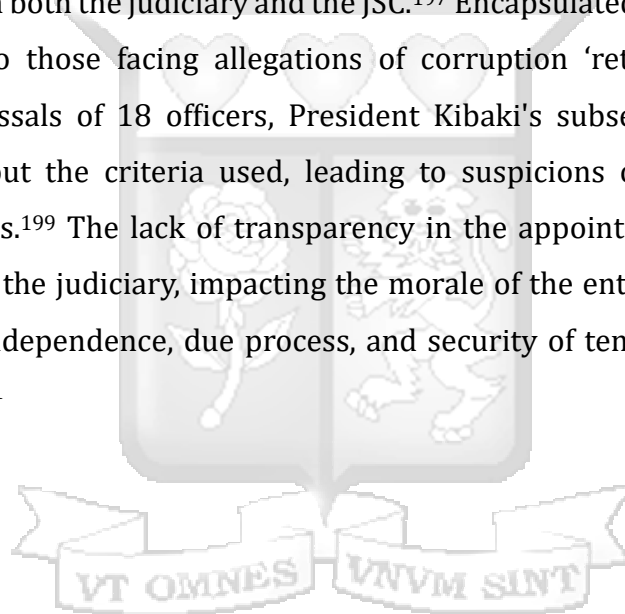
¹⁹⁰ Makau M, *Justice Under Siege*, 118.

¹⁹¹ Akech M, *Abuse of Power and Corruption in Kenya*, 351.

¹⁹² Ochieng W, ‘The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective’ in Ghai J (ed) *Judicial Accountability in the New Constitutional Order*, 12 ed, ICJ Kenya, Nairobi, 2016, 50.

various offices, concentrating power in the presidency.¹⁹³ These changes, removing security of tenure for the Attorney-General, Controller and Auditor-General, and members of the Public Service Commission, High Court Judges, and Court of Appeal Judges, were instrumental in granting the President significant influence over the Commission.¹⁹⁴ Consequently, the JSC lacked legitimacy and failed to meaningfully contribute to the independence of the judiciary.¹⁹⁵

The Commission's actions during the radical surgery of 2003, as detailed in Chapter Two, underscore its lack of true independence, functioning more as a political puppet to fulfil the executive's desires.¹⁹⁶ While the surgical reforms were aimed at enhancing independence, they inadvertently brought to the forefront the glaring lack of accountability within both the judiciary and the JSC.¹⁹⁷ Encapsulated by the Chief Justice's alarming remarks to those facing allegations of corruption 'retire or be retired'.¹⁹⁸ Following the dismissals of 18 officers, President Kibaki's subsequent appointments raised concerns about the criteria used, leading to suspicions of political, tribal, or sectarian motivations.¹⁹⁹ The lack of transparency in the appointment process eroded public confidence in the judiciary, impacting the morale of the entire institution.²⁰⁰ Key principles such as independence, due process, and security of tenure appeared elusive during this period.²⁰¹



¹⁹³ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 50.

¹⁹⁴ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 51.

¹⁹⁵ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 50.

¹⁹⁶ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 50.

¹⁹⁷ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 50.

¹⁹⁸ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 51.

¹⁹⁹ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 51.

²⁰⁰ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

²⁰¹ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

3.2.3 Rapid Strides Towards Autonomy: Safeguards Under the 2010 Constitution

Previous eras of abuse sired in a new regime that demanded accountability at every juncture, from those entrusted with stewardship over a governance function, by the citizenry to whom they must account, directly or indirectly.²⁰² Accountability goes hand in hand with independence, and the very essence of the Constitution entailed protecting the independence and accountability of each branch of governance.

Several new features of the constitutional scheme have ensured that the executive branch has lost its former unbridled powers over the judicial branch.²⁰³ These include judicial appointments made through an independent JSC, security of tenure, establishment of a Judiciary Fund for administrative and other necessary functions of the judiciary.²⁰⁴ By establishing all these protections, the aim is to foster a truly independent judiciary that is not subject to the control of the other arms. However, this growing autonomy was complemented by a culture of answerability where the judiciary had to perform in a transparent manner to increase public faith in the institution which was previously besmirched with claims of corruption.

3.3 Alterations within the Institution: The Commission Today

In pursuit of a constitutionally democratic society, the 2010 Constitution of Kenya endeavoured to overturn the authoritarian legacy of the country's post-independence governance.²⁰⁵ It initiated a comprehensive project aimed at restructuring and establishing independent commissions and institutions. This transformative Constitution was envisioned as a bridge from a culture of authority to one of justification, from a culture of powerful hierarchies where those perched at the top make decisions without a bother to one where accountability, consultation, and democratisation are demanded at

²⁰² Sing'oei K, 'Reasons why Judicial Accountability is Critical to Credible Justice' Standard Media, <https://www.standardmedia.co.ke/commentary/article/2001257048/reasons-why-judicial-accountability-is-critical-to-credible-justice> 3 February 2024.

²⁰³ Ochieng W, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Fombad C (ed) Separation of Powers in African Constitutionalism, Oxford University Press, Oxford, 2016, 286.

²⁰⁴ Ochieng W, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Fombad C (ed) Separation of Powers in African Constitutionalism, Oxford University Press, Oxford, 2016, 286.

²⁰⁵ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

every turn.²⁰⁶ Reflecting this shift, the Constitution envisages the JSC as an independent and accountable commission.²⁰⁷

The structural design of the JSC is crafted towards ensuring its autonomy, ensuring that commissioners not only possess the necessary competence and expertise but also reflect a balanced representation.²⁰⁸ In alignment with international best practices, at least half the Commission's members are selected from within the judiciary and legal profession, complemented by 'lay' members to broaden input and public faith.²⁰⁹ To further bolster their independence, commissioners enjoy security of tenure, moderated by clearly defined term limits.²¹⁰

The Supreme Court has recognised five factors as critical to actualising institutional independence: functional, operational, and financial independence; the perceptions of independence; and effective collaboration and consultation with other State organs.²¹¹ Viewed through this lens, the Commission appears to have achieved a significant portion of autonomy. However, their hostile approach to collaboration and consultation raises concerns. The JSC's apparent belief in its exemption from the accountability standards that apply to other public entities has led to contentious actions, such as its refusal to accept an invitation to participate in National Assembly discussions on the judiciary's state,²¹² and its opaque recruitment and dismissal practices. Such actions not only mar the judiciary's overall reputation but also risk eroding public trust.

The composition of the Commission in Kenya, predominantly filled with judicial officers, was designed to protect the judiciary from political interference. However, this structure also poses the risk of these officers aligning to advance their collective interests,

²⁰⁶ Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

²⁰⁷ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

²⁰⁸ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

²⁰⁹ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

²¹⁰ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission*, 52.

²¹¹ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 146.

²¹² *Gladys Boss Shollei v Judicial Service Commission & another* [2014] eKLR.

potentially sidelining broader public concerns.²¹³ An illustrative case is the controversy surrounding the appointment of Kenya's second Chief Justice under the Constitution, where it was alleged that there was a bias towards selecting a candidate from within the existing judicial ranks. ²¹⁴

There is widespread consensus that the JSC exercises its authority and forms decisions in an opaque manner, rather than enshrining independence like it was envisioned to.²¹⁵ Despite bungling a number of situations it has come away unscathed.²¹⁶ The Commission is often enjoined in several suits alleging violations of rights through unfair dismissal's.²¹⁷ For instance, Justice Ojwang' was controversially subjected to a tribunal for claiming immunity from appearing before the JSC, an action seen as an abuse of the Commission's disciplinary powers.²¹⁸ Additionally, the practice of conducting recruitment processes privately to fiascos like the Retriemnt age debacle have far-reaching consequences on the perception of the judiciary as a whole.²¹⁹

A transparent, reliable, and accountable Judiciary is vital for upholding of the rule of law, a cornerstone of constitutionalism and democracy.²²⁰ From recruitment to removal, the processes governing judicial officers must be rigorous, transparent, accountable, and impervious to undue influence to safeguard their independence and protect them from potential victimisation.²²¹ While the nation has made commendable progress in insulating the judiciary from external pressures, the Judiciary Service Commission (JSC) operates with a level of discretion that sometimes raises questions about its transparency and accountability. The opacity surrounding its recruitment practices, for example, sows

²¹³ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 146.

²¹⁴ Ochieng W, The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective, 55.

²¹⁵ Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

²¹⁶ Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

²¹⁷ Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR).

²¹⁸ <https://www.standardmedia.co.ke/article/2001325372/suspended-judge-jackton-ojwang-faces-four-charges-at-tribunal> on 5 February 2024.

²¹⁹ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR.

²²⁰ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 147.

²²¹ Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

seeds of doubt about the criteria for becoming a judicial officer, thereby undermining public confidence in the judiciary.

As the judiciary strives to rebuild this trust, the JSC's actions should align with these efforts rather than risk further destabilization. This discussion aims to shed light on the newfound independence of the JSC,²²² and caution against the potential misuse of these privileges, which could pose threats to the judiciary's integrity. It is imperative that the JSC's processes are scrutinized and reformed where necessary, to prevent the erosion of public confidence and ensure that the judiciary remains a pillar of democracy and constitutionalism.

3.4 **Motives Behind the Structural Changes to the Commission**

The emergence of hybrid institutions of accountability highlighted a shift from the traditional checks and balances associated with the three branches of government. The dominance of Africa's political leaders and their parties over the legislature, coupled with control over appointments, diminished the effectiveness of the judiciary.²²³ This erosion of public trust in traditional systems of checks and balances paved the way for the establishment of independent commissions, positioning the JSC as a fourth arm of government.²²⁴ The purpose was to foster openness, transparency, accountability, and responsiveness within the judiciary as a governmental branch.²²⁵ The overwhelming influence over the JSC in the previous regime led to the lack of legitimacy and the body could not meaningfully contribute to judicial independence. This was the background informing the quest for its remodelling.²²⁶ The objective was a transformation from a presidential instrument to a highly autonomous institution.

²²² Abungu C, 'Judging the Judges' Medium, 7 December 2019 <https://cecilyongo.medium.com/judging-the-judges-12babe26ae2> on 19 September 2023.

²²³ Fombad C, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa', Separation of Powers in African Constitutionalism, 3 March 2016 <https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-15> 4 February 2024.

²²⁴ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

²²⁵ Fombad C, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa', Separation of Powers in African Constitutionalism, 3 March 2016 <https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-15> 4 February 2024.

²²⁶ https://icj-kenya.org/news/sdm_downloads/judiciary-watch-judicial-accountability-in-the-new-constitutional-order/ on 3 February 2024.

Thus, The JSC was set up in response to a long history of executive dominance over the judiciary, to protect independence and accountability.²²⁷ Prior to the overhaul, the nation had statutory commissions, but they were not entrenched in the constitution. Due to this anomaly, these commissions were viewed as beholden to the executive.²²⁸ Appointments were premised on political patronage, financial support was highly dependent on the treasury.²²⁹ This state of affairs culminated in ineffectiveness, and a failure to contribute to good governance. The constitutional entrenchment of commissions and independent offices in 2010 was informed by these historical lessons.²³⁰

At this juncture, it is crucial to highlight another justification, which involves aligning local structures with international standards and best practices. Both ICJ Kenya and the Eminent Panel of Commonwealth Jurists expressed concerns about the inefficiency and lack of transparency in the previous mode of appointing judges.²³¹ Consequently, they recommended the restructuring of the current JSC to enhance its independence and prevent subjugation to the direction or control of any person or authority in its functions.²³² Furthermore, considering the resemblance between our Constitution and the South African one, the adoption of certain institutions from South Africa is noteworthy.²³³

3.5 **Leveraging Historical Subjugation: Contemporary Dependencies on the Past**

²²⁷ Waitara C, 'Manufacturing a Crisis: How the Executive Is Failing the Judiciary' The Elephant, 29 August 2020, <https://www.theelephant.info/analysis/2020/08/29/manufacturing-a-crisis-how-the-executive-is-failing-the-judiciary/> on 3 January 2024.

²²⁸ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 147.

²²⁹ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 150.

²³⁰ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' Researchgate, 150.

²³¹ International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

²³² International Commission of Jurists – Kenya Section, 'Kenya: Judicial Independence, Corruption, and Reform', International Commission of Jurists, Nairobi, 2005.

²³³ Fombad C, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa', Separation of Powers in African Constitutionalism, 3 March 2016 <https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-15> 4 February 2024.

Judicial independence cannot be interpreted as a *carte blanche* to act arbitrarily.²³⁴ In fact, securing a minimum level of independence under the Constitution shifts the focus to whether that independence is being utilised effectively.²³⁵ This convergence of quests for independence and accountability is pivotal.²³⁶ When examining the behaviour of the Judicial Service Commission, these constitutional pronouncements often appear as mere words, lacking tangible effects or any sincere efforts for actualisation. Courts and Commissioners swiftly intervene to shield the Commission's actions whenever questioned. This section will delve into specific instances, contrasting the courts' stance on the JSC's accountability with their general approach to other independent commissions and offices. This juxtaposition may suggest a double standard, or a unique leeway granted to the JSC.

The courts are swift to invoke the Constitutional drafters' intent when issues arise that may encroach upon the jurisdiction of the Commission. In the case of *Law Society of Kenya v Attorney General and National Assembly*,²³⁷ the High Court scrutinised the role of the JSC in appointing the Chief Justice and Deputy Chief Justice. The petitioner argued that the new provision under an amendment contradicted Article 166(1)(a) of the Constitution by requiring the Commission to forward three names for each post.²³⁸ The High Court asserted that Article 166 of the Constitution aimed for a clear departure from the old system, where the President essentially held the prerogative in appointing the Chief Justice and superior court judges, with the JSC playing a formal role.²³⁹ The court emphasized that the selection process fell exclusively within the mandate of the

²³⁴ Fombad C, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa', *Separation of Powers in African Constitutionalism*, 3 March 2016 <https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-15> 4 February 2024.

²³⁵ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' *Researchgate*, 147.

²³⁶ Ochieng W, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' *Researchgate*, 147.

²³⁷ *Law Society of Kenya v Attorney General & 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR) (31 March 2023).

²³⁸ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 55.

²³⁹ Ochieng W, *The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective*, 55.

commission, and neither the executive nor the legislature could dictate how the commission should carry out its mandate.

While acknowledging the need for protection to uphold the rule of law and separation of powers, the courts tend to rule in favour of the JSC in human rights disputes, deviating from established precedents. Ochieng attributes this to the JSC's role in the appointment, promotion, and discipline of judges.²⁴⁰ Cases involving the nomination of Supreme Court judges, the JSC's recommendation for the removal of the Deputy Chief Justice, and issues like disabled access to court buildings have raised questions about the JSC's susceptibility to judicial scrutiny, particularly in comparison to other institutions, where courts emphasize the need for institutions to operate within the law while balancing independence with accountability.²⁴¹

In conclusion, Du Plessis views that the Constitution serves as both 'memory ... coming to terms with a notorious past, and promise, along the way towards a ... transformed future', this serves as a reminder that the whole purpose of adopting a new Constitution was to remedy the ills of the past.²⁴² As such, the protections being offered to the JSC threaten to destroy the delicate structure that the nation is still acclimatising to. The dangers of Kenya's past experience with an emasculated judiciary lacking in independence and accountability should be left in the past and a new era ought to be heralded where both values underpin the execution of the judicial mandate.²⁴³ By solely protecting the independence of the JSC and not demanding accountability perhaps we forget how any unchecked power is a danger.

3.6 Conclusion

This chapter has navigated through the shadows of historical judicial subservience, shedding light on the evolution of the JSC and the nuanced narrative surrounding its status. By elucidating the historical backdrop of executive dominance over the judiciary, it becomes apparent that the JSC's current position as a safeguarded entity is a response

²⁴⁰ Nyanjong A and Dudley O, Rethinking Judicial Independence and Accountability, 9.

²⁴¹ Nyanjong A and Dudley O, Rethinking Judicial Independence and Accountability, 8.

²⁴² Nyanjong A and Dudley O, Rethinking Judicial Independence and Accountability, 8.

²⁴³ Nyanjong A and Dudley O, Rethinking Judicial Independence and Accountability, 8.

to a chapter of judicial vulnerability. The strategic use of historical developments to underpin the JSC's leeway unveils a deliberate effort to fortify the judiciary against past transgressions. This exploration sets the stage for a critical analysis in the next chapter, probing the implications of selectively invoked historical narratives on the JSC's role, accountability, and its place within the broader legal landscape.



4.0 Disregarding Historical Realities: The Current Legal Paradigm Towards the Commission's Autonomy

4.1 Introduction

The chapter shall articulate the main claim of the thesis: the *carte blanche* autonomy bestowed upon the JSC is incongruent with the principles of accountability and transparency. Consequently, the perils of selectively applying historical episodes loom, jeopardising the newly established framework for accountability that the nation has ardently sought. The foundation for the assertion is established through an exploration of how history should be referenced when drawing lessons or analogies from the past. The introductory leg of the chapter will delve into this aspect. Ensuing sections amalgamate the premises previously discussed in Chapters Two and Three to advocate for a comprehensive narration of historical events when establishing a perspective based on the past, particularly concerning the Commission. Through this, the chapter aims to initially caution against the hazards of selectively applying historical lessons and subsequently provide guidance on the appropriate methods for drawing lessons from history. This will be illustrated through examples of how historical revisionism has proven detrimental in other nations.

4.2 History: The Proverbial Two-Edged Sword

Historians fervently preach that history should be employed for its own sake,²⁴⁴ learning about the past in pursuit of uncovering the plain truth.²⁴⁵ A cautionary tale widely accepted is the pitfalls of Whiggism, a historiographical approach that interprets historical events through contemporary perspectives.²⁴⁶ This methodology is inherently flawed with several drawbacks, including the potential manipulation of facts to suit present purposes.²⁴⁷ The adage “those who do not remember the past are condemned to

²⁴⁴Cahillane L, ‘The use of history in law: avoiding the pitfalls’ Cahillane, Laura and Schweppe, Jennifer (eds), *Legal Research Methods: Principles and Practicalities*, University of Limerick, 2016, 68.

²⁴⁵ Goh C, ‘The Relevance of History to Our Lives Today’ 10 *Teaching and Learning* 1, 1988, 77.

²⁴⁶ Cahillane L, *The use of history in law: avoiding the pitfalls*, 60.

²⁴⁷ Cahillane L, *The use of history in law: avoiding the pitfalls*, 60.

repeat it” resounds when leaders,²⁴⁸ politicians, or the general public seek insights from historical events.

This sub-chapter will undertake a comprehensive examination spanning three domains: the utilisation of history in law, the approaches enlisted by nations in drawing lessons from history often disregarding their own pasts. And finally, an exploration of how lessons should be gleaned from historical narratives. This discourse lays the groundwork for the forthcoming sub-chapters' assertions.

4.2.1 *The Intersection of History and Law*

Legal practitioners often face criticism for enlisting the method of ‘internal legal history’, wherein specific examples are consciously drawn to align with the narrow requirements of a particular case.²⁴⁹ When divorced from the immediate context, these illustrations can become irrelevant.²⁵⁰ Lawyers frequently utilise historical analogies without adequately considering the nuances and distinctions between the historical reference and the current situation they are presenting.²⁵¹ As Moyn argues, not every historical element must be analogously connected to the present, such an approach may lead to perilous consequences, including historical revisionism.²⁵²

History serves various nuanced purposes in the realm of law. It can be utilised to illustrate the circumstances surrounding the emergence of a specific law or practice, facilitating a deeper understanding.²⁵³ Additionally, it can showcase shifts in thought on an issue or illuminate instances of injustice.²⁵⁴ According to Handler, a key function of legal history is to challenge assumptions that underlie contemporary legal scholarship.²⁵⁵

In Kenyan courts, there is an increasing reliance on both the nation's general history and constitutional history within judgments. This trend can be attributed to the Constitution

²⁴⁸ <https://bigthink.com/culture-religion/those-who-do-not-learn-history-doomed-to-repeat-it-really/> on 5 February 2024.

²⁴⁹ Cahillane L, The use of history in law: avoiding the pitfalls, 62.

²⁵⁰ Cahillane L, The use of history in law: avoiding the pitfalls, 62.

²⁵¹ Moyn S, The Trouble with Comparisons, 19 May 2020 <https://www.nybooks.com/online/2020/05/19/the-trouble-with-comparisons/> 3 February 2024.

²⁵² Moyn S, The Trouble with Comparisons, 19 May 2020 <https://www.nybooks.com/online/2020/05/19/the-trouble-with-comparisons/> 3 February 2024.

²⁵³ Cahillane L, The use of history in law: avoiding the pitfalls, 67.

²⁵⁴ Cahillane L, The use of history in law: avoiding the pitfalls, 68.

²⁵⁵ Cahillane L, The use of history in law: avoiding the pitfalls, 67.

endorsing historical and purposive approaches as tools for interpretation.²⁵⁶ Many judgments, particularly those pertaining to human rights and other protections, acknowledge the nation's tumultuous past as a factor in their decisions. In cases of constitutional interpretation, the court often turns to the drafter's intent for certain safeguards. The BBI judgment serves as a notable example, where the court's historical narration is seen as an attempt to lend credibility to the nation's history and establish a defence against a recurrence of hyper-amendment practices that characterised Kenya's regimes after 1963.²⁵⁷ The court, by setting out an authoritative historical account on paper, aimed to prevent future amendments.²⁵⁸

In the face of the prevailing historical revisionism affecting several nations, the court has vigilantly crafted an impartial account of the nation's history.²⁵⁹ This effort serves to safeguard legal precedents and historical scholarship from the dangers posed by selective application of lessons.²⁶⁰ Therefore, it becomes evident that legal scholars, lawyers, and judges all resort to the utilisation of history, emphasising the need for caution to avoid turning history into a mere pawn in the legal arena.

4.2.2 Historical Crafting: How Nations Shape the Present Through the Past

The contemporary landscape is witnessing an alarming surge in selective memory and a reluctance to fully embrace historical lessons.²⁶¹ Misleading revisionism, which proves effective and contagious, has become an epidemic in both autocratic and democratic societies.²⁶² When history is selectively manipulated to justify present claims, the rich complexity of humanity and historical narratives is diminished. Disconnecting from the

²⁵⁶ Article 2260, Constitution of Kenya (2010).

²⁵⁷ Manji A, 'The BBI Judgment and the Invention of Kenya' *Verfassungsblog*, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

²⁵⁸ Manji A, 'The BBI Judgment and the Invention of Kenya' *Verfassungsblog*, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

²⁵⁹ Manji A, 'The BBI Judgment and the Invention of Kenya' *Verfassungsblog*, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

²⁶⁰ Manji A, 'The BBI Judgment and the Invention of Kenya' *Verfassungsblog*, 22 May 2021 <https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/> on 3 October 2023.

²⁶¹ Mishra P, *Memory Failure*, *London Review of Books*, 4 January 2024 <https://www.lrb.co.uk/the-paper/v46/n01/pankaj-mishra/memory-failure> on 5 February 2024.

²⁶² <https://www.nytimes.com/2022/01/05/world/history-revisionism-nationalism.html> on 5 February 2024.

uncomfortable or inconvenient aspects of history hampers our ability to learn from the past and apply those crucial lessons to current challenges.²⁶³

Drawing from the lessons of previous nationalist regimes in Europe, it becomes evident that any revision of history for the sake of evoking nationalism can have catastrophic global consequences.²⁶⁴ Highlighting the necessity of presenting history transparently, revealing both victories and defeats, as this is the only way individuals can extract genuine lessons from the unaltered truth rather than revised versions.²⁶⁵

Pankaj Mishra sheds light on how German leaders, including former Nazis, downplay their culpability and advance their agendas, potentially at the cost of fulfilling their responsibility to Israel and the international community.²⁶⁶ Gestures of support towards Israel may be driven more by contemporary political challenges, Islamophobia and migration, rather than a genuine commitment to learning from history and living up to their vow of 'never again'.²⁶⁷

In Hungary, the government manipulates educational and cultural institutions to manufacture a xenophobic national heritage aligned with its ethnonationalist politics.²⁶⁸ Similarly, in China, the Communist Party is rewriting Chinese history to suit its needs.²⁶⁹ In India, Prime Minister Narendra Modi employs historical revisionism in school curricula to influence the minds of young Indians, promoting a narrative of "Hindu invincibility" prior to colonialism and the influence of Muslims and Christians.²⁷⁰

This sub-section emphasises the perils of historical revisionism and its misuse. The subsequent discussion will delve into how history should be appropriately relied upon.

²⁶³ <https://fs.blog/learning-from-history/> on 5 February 2024.

²⁶⁴ <https://fs.blog/learning-from-history/> on 5 February 2024.

²⁶⁵ <https://fs.blog/learning-from-history/> on 5 February 2024.

²⁶⁶ Mishra P, Memory Failure, London Review of Books, 4 January 2024 <https://www.lrb.co.uk/the-paper/v46/n01/pankaj-mishra/memory-failure> on 5 February 2024.

²⁶⁷ Mishra P, Memory Failure, London Review of Books, 4 January 2024 <https://www.lrb.co.uk/the-paper/v46/n01/pankaj-mishra/memory-failure> on 5 February 2024.

²⁶⁸ <https://www.nytimes.com/2022/01/05/world/history-revisionism-nationalism.html> on 5 February 2024.

²⁶⁹ <https://www.nytimes.com/2022/01/05/world/history-revisionism-nationalism.html> on 5 February 2024.

²⁷⁰ Bhattacharya S, How RSS textbooks are reshaping Indian history and science under Modi, Aljazeera, 19 February 2024 <https://www.aljazeera.com/news/2024/2/19/how-rss-textbooks-are-reshaping-indian-history-and-science-under-modi> on 21 February 2024.

4.2.3 *Comprehensive Narratives: A Discourse on the Proper Use of History*

The effective utilisation of history is contingent upon engaging with full and comprehensive historical narratives. As MacMillan aptly puts it, "The past can be used for almost anything you want to do in the present. We abuse it when we create lies about the past or write histories that show only one perspective".²⁷¹ Drawing lessons from history requires a conscious effort to approach it with care and accuracy, with the correct tools.²⁷² The relevance of history lies in its careful and responsible application, offering the potential for instrumental and beneficial change.²⁷³ However, when history is misused, it can lead to catastrophic consequences.

Learning from history and applying its lessons effectively involves scrutinising both the similarities and differences between past and present conditions.²⁷⁴ This critical examination allows us to understand how contemporary challenges are influenced by social, political, economic, and cultural factors, providing insights into potential opportunities and actions or constraints that may lead to inaction.²⁷⁵ Analogies with the past should be wielded and constructed with care, as suggested by Moyn, considering both continuity and novelty in the developments.²⁷⁶

In essence, history serves diverse purposes in present-day life, influencing politics, legal aspects, shaping behaviour, and contributing to education. Recognising the power of history, it becomes imperative to construct historical narratives wholly, avoiding succumbing to revisionism and selectively drawing comparisons with the present. The power of history often lies in its straightforward recounting of the past. Nations must exercise caution in drawing lessons, ensuring their accuracy and consistent application, as demonstrated by Germany's current context. History, with its significant impact on

²⁷¹ <https://www.pbs.org/kenburns/us-and-the-holocaust/how-can-we-learn-from-history> on 5 February 2024.

²⁷² <https://fs.blog/learning-from-history/> on 5 February 2024.

²⁷³ <https://www.pbs.org/kenburns/us-and-the-holocaust/how-can-we-learn-from-history> on 5 February 2024.

²⁷⁴ <https://www.pbs.org/kenburns/us-and-the-holocaust/how-can-we-learn-from-history> on 5 February 2024.

²⁷⁵ <https://www.pbs.org/kenburns/us-and-the-holocaust/how-can-we-learn-from-history> on 5 February 2024.

²⁷⁶ Moyn S, The Trouble with Comparisons, 19 May 2020 <https://www.nybooks.com/online/2020/05/19/the-trouble-with-comparisons/> 3 February 2024.

shaping or destroying nations, should be conveyed in its entirety to fulfil its intended purpose.

4.3 An Era of Impunity: Interrogating the Historical Context of Governance and its Relevance to the Contemporary JSC

An examination of the comprehensive historical record preceding 2010 unveils the deeply ingrained challenges of impunity within the nation. The proliferation of unaccountability, akin to a pervasive poison, manifested not only in the inherited and cultivated structures but also in the actors occupying key offices. Scandals and systemic failures facilitated such abuses, tarnishing the nation's integrity. This section consolidates the foundational premises articulated in chapters two and three, delving into the complete history that the JSC avoids. It underscores the perils and threats associated with historical revisionism, emphasising that permitting one institution to operate unchecked may embolden other independent entities to follow a similar trajectory.

4.3.1 A Complete Account: the Pervasion of Impunity in Kenyan Governance

By adopting a comprehensive historical perspective, it becomes apparent that the lack of accountability permeated all facets of governance, extending from the executive to various branches and institutions. The Executive, serving as the origin of this detrimental phenomenon, witnessed the manifestation of a corrosive culture that infiltrated every public office in Kenya. During the reigns of Kenyatta and Moi, echoes of colonial practices emerged, where governance and power devolved into instruments for advancing specific categories or groups' interests. Power became highly concentrated in the executive organ, rendering the legislature and judiciary mere entities executing the executive's wishes rather than independently safeguarding justice and mitigating the arbitrary use of power.

The realisation of genuine democratic values in Kenya materialised post-2010, marked by the introduction of robust safeguards within the supreme law of the land. Preceding this era, incumbents utilised their offices as a *carte blanche* to operate in their preferred manner rather than as a public trust for national development. The severity and means of abuse varied across a spectrum, with Presidents Kenyatta and Moi exemplifying extreme subjugation of the office, lacking even the illusion of legitimacy in their exercises of power. President Kibaki adopted a more moderate approach, employing political threats and abuses discreetly, thereby maintaining the illusion of an intact democracy.

During these periods, attempts to hold the executive or their proxies accountable proved futile, often resulting in silencing through imprisonment, the banning of political parties, and, in extreme cases, murders. It becomes evident that when those at the helm engaged in such activities, failing to set behavioural standards for the system to follow, the entire structure succumbed to similar practices.

The ultimate consequence was the concentration of all power within the Executive, marked by nepotistic appointments and patronage in public offices. Dismissals and disciplinary proceedings were weaponised, with subjugation to political will prevailing over structural considerations. The judiciary, rendered subservient, lost much of its power through the suppression of political opposition parties. Consequently, the Executive operated with unchecked authority, devoid of scrutiny or accountability. The envisioned checks and balances were rendered powerless.

The judiciary transformed into a platform for political theatrics rather than a channel for upholding laws and protecting human rights. Evident impunity tainted judicial conduct, with cases adjudicated based on political desires. The Mwakenya trials, unchallenged arbitrary arrests, and unlawful detentions underscored this reality. The handling of the high-profile Goldenberg scandal within the justice system, characterised by theatrical attempts to hold perpetrators accountable, exemplified this trend. Chief Justices relocated or removed judges who opposed political elites, advocating that the executive was above the law. While the culture of impunity stemmed from executive grandiosity, the judiciary played a significant role in tarnishing its own reputation by fostering and expanding corrupt practices, as highlighted in various task force reports. The JSC, packed with presidential appointments, became a political puppet exposing the judiciary to executive influence.

The laws and systems enabling such practices were perpetuated through multiple rounds of constitutional amendments, weakening the Constitution, and nullifying its protective provisions. Laws were enacted to serve executive whims, diluting any arm that could have countered the wrongdoings. The use of the police force, tribalism, and a lack of public outcry further enabled impunity.

4.3.2 Manipulating History: Implications for the Nation

Preceding discourse reveals that history possesses the potential to prompt positive transformations within a nation by deriving lessons from the past. However, the manipulation of history presents a disconcerting prospect. The dangers of selective historical interpretation and revisionism are starkly illustrated by the 20th century's encounters with nationalism, particularly evident in Europe. Historical figures such as Hitler in Germany, Mussolini in Italy, and the Soviets in Russia adeptly employed selective historical narratives to advance their nationalist agendas. In contemporary times, nations such as China, India, and Germany persist in the use of selective history and revisionism for political expediency. It is disquieting to note that, despite the calamitous consequences of historical revisionism in the past, this resurgent trend lacks adequate scrutiny.

Within the Kenyan context, the Judicial Service Commission and the judiciary, by tacitly permitting this trend, find themselves succumbing to the perilous trajectory of historical revisionism. By recurrently citing historical challenges faced by the judiciary as justification, the JSC manipulates historical facts with impunity, evading accountability for its actions. The antecedent analysis underscores the stark reality that Kenya's history is scarred by systemic abuses and a pervasive lack of accountability. Consequently, the envisioned system of checks and balances, coupled with the constitutional emphasis on transparency and good governance, was designed to be universally applicable across all branches of government.

The JSC consistently relies on the argument that its independence is paramount for the administration of justice, citing past abuses to rationalise its lack of accountability in crucial functions such as appointments, dismissals, and disciplinary proceedings. This selective historical application is not a judicious approach, and the courts, by affording leeway through this argument, contribute to an inadvisable use of historical understanding. Such actions entail considerable risks, including the jeopardising of the delicate reputations of the Commission and the judiciary, reminiscent of the post-independence era characterised by doubt, suspicion, and a pervasive lack of public trust. Furthermore, there exists the potential peril of reverting to an autocratic regime and reopening doors to systemic impunity.

In light of the Constitution's imperative for purposive interpretations and incorporating historical considerations in judgments, courts routinely reference history. However, in the case of the JSC they selectively apply the historical facts. Presenting the danger of

rewriting and manipulating historical narratives. The potency of history lies in its comprehensive study, contemplating the entirety rather than fixating on isolated segments. Neglecting the holistic perspective may impede the assimilation of critical lessons and establish a hazardous precedent within the judicial system.

With augmented powers come augmented responsibilities. Since the transformation of the JSC under the Constitution, a reassessment of the need for accountability becomes imperative. Kenyan citizens have ardently aspired to good governance, enshrining these aspirations within the constitutional framework, notably in Article 10. The JSC must not lose sight of its status as a public office, emphasising that its decisions and officers must align with national values and principles, while respecting constitutionalism.

The attendant risks associated with such a system are manifold. Allowing one institution or arm to operate unchecked could potentially embolden others, placing the nation at risk of regressing into an autocracy. Upholding democracy and its intrinsic values necessitates the judicious exercise of powers within governance structures. Any allowance for an institution to operate unrestrained establishes a precarious precedent, exerting undue influence on other arms of the government. Moreover, discretion based on historical considerations may undermine the transparent and efficient exercise of power envisaged by the Constitution. The manipulation of history not only facilitates present-day manipulation but also culminates in flawed public decision-making, as decision-makers may remain oblivious to the invaluable lessons of history or draw incorrect conclusions by employing incomplete or inappropriate analogies.

4.4 Conclusion

This chapter aimed to underscore that the safeguards provided to the Judicial Service Commission do not align with a prudent utilisation of history, as a comprehensive historical perspective advocates for accountability across all state organs. It accomplished this goal by initially delving into the proper application of history in decision-making and emphasising the perils associated with selective historical narratives, illustrated through instances of increasing revisionism. The subsequent discussion applied the lens of a complete historical account to the Kenyan context, revealing the extensive history that the JSC and its proponents manipulate. The final chapter will synthesise these insights, offering conclusions and recommendations for this thesis.

5.0 Conclusions and Recommendations

5.1 Conclusions

Any powers that are not curtailed can prove detrimental and be channelled towards advancing selfish interests and gains. Kenya's political history has highlighted the risks of unchecked power that can be exercised beyond the constraints of the law. Due to this, the Constitution envisioned and engendered fourth branch institutions such as the JSC to lead the nation into an era of independence within the constraints of answerability. The judiciary, by remaining silent, and even advancing the JSC's running amok is setting a dangerous precedent. It creates a vacuum within the democracy for a transportation back to the period of arbitrary exercises of power.

The exploration of the Judicial Service Commission and its autonomy within the legal framework of Kenya has revealed intricate intersections between historical realities, legal paradigms, and governance dynamics. The central claim, that the carte blanche autonomy granted to the JSC is unrelated with principles of accountability and transparency, gains depth through an examination of historical contexts and their contemporary implications.

The dangers of selectively applying historical lessons, as illustrated in various global and national instances, pose a significant threat to the judicious exercise of power. The intersection of history and law, as explored in Chapter 4, emphasises the need for a comprehensive understanding of historical narratives when shaping legal perspectives. The manipulation of history, as observed in the JSC's justifications for autonomy, raises concerns about the potential misuse of historical facts.

The historical context of governance in Kenya, particularly the era of impunity preceding 2010, reveals the pervasive challenges that can arise when institutions operate unchecked. The manipulation of history by the JSC, drawing parallels with historical revisionism in autocratic regimes, poses risks to the delicate balance sought in Kenya's post-2010 constitutional framework. The potential repercussions include a loss of public trust, a regression into autocracy, and the reopening of doors to systemic impunity.

5.2 Recommendations

Building upon the conclusions drawn from the comprehensive analysis of the JSC's autonomy and historical considerations, a set of recommendations emerges to align the judicial framework with principles of accountability, transparency, and good governance.

The JSC, while retaining necessary independence, should undergo a critical reassessment of its autonomy. A balanced approach that upholds its role in safeguarding the judiciary's independence while ensuring mechanisms for accountability and transparency is imperative. A nuanced examination of historical narratives must guide this reassessment to avoid the pitfalls of unchecked power.

The JSC's reliance on historical challenges as justification for autonomy should be approached with caution. The judiciary, legal scholars, and practitioners must collaboratively establish a framework that ensures historical accuracy in arguments presented before the courts. This entails a commitment to a comprehensive understanding of historical events rather than selective interpretations.

The constitutional framework should be reinforced to strengthen checks and balances across all branches of government, including the JSC. Mechanisms for accountability should be incorporated without compromising the judiciary's independence. This can be achieved through collaborative efforts between legal experts, policymakers, and civil society.

Efforts should be directed towards public education on judicial processes, the role of the JSC, and the significance of accountability in maintaining a robust judiciary. Informed citizens contribute to a vigilant society that can critically assess the actions of institutions and demand transparency.

In conclusion, the delicate balance between judicial independence and accountability necessitates a mindful recalibration of the JSC's autonomy. Through historical accuracy, strengthened checks and balances, public education, and ongoing dialogue, the judicial system can evolve into a resilient institution that upholds the values enshrined in the Constitution while learning complete lessons from the past.

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