Strathmore University

Law School

TOPIC: EXTENT OF ADMINISTRATIVE DISCRETION OF THE JUDICIAL SERVICE COMMISSION ON THE RIGHT TO BE HEARD DURING REMOVAL OF JUDGES. WHAT HAPPENS WHEN THE GROUNDS FOR REMOVAL AREN'T MET?

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By

Ambwere Cerullo Kangaya

101153

Prepared under the supervision of

Mr. Aleem Visram

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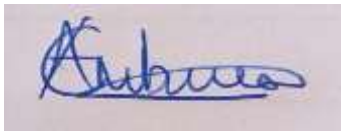
Declaration

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

Signed: 

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

Signed: .....

[Supervisor's Name]: Aleem Visram

Abstract

A decade back, Kenya promulgated a new Constitution which has been termed as transformative. One of the salient features was the judicial independence that it introduced, an example being the formation of the Judicial Service Commission under commissions and independent offices which was milestone in ensuring autonomy of the Judiciary arm of government. The Commission's progress has been hailed to a large extent. However, it has also received backlash in equal measure- especially because of the large powers that it has. Of concern has been the way it conducts the initiation of the removal process of judges from office.

The Constitution certifies the Commission to be the only one that can initiate the removal process of judges from office. Being an administrative body there is legitimate expectation that it shall adhere to principles of administrative law in conducting this role. More so, the Judicial Service Act has given the Commission the authority to formulate preliminary procedures that ought to guide it while initiating the removal process, but then they are non-existent. The result has been unregulated administrative discretionary power. This has brought uncertainties in the execution of this role. Furthermore, the Commission is not allowed to discipline judges whose misconduct is not gross as provided under Article 168(1) of the Constitution. Does this interpret there is an offence without a sanction?

The aim of this dissertation is thus to try and understand the nature of administrative discretion, the extent that the Commission can exercise it in the initiation of the removal process of judges and the way forward for judges whose misconduct does not amount to gross as well as propose recommendations that will ensure prompt and efficient accountability of the JSC in the performance of its administrative powers.

List of Abbreviations

JSC- Judicial Service Commission

List of Cases

Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties) (2020) Eklr.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948).

Baker v Canada (Minister of Citizenship and Immigration) (1999) EWCA.

Council of Civil Service Unions v Minister for Civil Service (The CGHQ case) (1985) The Supreme Court of Canada.

Gladys Boss Shollei v Judicial Service Commission and another (2014) Eklr.

Jack Goldberg v John Kelly (1970) United States Supreme Court.

John D Carey v Jarius Piphus (1978) United States Supreme Court.

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

Judicial Service Commission v Mbalu Mutava & another (2015) eKLR.

Kanda v Government of Malaya, (1962) The United Kingdom House of Lords.

Margarita Fuentes v Robert Shevin (1972) United States Supreme Court.

Mullane v Central Hanover Bank & Trust Company (1950) United States Supreme Court.

Nancy Makokha Baraza v Judicial Service Commission & 9 others (2012) Eklr.

Njoki S. Ndungu v Judicial Service Commission and another [2016] eKLR

Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua (2010).

Rex v John Wilkes (1770), The United Kingdom House of Lords.

Ridge v Baldwin (1964) The United Kingdom House of Lords.

Rookes v Withers A.D 1598.

Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977), The United Kingdom House of Lords.

Susannah Sharp v Wakefield (1891), The United Kingdom House of Lords.

List of legal instruments

Black's Law Dictionary

Commonwealth Latimer House Guidelines and Principles

Constitution of Kenya.

Constitution of Nebraska.

Judicial Code of Conduct and Ethics (2016).

Judicial Service Act Kenya.

Public Officer Ethics Act (2012).

United Nations Basic Principles on the Independence of the Judiciary.

1.1 CHAPTER ONE

1.2 INTRODUCTION/BACKGROUND

Administrative law is involved with the regulation of the exercise of power by stipulating the principles and procedures that administrators are bound to observe in the discharge of their functions. It also provides remedies when these principles and procedures are violated.[1] Among the procedures is the right to procedural fairness, which binds not only judicial bodies, but also bodies exercising administrative functions.[2]

These administrative agencies, which make individual decisions that affect the citizens' lives and set general policies, are staffed by bureaucrats who are neither elected nor directly accountable to the public. This has raised the challenge reconciling administrative decision-making process with democracy. To solve this, administrators have been considered mere implementors of legislative decisions, which is referred to as the transmission belt model of administrative law. [3]

However, there have been disagreements as to how much discretion legislators ought to allow administrative agencies to exercise. The minimalist school of thought supposes that any legislative delegation of authority to agencies should be narrowly construed whereas expansionists assert that administrators should have a wide scope of discretionary powers and be indirectly accountable to the Legislature.[4] Amidst all this, in practice administrative agencies continue to possess considerable discretion, even in the restrictive school of thought.[5]

The situation is not different in Kenya. The Judicial Service Commission (JSC), an administrative body, oversees the removal of judges of superior courts from office.[6] This may be initiated by the JSC acting *suo moto* or on petition advanced to it by any person. If it is satisfied that the petition

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[1] Akech M, *Administrative law,* Strathmore University Press, Nairobi, 2016, 27.
[2] *Ridge v Baldwin* (1964) A.C. 40.
[3] Coglianese C, 'Administrative law: The U.S. and beyond' *University of Pennsylvania Law School*, 2016, 3.
[4] Coglianese C, 'Administrative law: The U.S. and beyond' 4.
[5] Coglianese C, 'Administrative Law: The U.S. and beyond' 3.
[6] Article 168 (1), *Constitution of Kenya* (2010).

discloses any ground for removal, it shall forward it to the President who shall then suspend the judge from office and then appoint a tribunal to investigate the same.[7]

As per the Constitution, the *Judicial Service Act* was enacted.[8] However, both the Constitution and the Act fail to provide for regulations that should guide the JSC in its conduct before it forwards a petition to the President. This lacuna has brought about uncertainties regarding the way JSC conducts itself. Of relevance to this research is the right to be heard, which the JSC has not effectively implemented due to the insufficient notice it gives to the judges facing allegations as well as an equivocal opportunity to be heard, thus putting at risk the constitutional rights of the affected judges.

Another question concerning this discretionary power arises where a judge has committed a misconduct, but such does not sum to being gross. The Constitution does not envisage such a situation. The Judicial Service Act, which is expected to offer clarity, only sets out punishments that may be imposed on a judicial officer that falls short of dismissal.[9] Initially, the JSC took it upon itself to discipline judges of superior courts whose conduct did not meet the gross misconduct threshold. However, the High Court held that the JSC has no authority to make a finding of a lesser infraction and proceed to impose a sanction on a judge of a superior court as such is unconstitutional and unlawful.[10] The question at stake then becomes, what should happen to such judges: do they walk scot free?

1.3 STATEMENT OF THE PROBLEM

States are required to take measures guaranteeing judicial independence through adoption of laws that establish clear procedures and objective criteria for the suspension and dismissal of judges.[11] To facilitate this removal process, *Section 47 of the Judicial Service Act* permits JSC to make regulations outlining the preliminary procedures before making any recommendation of suspension to the President. This is because a person being taken through an administrative action

[7] Article 168(3, 4&5), *Constitution of Kenya* (2010).
[8] Article 168(10), *Constitution of Kenya* (2010).
[9] Third Schedule, *Judicial Service Act* (2012).
[10] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[11] *CCPR General Comment No. 32, Fair and public hearing by a competent, independent and impartial tribunal,* 23 August 2007, para 19.

should be able to tell beforehand what to expect of the process.[12] Therefore, for JSC to be satisfied that complaints against the judge merits a petition to the President, it is only fair and just that it evaluates the complaint first through correct procedure[13] which entails being bound by the principle of natural justice- the right to be heard. It is also said that there is no wrong in law without a remedy: when judges commit a misconduct, there must be some form of sanction.

However, the preliminary procedures are non-existent. The effect has been infringement of fair administrative action: the right to be heard.[14] This is very integral considering the judge's position, reputation and character are at stake and that such also has serious ramifications in terms of integrity and future employment of him as a public officer. [15] Furthermore, the Constitution and the Judicia Service Act do not provide for guidelines on disciplining a judge of superior court short of removal. Interestingly, it has been declared unconstitutional for the JSC to discipline judges of superior courts whose misconduct does not amount to gross misconduct and hence cannot initiate their removal.[16] This contravenes the maxim that there is no offence without sanction or remedy.

The lack of these procedures has resulted in uncertainty on how the JSC carries out this process resulting in the abuse of the right to procedural fairness; right to be heard and thus arbitrary use of discretionary powers by the JSC. Some of the Supreme Court judges have also threatened to effect go-slows because of the acts of the JSC. The overall effect is felt by Kenyans, who have a backlog of cases in court, whereas the ones to litigate are also in conflict. Therefore, this research aims at examining the extent of administrative discretion exercised by the JSC, focusing on the right to be heard, then propose recommendations to ensure its administrative powers are under checks and balances and how to go about cases of judges of superior courts whose misconduct does not amount to gross misconduct.

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[12] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[13] *Nancy Makokha Baraza v Judicial Service Commission & 9 others* (2012) Eklr.

[14] *Gladys Boss Shollei v Judicial Service Commission and another* (2014) Eklr. See also *Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua* (2010).
[15] *Joseph Mbalu Mutava v Attorney General & another* (2014) Eklr.
[16] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.

1.4 JUSTIFICATION OF THE STUDY

This research has both academic and policy significance. Academically, it will further the understanding of the exercise of administrative discretion especially its application in the removal process of judges within the rule of law theoretical framework here in Kenya. Regarding policy making, this research can act as a lead to the drafting of the preliminary procedures that will guide the JSC in running its affairs when initiating the removal of a superior judge from office. Additionally, the research will propose how judges of superior courts will be handled where the misconduct committed is not gross and such does not warrant for removal.

1.5 SIGNIFICANCE OF THE RESEARCH

This research will be of great importance to the legislators, the courts and the JSC at large. The legislators can be guided by it while undertaking key law reforms in the *Judicial Service Act* to ensure that the administrative discretion of the JSC is guided by law, especially the preliminary procedures to be followed during the initiation of the removal process of judges of superior courts. It is therefore imperative that administrative discretion given to these bodies should be limited to ensure its proper exercise and proper mechanisms for accountability should be put in place to ensure justice is served to all. The research will also provide remedy to the challenges the JSC has posed during removal process by advocating for respect of the right to be heard- which is a very key component of administrative functioning. Such will then guide the courts during judicial review, which is a recourse of maladministration.

The research will also try to cure the pitfalls in the law by pioneering the solution towards misconduct of judges of superior courts whose misconduct does not warrant for removal (is not gross) but need some form of sanction.

1.6 AIM AND OBJECTIVES OF THE STUDY

The aim of this research is to assess the impact of administrative discretion on the right to be heard during the initiation of the removal of judges from office and the fate of a judge whose misconduct is not gross. To attain this goal, the research will be guided by the following objectives:

1. To scrutinize the nature of administrative discretion.
2. To ascertain the extent to which the JSC can exercise administrative discretion, on the right to be heard and cross-examine, in initiating the removal of judges and analyze the challenges posed.
3. To identify the suitable recourse for judges whose misconduct does amount to gross.
4. To formulate recommendations that ensure prompt and efficient accountability of the JSC in the performance of its administrative powers.

1.7 RESEARCH QUESTIONS

1. What is administrative discretion?
2. What is the extent of JSC's administrative discretion on the right to be heard during the removal of judges? And what challenges arise because of this administrative discretion?
3. How should be judges whose misconduct do not qualify as gross be handled?
4. What recommendations can be put forward to facilitate accountability of the JSC in the performance of its administrative powers?

1.8 HYPOTHESES

This research is based on the following hypotheses:

The JSC has used its administrative discretion ultra vires in initiating the removal process of judges of superior courts from office. Furthermore, that judges are likely to behave arbitrarily when they are not sanctioned.

1.9 LITERATURE REVIEW

Administrative discretion, which forms the substance of administrative law, has been a subject of research, academic and scholarly writings globally.[17] This discretion can be defined as the ability of public administrators to command a sphere of influence to take actions that reflect the specific values they may hold. It can also be said to be an administrator's perceived latitude in effecting

[17] O'Halloran S & Epstein D, 'Administrative procedures, information and agency discretion' 38 (3) *American Journal of Political Science*, 1994, 697.

administrative outcomes.[18] Relevant to this research, two approaches will be considered: the nature of the discretion and its extent on the right to be heard with regards to removal of judges of superior courts. It will be ethical to first appreciate the existing scholarly and academic works since they form the basis of this research. The review will, however, endeavor to critique some of the existing works and the pitfalls that they portray.

O'Halloran and Epstein cover the nature and extent of administrative discretion. They identify the U.S 1946 Administrative Procedure Act as the pioneer statutory recognition of agency discretion, which created three categories of permissible agency action: rule making, adjudicatory hearings and discretionary actions. The bureaucrats are to use that freedom to either further the goals of the interest groups or to serve public good. The authority is mainly delegated by Parliament. However, this discretion is fettered. There is the *ex-ante* controls and ongoing controls- the institutions that check agency action on regular basis. The agencies are held accountable when they enact outcomes different from the policies preferred by those who originally delegated power.[19]

On removal of judges, various scholars have hailed the effort of the 2010 Constitution in ensuring transparency in the process. Migai Aketch points out that the problems that the independence constitution posed- it failed to establish the due process mechanisms to facilitate the removal process.[20] He then appraises the 2010 Constitution, which mandates only the JSC to initiate the removal process of superior judges. He states that the JSC is required to hold a hearing before sending the petition to the President when there are legitimate grounds for removal.[21] However, he does not elaborate on what counts as fair hearing before the petition is sent to the President. He is also silent on what happens when a misconduct exists but fails to meet the threshold established under Article 168(1) of the Constitution, does the JSC have any powers to act, or they should do away with the matter.

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[18] Roman A, 'The roles assumed by public administrators: The link between administrative discretion and representation' 39(4) *Public Administration Quarterly*, 2015, 603-604.
[19] O'Halloran S & Epstein D, 'Administrative procedures, information and agency discretion' 702.
[20] Migai A, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?' 18(1) *Indiana Journal of Global Legal Studies*, 2011, 378.

[21] Migai A, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?' 18(1) *Indiana Journal of Global Legal Studies*, 2011, 390.

Danne Ally does a comparative analysis of the removal of judges between Kenya and South Africa.[22] His main aim is to show how the constitutions of the two states protect the judges against unwarranted removals. He holds the view that the dismissal of judges must be entrenched in a constitution, which must outline clear procedures and objective criteria for removal of judges. He only acknowledges the fact that the removal being initiated by the commission enhances judicial independence. He also fails to recognize the fact that Kenya does not have preliminary procedures provided by statute to facilitate JSC's conduct during initiation of the removal process, unlike South Africa. For Kenya, he uses case laws to make the procedure, in which case, cannot have similar and binding force, authority and certainty as a statute.

Judicial precedents have also illustrated some of the deficiencies in the removal process. In *Joseph Mbalu Mutava v Judicial Service Commission & another (2014),* the court found the JSC to be an administrative body and thus was bound by the rules of natural justice and procedural fairness. Court held that procedural fairness was mandatory despite the nature of the inquiry. However, the Court of Appeal decision made a turn. The court took the view that since the law does not provide for procedure to be followed, then JSC has the discretion to adopt any fair procedure appropriate to its task and since it was only making preliminary inquiries, the respondent was not entitled to cross-examine the witnesses.[23] This leaves the JSC with undefined discretion.

In *Nancy Makokha Baraza v Judicial Service Commission & 9 others (2012),* one of the petitioner's contention was that she was given a very short notice regarding her right to be heard, while she was on official duty. The binding rule is that sufficient time must be given between issuance of the notice and the meeting itself and such amounts to due notice. The court took an unexpected turn by holding that since this was not the actual hearing and that the petitioner did not request for more time, therefore her right was not violated. It is not upon the petitioner to beg for her constitutional right. Since the right to fair administrative action is provided under the Constitution, the JSC, being an administrative body, is bound by it. Such is not afforded only during hearings since it forms part of natural justice.

[22] Ally D, 'A comparative analysis of the constitutional frameworks for the removal of judges in the jurisdictions of Kenya and South Africa' 2 (3) *Athens Law Journal*, 2016.
[23] *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

The above analysis portrays lacuna in the law in terms of the preliminary procedures to be followed during the initiation of the removal process of a superior judge from office.

The law is also silent where a judge commits a misconduct that is not gross to warrant for removal. Walter Khobe notes that the Constitution provides for the grounds for removal of judges of superior courts. However, it lacks explicit provisions for disciplining of such a judge who is short of removal. He notes that the JSC has thus bestowed upon itself the power to admonish a judge where the misconduct does not rise to the threshold of misconduct warranting for removal of a judge.[24] However, such action by the JSC is ultra vires.[25]

One of the issues in the case of *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) was whether the JSC had the legal mandate to discipline judges of superior courts whose misconduct did not amount to being gross. The court held that the Tribunal established under Article 168 (7)(b) of the Constitution of Kenya was the only body authorized to determine whether an alleged conduct of a judge violated the Constitution and make binding recommendations to the President. It went further to state that no residual powers were granted to the JSC to decide the fate of a judge once it had determined that the threshold for removal had not been met. Therefore, by admonishing Justice Njoki Ndung'u, the JSC crossed its constitutional and statutory boundaries which limits its powers to determining the merits of the complaint against a judge for the sole purpose of determining whether the petition should be send to the President.

1.10 LIMITATIONS

This study faces various limitations. Very few scholars have written on the issue of the preliminary procedures to be followed by the JSC during removal process. Additionally, the preliminary procedures, which are purported to have been sent to Parliament for approval, are not accessible to the public. Furthermore, most of the Commonwealth jurisdictions use Parliamentary system in the removal of judges, Kenya does not. It is thus a challenge to establish a comparative analysis.

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[24] Ochieng K W, 'The composition, functions and accountability of the Judicial Service Commission from a comparative perspective' in Ghai J C (ed) *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 63.

[25] Article 168(4) *Constitution of Kenya* (2010). See also Ally D, 'A comparative analysis of the constitutional frameworks for the removal of judges in the jurisdiction of Kenya and South Africa' 145.

The Corona virus pandemic has also been a setback to the research since the researcher could not access library materials at the University due to the curfew by the government. Lastly, most of the online resources require subscriptions, which has been a major challenge considering the researcher is an undergraduate student.

1.11 CHAPTERIZATION

This research is broken down into the following chapters.

1. Introduction & background chapter.

This chapter will lay the foundation for this dissertation by laying down the abstract, discussing the background to this research, the problem statement, aims and objectives, the literature review as well as the limitations of this study.

2. Theoretical framework and methodology.

This chapter shall narrow down on the various theories that are relevant and key in justifying the arguments brought up in this dissertation. Additionally, the chapter will provide which methodology shall be adopted when conducting this research as well as its relevance.

3. The nature of administrative discretion.

This chapter will focus on understanding what is the understanding of the term administrative discretion and its parameters in terms of how it is exercised.

4. The extent of JSC's administrative discretion in the removal of judges.

This chapter will major in analyzing the extent of the JSC's discretion on how it conducts its procedures on matters initiating the removal of judges. Of concern shall be the right to be heard. This shall be done with the illustration of key precedents: Mbalu Mutava, Nancy Baraza and Njoki Ndung'u cases.

5. Sanction for judges who do not meet the 'gross' misconduct threshold.

The aim of this chapter will propose a sanction for judges who have engaged in misconduct, but they are not gross and how such should be handled.

6. Conclusion and recommendations.

This chapter shall wind up the research by giving recommendations on the problems analyzed therein.

1.12 RESEARCH METHODOLOGY

This research will employ doctrinal methodology of research. The target material is those of relevance to administrative and constitutional branches law. The resources will also borrow from other relevant fields of law to this research. The doctrinal approach will entail the review of both primary and secondary sources of information. The primary sources shall include, but not limited to constitutions, statutes and case laws. On the other hand, secondary sources shall include, but not limited to, authoritative textbooks, journals and academic articles, newspaper articles, relevant internet resources and academic reports.

Both Kenyan and global sources of information will be made use of, the latter being of great significance while discussing the ideal situation and putting forward the recommendations.

2 CHAPTER TWO

2.1 THEORETICAL FRAMEWORK

The JSC is a constitutionally established commission[26] which exercises this power on behalf of the people of Kenya, from whom the judicial authority being exercised by the judges and magistrates is derived.[27] To properly understand how the JSC goes about the removal process of judges, two theories shall be employed. These shall be the rule of law theory and the principal-agent theory.

2.1.1 Principal-Agent Theory

The principal-agent theory arises out of an agency relationship. This relationship is a special contractual engagement arising when an agent is appointed and authorized to act as a representative of a principal in any of the specified undertaking.[28] Nuno Garuopa and Jud Mathews explain that this theory has three parties: The Legislature, which appoints an agency to carry out a task and enlists a monitor, the court, to supervise its performance.[29]

Authority to perform the acts by an agent, either express or ostensible, is key in establishing existence of this relationship. Johan Adriaensen asserts that both the agent and the powers to be delegated must be specified.[30] Legislatures often enact laws that grant administrative discretionary powers that are so wide to confound to the principle of legality.[31] As Migai Aketch and David Epstein put it, the agency has discretion over the functions delegated to it. The limits on the discretion may be defined, either clearly and in a narrow sense- ultra vires doctrine or in a wider

[26] Article 171, *Constitution of Kenya* (2010).
[27] Article 159 (1), *Constitution of Kenya* (2010).
[28] Laibuta K, *Principles of commercial law*, Law Africa, Nairobi, 2006, 391.
[29] Mathews J & Garoupa N, 'Strategic delegation, discretion and difference: explaining the comparative law of administrative review' 62 *The American Journal of Comparative Law*, 2014, 5.
[30] Adriaensen J & Brandsma G, 'The principal-agent model, accountability and democratic legitimacy' *Palgrave Studies in European Union Politics*, 2017, 41.
[31] Akech M, *Administrative law*, 30.

sense, considering the purpose.[32] In the end, the principal has moral superiority and is the ultimate judge over the agent's behavior and may sanction the agent.[33]

This theory has roots in democracy. Due to large populations and for effective governmental control, most political organizations have resorted to representative democracies.[34] Rousseau terms the elected representatives as delegates acting on behalf of the people and they are given specific tasks to undertake.[35] A common way to reconcile decision making by unelected administrators with democratic principles has been to consider administrators as mere implementers of decisions made through a democratic legislative process. Given that agencies do possess discretion, one aim of administrative law has been to identify procedures that encourage administrators to exercise their discretion in ways that promote both procedural and substantive values.[36]Therefore, the Legislature and Judiciary holds the agent responsible for ultra vires acts on behalf of the citizenry.

The JSC obtains its powers from the Constitution and the Judicial Service Act, drafted by Parliament, making Parliament the principal since it is the peoples' representative. The commission is tasked with a role of initiating the removal of process of judges from office. The discretion of the commission is limited to the grounds set under the Constitution. However, the preliminary procedures to be followed are non-existent. The commission should thus restrict itself, in whatever process it takes, to the administrative principle of legality- which provides that acts of government or administrators must be justified by specific law as well as natural justices.[37] If that is not the case, it shall be acting beyond its scope and the affected party has a recourse through judicial review.[38]

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[32] Akech M, *Administrative law*, 31. See also Epstein D &O'Halloran S, 'Administrative procedures, information and agency discretion' 38(3) *American Journal of Political Science*, 1994, 701.
[33] Adriaensen J & Brandsma G, 'The principal-agent model, accountability and democratic legitimacy' 41.
[34] Akech M, *Administrative law*, 6.
[35]Rousseau J, *The social contract, or principles of political right*, Book II, 1779. Translated by Cole G, *J.M Dent & Sons* London, 1973.
[36] Coglianese C, 'Administrative Law: The U.S. and beyond' 3- 4.
[37] Akech M, *Administrative law*, 31.
[38] Mathews J & Garoupa N, 'Strategic delegation, discretion and difference' 9.

2.1.2 Rule of Law Theory

The second theory that is relevant in understanding the administrative discretion of the JSC is the rule of law theory. It was mainly propounded by A V Dicey, who, in the first sense, asserted that a person could only suffer lawfully for a distinct breach of law before the ordinary court. He thus argued that the rule of law is distinct because of the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.[39] Consequently, Tamanaha provides that this theory requires that government officials and citizens be bound and act in consistent with the law.[40] One of the functions of rule of law is to is to impose restraints on government officials in that they should abide by valid laws in force at that time thus reducing willfulness and arbitrariness.[41] Therefore the discretion being exercised must be in accordance with the law. Dworkin makes a distinction between week and strong discretion.[42] In the second sense, the rule of law theory entails, not only that no man is above the law, but that also every man, whatever his or her rank, is subject to the ordinary law of the realm and amenable to the jurisdiction by ordinary courts.[43]

The Constitution provides for the right to fair administrative action which applies to every judicial and administrative bodies. As per the rule of law theory, the restraint of the Commission is provided by the Constitution in terms of the five grounds for removal of judges. However, since there is the absence of guiding standards in terms of preliminary procedures to be followed during the initiation of the removal process, the JSC has discretionary powers to act in such a way that enables it to fulfill its functions. The JSC should thus restrict itself, in whatever process it takes, to the administrative principle of legality- which provides that acts of government or administrators must be justified by specific law.[44] Additionally, its actions should conform to the right to fair administrative action- including the right to be heard. Since everyone is equal before the law, the JSC will be held liable for violation of constitutional right and acting beyond their discretion.

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[39] A V Dicey, *Introduction to the study of the law of the constitution*, 1885.
[40] Tamanaha B, 'A concise guide to the rule of law' St. John's University School of Law, Legal Studies Research Paper Series Paper Number 7, 2007, 3- < http://ssrn.com/absstract=101205> on 10 March 2020.
[41] Tamanaha B, 'A concise guide to the rule of law' 8.
[42] Dworkin R, *Taking rights seriously*, Harvard University Press, Cambridge, 1978, 190.
[43] Ambani J and Mbondenyi M,' The new constitutional law of Kenya: principles, government and human rights' 1 st ed, Claripress Limited, Nairobi,2012,27-28.
[44] Akech M, *Administrative law*, 31.

Regarding the second sense, since everyone is equal before the law, the judges should be held accountable for misconducts that they commit, even if they do not amount to gross.

3 CHAPTER THREE

3.1 ADMINISTRATIVE DISCRETION

3.1.1 Meaning of administrative discretion

From a very broad approach, administrative discretion has been conceptualized as the ability of administrators to command a sphere of influence to take actions that reflect the specific values they might hold.[45] However, when narrowed down and applied to public functionaries, it can be said to be the power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, without external influence. This discretion undoubtedly is to some extent regulated by usage or fixed principles.[46] Thus, an official in whom a discretion is vested has power to make choices between various courses of action; if he must achieve a specific end, he has a choice as to how that end may be reached. Therefore, this makes choice the essence of discretion.[47] However, the choice needs to be based on and guided by some laws or legal principles.

The term administrative discretion has evolved over time from the blanket meaning of variety of choices and personal judgement to liberty governed by law and principles- thanks to judicial precedents. One of the founding cases on administrative discretion is the *Rooke's case*,[48] which defined it as the science of understanding to distinguish between falsity and truth, right and wrong, shadows and substance and not according to the will and private affections. The case, however, does not touch on any legal basis as guardian against misuse of discretion. In subsequent judgements, courts have taken a further step by trying to draw a clear-cut line between ordinary

[45] Meier K & Bohte J, 'Structure and discretion: Missing links in representative bureaucracy' 11(4) *Journal of Public Administration Research and Theory,* 2001, 457.
[46] Black's Law Dictionary, 4th ed.
[47] Rakesh C, 'Administrative discretion' 2(4) *International Journal of Academic Research and Development*, 2017, 130. See also *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977), The United Kingdom House of Lords.
[48] *Rookes v Withers* A.D 1598.

discretion, which implies use of personal will and choice to make decisions, and legal discretion, which ought to be guided by reason and law. In *R v Wilkes*,[49] the court held that discretion, when applied to the legal context, means sound judgement guided by law. That it must be governed by rule and not by humor, and must not be arbitrary, vague and fanciful, but legal and regular. Additionally, in the leading case of *Sharp v Wakefield*,[50] Lord Halsbury stated that,

> *"When it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion…. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office, ought to confine himself…"*

3.1.2 Source and rationale for administrative discretion

This concept of administrative discretion was born out of administrative law. This is because much of the activity of the government is carried out by bureaucrats, also known as public officers or administrators, acting as agents of the government. They engage in the administration of, among other things, taxes and criminal laws, issue licenses and permits, and regulate all manner of social, economic and even political activities. In other words, they facilitate the interaction between the government and its citizens in their capacity as agents.[51] However, the experiences can either be pleasant or unpleasant, depending on how these agents of government exercise their derived powers. As a result, administrative law endeavors to make these experiences pleasant, by requiring the bureaucrats to make decisions that are lawful, procedurally fair, as well as explain or justify their decisions to those affected, or are likely to be affected.[52] In doing this, it regulates the exercise of power by stipulating principles and procedures which administrators are required to observe and thereafter provides remedies in the event they are not adhered to.[53]

This is not an end. There exist several practical reasons as to why the delegation of some of the governmental functions have had to take place. The Legislature, though not in all instances, has been compelled to create administrative agencies for execution and enforcement of its expressed

[49] *Rex v John Wilkes* (1770), The United Kingdom House of Lords.
[50] *Susannah Sharp v Wakefield* (1891), The United Kingdom House of Lords.
[51] Akech M, *Administrative law*, 3.
[52] Akech M, *Administrative law*, 3.
[53] Akech M, *Administrative law*, 26.

policies.[54] The role of administrative authority and discretion has been to mainly fill the 'holes' left by the law as it fails to guide decisions in certain cases, in part because of statutory ambiguity, which exists for a number of reasons such as the legislature facing time constraints as well as lacking all the information to make laws that cover for all situations. Additionally, the lawmakers are usually unaware of future events and thus must confront the possibility of unsolvable technical problems.[55] Moreover, the social and economic heterogeneity of the electorate makes it difficult for a law to serve all groups equitably as administrations face difficult and different problems which cannot solved by a single rule.[56] The Legislature cannot, as a result, possibly enact into a single body of law the infinite details necessary to completely define the national policy involved in the control and solution of many social or economic problems.

Consequently, it is usually ideal to establish a standard or policy in general statutory language and entrust its enforcement to an agency created for that purpose. Lastly, since Parliament remains in session only intermittently, it cannot not possibly exercise the continuing supervisory power so frequently necessary to the complete effectuation of legislation policies. More so, statutes are seldom self-executing. They need interpretation and must be applied in myriad concrete circumstances. As a result, in interpreting and applying statutes, administrators assume discretion.[57]

This therefore warrants for allowance of administrative discretion to the bureaucrats or administrators to enable them to do their work effectively and efficiently since it is assumed that they are professional experts and have delegated authority from the Legislature.[58] This explains the significance of administrative discretion in the implementation of government policies and realization of laws in a jurisdiction.

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[54] Cooper R, 'Administrative justice and the role of discretion' 47(4) *Yale Law Journal*, 1938, 580-581.
[55] Otenyo E, Administrative discretion, Springer International Publishing, Switzerland, 2016, 2. https://link.springer.com/content/pdf/10.1007%2F978-3-319-31816-5_955-1.pdf .
[56] Rajesh K, 'Administrative discretion and inclusive growth in Indian perspective: achievements & challenges' Scholarly Research Journals, 2012, 3294. Coglianese C, 'Administrative Law: The U.S. and beyond' 3.
[57] Cooper R, 'Administrative justice and the role of discretion' 580-581.
[58] Otenyo E, Administrative discretion, Springer International Publishing, Switzerland, 2016, 2.

3.1.3 Categorization of administrative discretion

Any examination of discretion must acknowledge Dworkin's categorization of discretion. He symbolizes discretion to a hole in a doughnut since it does not exist except as an area left open by a surrounding belt of restriction. This is followed by a distinction of the three senses of discretion. The first form of weak discretion requires that the standards that an official must apply demands use of judgement and cannot be applied mechanically.[59] In other words, it requires some form of choice or judgment to be exercised by the decision-maker, even though standards exist.[60] The second form of weak discretion is applicable in instances where an official has final authority to decide which cannot be reviewed or reversed by any other official. On the other side, strong discretion exists where an official is not bound by the standards set by the authority in question. He acknowledges that such a discretion does not exist since every action by a person makes relevant certain standards of rationality, fairness and effectiveness.[61]

Galligan makes a further proposition that discretionary power is based on two variables, one being the ambit that an official has for the assessment and judgement of the issues. As that, he holds that there is discretionary power when there is a relative absence of guiding standards, followed by the inference that it is for the authority to establish its own. Further, he points out that, even where there are standards, the official may require further exercise of discretion in the creation of more specific, individualized standards. The second variable is the surrounding attitudes of officials as to how the issues are to be resolved. The regulatory institution itself may provide incentives and disincentives for people to make decisions in particular ways.[62]

3.1.4 Constraints to administrative discretion

The traditional constraints on administrative discretion were proffered by AV Dicey as part of his analysis of the rule of law. Dicey's view on the rule of law clearly recognized the need to make agencies accountable. One of the key features of the rule of law is the need to curb conferral of

[59] Dworkin R, *Taking rights seriously*, Harvard University Press, Cambridge, 1978, 31.
[60] Nagarajan V, 'Discourses on discretion and the regulatory agency' in *Discretion and Public Benefit in a Regulatory Agency: The Australian Authorization Process*, ANU Press,2013, 6.
[61] Dworkin R, *Taking rights seriously*, 33.
[62] DJ Galligan, Discretionary Powers: A Legal Study of Official Discretion (1986) cited in Nagarajan V, 'Discourses on discretion and the regulatory agency' 134-135.

wide, arbitrary or discretionary power to government officials in the interests of certainty and predictability. [63] Therefore, rule of law imposes legal constraints on administrators by requiring compliance with existing laws at the time of any given action. This implies that the actions by administrators must have positive legal authorization, without which it is improper.[64]

The constraint can also be viewed from the perspective of the legality principle in administrative law, which provides that every act of an administrator must be justified by a specific law.[65] It is trite that the Legislature often enacts laws which grant administrators wide discretionary powers and therefore the reason for existence of this principle.[66] To solve this problem, the *ultra vires* doctrine was established. In the narrow sense, it means that a person or body acting under statutory power can only do those things that the statute authorizes him or it to do. Therefore, an act will be ultra vires if the person or body doing it did not have the statutory power to do it.[67] A person or body cannot perform an administrative act or exercise a power unless they are authorised to do so by statute or the common law.[68] In the wider sense, it is used to denote the way the power has been exercised. As such, an administrator's or administrative body's decision can be challenged on legality basis- that is, although they had the power to do an act, that power was exercised in an unlawful manner- an example being failure to comply with the rules of fair procedure.[69]

The discretion must also be used in a reasonable manner. That administrator when making decisions, should ensure that they are reasonable or rational especially when they are exercising discretionary powers. In determining whether an administrator's decision is reasonable, it is vital that the 'Wednesbury unreasonableness' test be deployed. The courts, therefore, will only interfere with an administrative body's discretionary decision where "it is so unreasonable that no reasonable authority could ever come to it" and such means it must be "one that would require something overwhelming."[70] A decision is deemed to be irrational where it is so outrageous in its

[63] Nagarajan V, 'Discourses on discretion and the regulatory agency' 136.
[64] Tamanaha B, 'A concise guide to the rule of law' 3.
[65] Akech M, *Administrative law*, 29.
[66] Wade W & Forsyth C, *Administrative law*, 8th ed, OUP, 2000, 21.
[67] Akech M, *Administrative law*, 29.
[68] Booysen H, 'Administrative custom and the ultra vires doctrine' 92(3) *South African Law Journal,* 1975, 291.
[69] Akech M, *Administrative law*, 31.
[70] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) English and Wales Court of Appeal.

defiance of logic or accepted moral standards that no person would have applied his mind to the question to be decided could have arrived at it.[71]

An administrative discretion also needs to be deployed in a proportionate manner. The proportionality principle asserts that the means used by administrators must be appropriate to achieve the objectives sought. It must, therefore, not go beyond what is necessary to achieve those objectives.[72] Thus, if an administrator has a variety of options to attain a particular goal, he must go with the one that puts the least burden on the individual affected. This helps to ensure that the use of unfettered discretionary power is curtailed.

4 CHAPTER FOUR

4.1 EXTENT OF ADMINISTRATIVE DISCRETION BY THE JSC

In understanding and analyzing the nature of administrative discretion exercised by the JSC regarding the right to be heard, it is vital that we apply the implied authority under principal-agent theory as well as Dworkin's categorization of discretion. The rule of law theory shall also be instrumental in showing the relevance of procedures in a legal framework. But first, we will start by looking at the legal provisions governing initiation of the removal process of judges.

There exists limited grounds under which a judge of a superior court in Kenya may be removed from office, which are: inability to perform the functions of office arising from incapacity; breach of Judicial code of conduct; bankruptcy; incompetence and gross misconduct or misbehavior.[73] This removal may only be initiated by the JSC, acting *suo moto* or on petition to it by any person, which after considering the petition and upon being satisfied that it discloses a ground for removal, send it to the President who shall then suspend the judge from office and appoint a tribunal to investigate into the matter.[74]

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[71] *Council of Civil Service Unions v Minister for Civil Service (The CGHQ case)* (1985) The United Kingdom House of Lords.
[72] Akech M, *Administrative law*, 35.
[73] Article 168(1), *Constitution of Kenya* (2010).
[74] Article 168(2, 3, 4 & 5), *Constitution of Kenya* (2010).

The Constitution only authorizes Parliament to enact a legislation providing for the procedure of a tribunal appointed by the President;[75] no such provision exists for the JSC while initiating the removal process. The Judicial Service Act was therefore enacted. Because of the expertise the JSC possesses and the administrative autonomy, Parliament, through the Act, gave them the discretion to come up with regulations for efficient conduct of its mandate and such regulations may provide for, among others, the preliminary procedures for making any recommendation regarding removal of a judge of superior court to the President.[76] However, up to date, these regulations are nonexistent, and this forms the basis of this research.

The principal-agent theory draws a good illustration of how JSC exercises its authority (administrative discretion) while performing this mandate of the removal process of judges of superior courts. The JSC has actual (express) authority, as an agent of Parliament, regarding this role since it derives its powers from the Constitution and the Judicial Service Act- the mandate is written down. This authority has been specifically conferred to JSC and limited in terms and scope for the purpose for which it is given, that is the five grounds for removal.[77] However, since the regulations guiding the preliminary procedures are non-existent, the JSC also possesses implied authority to do everything necessary and ordinarily incidental to the attainment of the object for which it is appointed. However, this implied authority must be exercised in the customary manner and in the ordinary course of business.[78] This authority symbolizes Dworkin's weak categorization of discretion where some form of choice needs to be exercised by the JSC, even though the constitutional standards (grounds for removal) do exist.

In considering the petition, and to be satisfied that it discloses a ground for removal, it is imperative that the JSC adheres to constitutional provisions on fair administrative action since it is a constitutional and administrative body.[79] To be exact, the fair administrative action- procedural fairness which is closely interrelated to natural justice. It is widely accepted that rules of natural justice, in particular right to fair hearing, applies not only to judicial bodies but also to bodies

[75] Article 168(10), *Constitution of Kenya* (2010).
[76] Section 47 (1) and (2, c), *Judicial Service Act* (2012).
[77] Laibuta K, *Principles of Commercial Law*, 394.
[78] Laibuta K, *Principles of Commercial Law*, 394.
[79] Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jacton B. Ojwang, Judge of the Supreme Court of Kenya Report and Recommendation of the Investigation into the Conduct of Hon. Mr. Justice Prof Jacton B. Ojwang, para 304.

exercising administrative functions and the JSC is no exception.[80] This is a common law custom since it has been adopted worldwide by most common law jurisdictions. In *Ridge v Baldwin,* Lord Hodson identified three features of natural justice: the right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and the right to be heard in answer to those charges.[81] Of importance to this research is the right to be heard. In the Kenyan jurisdiction, the right to procedural fairness is constitutionally enshrined under Article 47, which provides that every person has the right to administrative action that is procedurally fair.

Procedures play a very instrumental role in upholding the rule of law. Although law performs different functions in society, the citizens expect that it should, at least, promote justice and this is done by establishing procedures that ensure their claims are treated in a uniform manner as others who have similar claims.[82] Therefore, a person being taken through an administrative action should be able to tell beforehand what to expect of the process. This is no different from the preliminary procedures that the Act allows the JSC to formulate. This is because such regulations will ensure that those judges facing allegations which may lead to removal from office can clearly predict the procedure to be followed.[83]

Lack of these regulations to guide the JSC has led to exposure of a lot of uncertainties in the initiation of the removal process of judges of superior courts from office, especially pertaining to the right to be heard. The JSC has been inconsistent with the way it goes about this right since its discretion is undefined therefore leaving it with very broad discretion on how to go about observing this right. In *Kanda v Government of Malaya,* Lord Denning pronounced that,

> *"That if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."*[84]

[80] *Ridge v Baldwin*, The United Kingdom House of Lords (1964).
[81] *Ridge v Baldwin*, The United Kingdom House of Lords (1964).
[82] Migai A, *Administrative Law*, 57.
[83] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[84] *Kanda v Government of Malaya*, (1962) The United Kingdom House of Lords.

Therefore, the right to be heard, which forms the basis of an administrative hearing, can be divided into two: the procedural part, which entails being given a fair opportunity to prepare and the substantial part, which entails the right to be granted an opportunity to argue one's case in an unequivocal manner. That the judge must be able to tell clearly that he was granted an express opportunity to be heard, it should not be implied from circumstances. The following part will try to show how both ways have been violated by the JSC due to their unfettered discretion.

4.2 FAIR OPPORTUNITY TO PREPARE AND NOTICE

Due process and its procedural rules are meant to protect persons from unjustified deprivation of life, liberty or property.[85] This is through enabling persons to contest the basis upon which it is proposed to deprive them of their protected interests.[86] The core of these requirements is notice and a hearing before an impartial body.[87] Notice is therefore, an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality. It ought to be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[88] It must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[89] This illustrates that anyone undergoing a hearing has the expectation of being given sufficient or due notice as to when they will be appearing before an administrative or judicial body to argue out their case and or defend themselves.[90] This notice enables them to prepare sufficiently beforehand. In the case of *Baker v Canada*,[91] it was held that the values underlying the duty to procedural fairness relate to the principle that the individual(s) affected should have the opportunity to present their case fully and fairly.

However, regarding the JSC, such has not been the case as it has been giving some of the accused judges very short notice: which is a violation of the right to be heard. This was evident in the case of *Nancy Makokha Baraza v Judicial Service Commission and 9 others*, one of the issues raised

[85] *John D Carey v Jarius Piphus* (1978) United States Supreme Court.
[86] *Margarita Fuentes v Robert Shevin* (1972) United States Supreme Court.
[87] https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-requirements-of-due-process
[88] *Mullane v Central Hanover Bank & Trust Company* (1950) United States Supreme Court.
[89] *Jack Goldberg v John Kelly* (1970) United States Supreme Court.
[90] Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jacton B. Ojwang, para 285.
[91] *Baker v Canada (Minister of Citizenship and Immigration)* (1999) Supreme Court of Canada.

by the appellant was that she was informed, on 12th of January 212 at 9:00 am, that she was to appear before the JSC that very day at 2:00pm to answer an affidavit that had been made against her. At this time, she was on her way to Naivasha on official duty when she received the communication. The following day, the JSC issued a statement to the press conveying their decision of sending the petition to the president, without the petitioner being heard. The court found that the JSC was economical with its time, but held that since that was not a hearing, and because the appellant did not request for more time, then the failure to give her sufficient time did not violate her right. This reveals that the lack of the regulations has left it open for the JSC to manipulate the due notice principle through its unfettered discretion disabling the alleged judges from arguing out their cases properly and to their satisfaction.

Such is wanting since it is trite law that sufficient time must be given between the issuance of the notice and the meeting itself- due notice.[92] In the case of *John Rioba Maugo v Riley Falcon Security Services,*[93] the court held that the speed with which the disciplinary process for the claimant was conducted denied him time to prepare and adequately defend himself as he was issued with a show cause letter and expected to respond to it on the very same day. It was therefore held that the procedure was so flawed that it amounted to unfair dismissal. Using this case as a guide, Nancy Baraza was given a very short notice, and this resulted in violating her right to be heard as the violation hindered her from defending herself and making her case.

4.3 SUBSTANTIVE BIT: ACTUAL OPPORTUNITY OF BEING HEARD

In accordance with the provisions of Articles 47 and 50 of the Constitution of Kenya, the components of fairness in any administrative hearing are reasonable advance notice and reasonable opportunity to be heard. The basic principle is that a person should be able to know what to expect of the process. As said by Dr, Mutunga, "*if the JSC cannot give justice to judges, how can they convince the natives of this country that the Judiciary dispenses justice?"*[94] This issue has been contentious in various disputes brought to court between the JSC and disputing judges. The courts

[92] *Republic v KMTC ex parte James Chepkonga Kendagor (2004)* Eklr.
[93] *John Rioba Maugo v Riley Falcon Security Services* (2016) Eklr.
[94] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.

in Kenya have taken a very literal and rigid interpretation on this issue, while heavily borrowing from Lord Denning's quote that:

> *"... the investigating body is under a duty to act fairly: but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it…. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only… But, in the end, the investigating body itself must come to its own decision and make its own report."*[95]

This position has been observed in the case of Mbalu Mutava, where the court was cognizant of the fact that neither the Constitution nor the Judicial Service Act stipulates the procedure to be followed during this removal process. It further pronounced that because of lack of the regulations pursuant to section 47 of the Act, then JSC has the discretion to adopt any fair procedure appropriate to its task.[96] However, from Nancy Baraza's case, we have seen that JSC has failed on this.

Additionally, Article 168(4) of the Constitution tasks the JSC to consider the petition and be satisfied that it discloses a ground for removal before forwarding it to the President. The JSC is therefore not a conveyor belt but plays the role of a sieve in the process. To be satisfied that the complaints alleged against a certain judge merits a petition to the President, it is only just and fair that it exhaustively evaluates the complaint before doing so.[97] This is done through evaluation of the complaint, which the JSC should do so by a careful and thorough examination of the facts. Such examination should include seeing and hearing both the complainant and the judge separately as that would serve to inform and enhance a balanced and proper evaluation of the circumstances that have arisen which is likely to lead to the removal of a judge. The only sensible and practical way to attend to complaints raised against a judge is to invite him to answer the charges and

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[95] *Regina v Race Relations Board ex parte Selvarajan* (1976) The United Kingdom House of Lords.
[96] *Joseph Mbalu Mutava v Attorney General & another* (2014) Eklr.
[97] *Nancy Makokha Baraza v Judicial Service Commission & 9 others* (2012) Eklr.

thereafter determine the weight and quality of the complaints raised against him before acting.[98] The Latimer House Guidelines also provide an important starting point: in cases where a judge risks removal from office, he must have the right to be fully informed of the charges, to be represented at a hearing, to make full defense and be judged by an impartial and independent tribunal.[99]

The JSC has again proved to be non-compliant with this right. In the case of *Apolo Mboya v Judicial Service Commission,*[100] the JSC wrote to Justice Njoki Ndung'u that a special committee had been appointed to hear the claimant's petition and was informed that the hearing date would be communicated to her later. However, this never happened, and the next thing was a communication from JSC informing her that the petition had been determined and she had been found to have committed misconduct warranting for her admonition. There was legitimate expectation from the reading of the first letter, that a formal hearing where the parties would be allowed to present their own positions was going to take place.[101] Court took note of the fact that although JSC is a master of its own procedures, the nature of allegations made against the judges of the Supreme Court required an oral hearing and the evidence of the complainant needed to be tested by cross-examination. Notwithstanding this, the court held that even though an oral hearing would have been better in the circumstances of the case, the JSC had the discretion of considering the petition and the written responses in reaching a determination as it did.[102]

Also, the Tribunal inquiring into the conduct of Justice J B Ojwang' took note of the fact that the JSC did not give the judge a chance to be heard against the allegations levelled against him resulting in negation of the rules of natural justice and in clear contravention of articles 47 and 50 of the Constitution of Kenya.[103] The judge had complained that he had been condemned unheard and stated that, *""it is just coming here for the first time so it is not fair to me because I have not*

[98] *Republic v Chief Justice of Kenya & 6 Others Ex Parte Moija Mataiya Ole Keiwua* [2010] Eklr.
[99] Guideline VI. 1(a)(1), *Commonwealth Latimer House Guidelines.*
[100] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[101] *Susanna Njoki Ndung'u v Judicial Service Commission* (2016) Eklr.
[102] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[103] Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jacton B. Ojwang, para 273.

been given an opportunity to talk about it, to have my advocates deal with it, I only find that it appears here as one of the charges against me…"

To determine the extent of JSC's administrative discretion regarding the two aspects of the right to be heard, we will employ the tests developed in the case of *Baker v Canada* which affirmed that procedural fairness is flexible and entirely dependent on context to determine the degree of fairness. As such, the following factors need to be considered: the nature of the decision being made and the process to be followed; the nature of the statutory scheme and the term of the statute pursuant to which the body operates; the importance of the decision to the affected person; the presence of any legitimate expectation; and lastly the choice of procedure made by the decision maker.

Applying the tests, the nature of the decision being made is that it is a binding decision. This is because the decision by the JSC to the President to suspend a judge from office is binding on the President. He has no discretion as his hands are tied.[104] The process to be followed is non-existent since the preliminary procedures have not been availed. The decision to suspend a judge is of great weight in terms of importance. This is because the judge's position, reputation and character are at stake and that such also has serious ramifications in terms of integrity and future employment of him as a public officer. [105] As affirmed by the tribunal inquiring into the conduct of Justice J B Ojwang, the dismissal of a constitutional office holder from office is a grave and final decision. It not only impacts livelihoods, but also affects reputations, impinges on character and lowers the esteem ascribed to and erodes confidence in public office in the body politic.[106] Since the JSC is an administrative body, there is legitimate expectation that it shall stick to Article 47 of the Constitution on fair administrative action- procedural fairness. With all the tests being in the affirmative, therefore, the degree of fairness to be exercised by the JSC ought to be higher.

This analysis shows that the powers held by the JSC have proved to be too much leading to unpredictability on how it conducts its procedures- thus going against the principle of a good administrative body; that it should be able to let know those coming before it the procedure that

[104] Article 168(5), *Constitution of Kenya* (2010).
[105] *Joseph Mbalu Mutava v Attorney General & another* (2014) Eklr.
[106] Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jacton B. Ojwang, para 305.

shall be in use. This is because he decision to institute tribunal proceedings against a judge should not be taken lightly. The mere fact that tribunal proceedings have been commenced will generally be understood as signaling that the judge faces credible allegations of misconduct which are serious enough that, if proved, would warrant the removal of the judge from office. The impact is usually immediate and may not be fully undone even if the judge is subsequently cleared.[107]

5 CHAPTER FIVE

5.1 MISCONDUCT BY JUDGES NOT AMOUNTING TO GROSS

From a layman's understanding, the rule of law concept requires that everyone in a jurisdiction be bound by the existing laws despite their political, economic or social status, among others. With this, the Constitution provides for it as one of the national values and principles, which bind all state organs, state officers, public officers and all persons, whenever any of them applies or interprets the Constitution or enacts, applies or interprets any law.[108] Judges fall under state officers and are therefore bound by the same.[109] In addition, judges can also be said to be public officers since everyone who holds a public office in Kenya is a public officer, and therefore correct to deduce state officers as public officers too.[110] The Public Officer Ethics Act, the legislation governing public officers in Kenya, guarantees for the rule of law by stipulating that public officers shall carry out their duties as per the law.[111] It allows each commission to come up with a specific code of conduct and ethics for the public officers for which it is the responsible commission.[112] This gave birth of the Judicial Code of Conduct and Ethics which guides, among others, judges. Their conduct is therefore governed by law. What remains unclear is how a misdemeanor by judges that does not warrant for removal should be addressed. This lacuna

[107] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, The British Institute of International and Comparative law, London, 2015, 94.
[108] Article 10, *Constitution of Kenya* (2010).
[109] Article 260, *Constitution of Kenya* (2010).
[110] https://www.afrocave.com/public-officer-and-state-officer-kenya/
[111] Section 10 (1), *Public Officer Ethics Act* (2012).
[112] Section 5 (1), *Public Officer Ethics Act* (2012).

violates the rule of law theory since their actions remain unsanctioned as the enforcement is a challenge.

Pursuant to the national values and principles under Article 10 of the Constitution- integrity, transparency and accountability, the authority assigned to a state officer is said to be a public trust which is to be exercised in a manner that brings honour to the nation and dignity to the office as well as promotes public confidence in the integrity of the office.[113] For judges, integrity as a value requires them to ensure that their conduct is above reproach in the view of a reasonable observer and that their behaviour and conduct reaffirms the peoples' faith in the integrity of the Judiciary.[114] A judge is also expected to avoid impropriety and the appearance of it in all his activities as such is essential to the performance of his duties. An example is by not allowing a member of the legal profession to use his residence to receive clients and also exercise their freedom of association, assembly and belief in a manner that preserves the dignity of the judicial office and impartiality of the Judiciary.[115] They are also expected, in their personal relations with other members of the legal profession, to avoid situations which reasonably give rise to suspicion or favourism.[116] Other principles and values are professionalism, equality and non-discrimination, propriety, prohibition against sexual harassment among others.[117]

Therefore, judges as state officers are expected to behave, whether in public and official life or private life or in association with other persons, in a manner that avoids demeaning the office he holds. In the event of such contravention, the accountability principle applies as he shall be subject to the applicable disciplinary procedure and may, in accordance with the disciplinary procedure, be dismissed or otherwise removed from office- discipline being among the guiding principles of leadership and integrity.[118] The wording 'may'- used to express possibility,[119] seems to imply that the disciplinary procedures entails more than just dismissal- meaning that there could be other avenues of discipline.

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[113] Article 73 (1)(a) (iii) and (iv), *Constitution of Kenya* (2010).
[114]Section 6, *Judicial Code of Conduct and Ethics* (2016).
[115] Section 7 (6)(7), *Judicial Code of Conduct and Ethics* (2016).
[116] Section 7(5), *Judicial Code of Conduct and Ethics* (2016).
[117]Part II, *Judicial Code of Conduct and Ethics* (2016).
[118] Articles 73 (2)(e) and 75 (1)(c) and (2), *Constitution of Kenya* (2010).
[119] Cambridge Dictionary.

In order to maintain public confidence in the Judiciary, the courts to be precise, it is expected and appropriate that where a judge faces credible allegations of misconduct, they should take no part in the administration of justice till those allegations are resolved- behavioral accountability.[120] This helps facilitate judicial accountability, which one form is discipline.[121] The intensity of the discipline ranges according to the level of the misconduct with serious misconduct prompting for removal. However, there may also be provisions for lesser misconducts such as formal reprimands and admonitions,[122] and *the Latimer House Guidelines* allow such processes to be conducted by the chief justice of the courts.[123]

International instruments on the independence of the judiciary have articulated at least three broad principles that pertain to the substantive grounds for removal of judges.[124] The first is that the grounds for removal must be discernible in accordance with established standards of judicial conduct.[125] The second principle asserts that states apply grounds for removal that are a threat to judicial independence.[126] The universally agreed grounds are incapacity or misbehavior that clearly renders them unfit to discharge their duties.[127] However, recently there has been shift of the use of terms, from misbehavior to misconduct since in ordinary parlance, the term misbehavior sometimes has more trivial connotations.[128] The third principle has to do with the degree or level of misconduct that is considered sufficient to warrant the removal of a judge.[129] The Latimer House Guidelines refer to serious misconduct.[130] The same is echoed in the Principles and Guidelines on

[120] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 97.
[121] Principle V (1) (a), *Latimer House Principles.*
[122] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 80.
[123] Guideline VI.I (a)(ii), *Latimer House Guidelines.*
[124] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 81.
[125] Article 19, *United Nations Basic Principles on the Independence of the Judiciary.*
[126] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 82.
[127] Principle IV, *Latimer House Principles.*
[128] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 82.
[129] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 83.
[130] Guideline VI.1(a)(A), *Commonwealth Latimer House Guidelines.*

the Right to a Fair Trial and Legal Assistance in Africa which provides that the removal could be based on gross misconduct incompatible with the judicial office.[131]

These international principles have been constitutionalized by our Constitution. As per Article 168, a judge may be removed from office on grounds of breach of the Judicial Code of Conduct and Ethics or gross misconduct or misbehaviour. However, the issue of whether a particular instance of judicial misconduct is sufficiently serious to warrant for removal, which is the standard set by the Latimer House Principles, is capable of arising in any jurisdiction, irrespective of whether the grounds for removal consist of an extensive code or a brief reference to misconduct or misbehaviour in a constitutional provision.[132] Since the Constitution does not define what amounts to gross misconduct or misbehaviour, such must be determined on case by case basis and not every violation of the Constitution or other law or judicial code of conduct is gross misconduct or misbehaviour.[133] This therefore implies that there can be violations by judges that do not suit into the grounds for removal but are, nevertheless, misconducts.

The Constitution does not envisage for the disciplinary measures of a judge of superior court short of removal. On the other hand, the Judicial Service Act only provides for disciplinary powers to the JSC about judicial officers alone. Such disciplinary measures include interdictions and reprimands.[134] They do not, however, apply to judges of the superior courts. This lacuna has resulted in the JSC, using its wide administrative discretion in the form of implied authority, assuming the mandate of disciplining such judges falling short of removal. This was manifest in the case of three Supreme Court judges, Justices Mohamed Ibrahim, JB Ojwang' and Njoki Ndung'u where the JSC received a petition for their removal as they had gone on a go-slow and refused to offer judicial services to the members of the public.[135] One of the judges instituted a suit against the JSC because it had found her conduct wanting of a judge of Supreme Court and

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[131] Article A.4 (p), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
[132] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 86.
[133] *In the Matter of a Tribunal Appointed under Article 168(5) of the Constitution to inquire into the Conduct of Honorable Mr. Justice D. K. Njagi Marete, Judge of the Employment and Labour Relations Court of Kenya*, 2020, para 517.
[134] Part IV, Third Schedule, *Judicial Service Act* (2012).
[135] Ochieng K W, 'The composition, functions and accountability of the Judicial Service Commission from a comparative perspective' in Ghai J C (ed) *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 63.

amounted to misconduct. Since the conduct did not warrant for removal and formation of a tribunal by the President as required under Article 168 of the Constitution, JSC sent her a letter indicating that she had been admonished for misconduct.[136]

However, this discretion by the JSC was declared unconstitutional in the case of *Apollo Mboya v Judicial Service Commission,*[137] where one of the issues therein was to do with the contours of the mandate of the JSC in the process of the removal of a judge from office. The JSC was of the view that if it determines that the threshold for referral to the President for formation of a tribunal has not been met, it has the residual powers to inflict sanctions on a judge where minor infraction by a judge is established. The court, however, held that the JSC lacks power to try and convict a judge since such power is constitutionally reserved for the tribunal. As such, where JSC finds no evidence that meets the constitutional threshold for removal, then it must down its tools. This therefore provides an escape route for judges with minor infractions, which totally goes against the national values and principles enshrined in the Constitution, the constitutional chapter on leadership and integrity the Public Officer Ethics Act as well as the Judicial Code of Conduct and Ethics since such infractions, although minor, demeans to an extent, the office of the judge.

The Court observed that if the makers of the Constitution had intended to empower the JSC to discipline judges, then an appellate mechanism ought to have been provided for judges aggrieved by JSC's decision. The role of disciplining is only limited to magistrates, judicial officers and other staff of the Judiciary as enshrined under Article 172 of the Constitution. It was therefore held that since JSC had no authority to discipline a judge, by admonishing Justice Njoki Ndung'u, it had crossed its constitutional and statutory boundaries which limits its powers to determining the merits of the complaint against a judge in finding whether it should be sent to the President.

The same stand was also affirmed in the earlier case of *Judicial Service Commission v Mbalu Mutava and another*[138] where Justice Ouko pronounced that:

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[136] *Njoki S. Ndungu v Judicial Service Commission and another* [2016] eKLR.
[137] *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* (2020) Eklr.
[138] *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

> *"In considering the petition, the Commission conducts a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. That it has at least some probative value. The inquiry is not intended to lead to a final decision but is designed only for receiving information for the purpose of a recommendation on which a subsequent and final decision may be founded…. If on a preliminary inquiry the Commission finds no basis or merit in the petition, it must reject it. It is only upon being satisfied, prima facie, that a case has been disclosed to warrant sending the petition to the President will it take that step."*

With the judgement that the JSC cannot discipline judges, there is serious violation of the rule of law, which requires that everyone be bound by the law. However, in this instance, the law is selective since it provides for disciplinary measures of junior judicial officers while leaving out judges of superior court. This is a threat to judicial accountability and the reputation that the office of the judges holds. There is thus need, to implore less punitive disciplinary measures for such misdemeanours since for removal, the allegations of gross misconduct or misbehaviour must be serious, substantial and weighty[139] as well as legally bestowing that mandate to an appropriate person or body. This could either be the Commission or the Chief Justice.

6 CHAPTER SIX

6.1 CONCLUSION AND RECOMMENDATIONS

6.1.1 Conclusion

This research focused in analyzing two specific questions: the extent of JSC's discretion on the right to be heard in the removal of judges and the way forward for a judge whose alleged misconduct does not suffice to gross. The analysis was realized in chapter form with the first chapter giving the background to this research, the problem statement, hypotheses, assumptions, justification for the study as well as literature review. The second chapter was focused on discussing theoretical frameworks relevant in understanding the research questions- rule of law

[139] *In the Matter of a Tribunal Appointed under Article 168(5) of the Constitution to inquire into the Conduct of Honorable Mr. Justice D. K. Njagi Marete, Judge of the Employment and Labour Relations Court of Kenya*, 2020, para 521.

and principal-agent theories and linking them up with the research questions. Chapter three was about the meaning, understanding and latitude of the term administrative discretion as well as its relevance in a democratic space. This was significant since there is need to understand the nature before discussing the extent of administrative discretion.

The fourth and fifth chapters dealt with the two research questions, respectively. For the first question, it was evident especially from the *Mbalu Mutava and Njoki Ndung'u* decisions that Kenya is dependent on common law understanding of the right to be heard which leaves the manifestation of natural justice and procedural fairness to the determination of the administrative body, despite the progressive interpretation brought about by Article 47 of the 2010 Constitution that provides for fair administrative action as a constant factor by all administrative bodies. This school of interpretation is problematic since it gives the JSC unfettered discretion over the entire process at the detriment of constitutional guarantees of the citizenry- affected judges.

On the second question investigated at the fifth chapter, as it sits, the legal framework does not envisage for a situation where a judge's conduct does not meet the threshold for removal. JSC, which had taken up the mandate of disciplining judges short of removal, was held to be performing an unconstitutional role in the *Njoki Ndung'u/ Apolo Mboya* case since its constitutional role was only limited to considering and being satisfied that the petition for removal of a judge discloses a ground for removal then forward it to the President. This therefore leaves such judges without any form of sanction posing a threat to the rule of law.

These two are critical issues that need advancement of solutions, which the next bit will bring forward.

6.1.2 Recommendations

1. Pursuant to section 47(2)(c) of the Judicial Service Act, the JSC should work on formulation of the preliminary procedures that shall guide the entire process of the removal of judges to prevent the inconsistencies existing and the violation of constitutional rights.
2. One of the key elements to be included in the procedures is due process. This will help create certainty and consistency in how the removal process is run as well as enable those

appearing before the commission be able to tell the procedure that will be deployed beforehand.

3. Given the serious nature and gravity of a decision to remove a judge from office, the JSC is and should be required, at the bare minimum, to observe certain procedural safeguards- the right to be heard and sufficient notice of the hearing under due process while preparing the procedures.[140] This is because procedural fairness is imperative as it ensures no person is condemned unheard. To facilitate this, prior notice of the allegation should be given, at least 21 days, and a fair opportunity to be heard accorded- either to the party himself or their legal representatives.[141]
4. Since removal is the most severe disciplinary sanction, some jurisdictions make provision for lesser measures such as formal reprimands.[142] Nebraska- a state in the United States of America, for example, allows for reprimand, discipline and censure of judges, of both superior and lower courts.[143] Therefore, the Constitution of Kenya should be amended to create room for disciplining of judges of the superior courts whose conduct does not amount to gross and hence cannot be removed from office so that their punishment is constitutionally legal and enforceable. The amendment should further permit Chief Justice, in consultation with the JSC, to be responsible for any disciplinary measures short of removal.[144] However, public admonition of judges should be prohibited.[145]
5. The timeframe for the lesser disciplinary measures should be reasonable and limited to a maximum of 6 months period.[146]

[140] Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jackton B. Ojwang', para 297.
[141] Section 27, *IBA Minimum Standards on Judicial Independence* (1982). See also Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jackton B. Ojwang', para 306.
[142] Smit Z, *The appointment, tenure and removal of judges under the Commonwealth principles: A compendium and analysis of best practices*, 80.
[143] Section V (30), *Constitution of Nebraska* (1875).
[144] Guideline VI.I (a)(ii), *Latimer House Guidelines.*
[145] Guideline VI.I (a)(iii), *Latimer House Guidelines.*
[146] Section V (30), *Constitution of Nebraska* (1875).