



Why the LSK Choice of Female Representative to the JSC Is Crucial

By Tom Kagwe



Since the promulgation of the Constitution of Kenya in August 2010, the Judicial Service Commission (JSC) is one of the Constitutional Commissions which has gone through what was described by scientist Thomas Kuhn as a “paradigm shift” in his book, *The Structure of Scientific Revolutions*. A paradigm shift was described in scientific terms as a way in which there occurs, or needs to occur, a fundamental change in how to describe a scientific development of basic concepts and practices that had previously guided that science.

Assuming exercise of judicial power is a science (even if social), and reflecting on where Kenya was during the tenure of the previous JSC that reigned before the fundamental changes that have taken place under the 2010 Constitution, Kenya has fundamentally transformed that institution.

The single most significant difference is that whereas in both the repealed constitution and the current one the JSC is a constitutional commission, the composition and number of members are radically different, giving the current commission 11 members with some independence of thought and decision-making unlike the previous 5-member JSC.

The five members of the previous JSC were direct appointees of the president. They included the Chief Justice, the Attorney General, two judges appointed from amongst the puisne judges and

finally the chair of the Public Service Commission. The requirement today that judicial officers elect their own JSC with a broad-based representation of various interests within the legal profession contrasts with the previous JSC which only represented the interests of the appointing authority. The President.

Therefore, whereas the previous JSC was filled with presidential appointees whose appointment was not even approved by the National Assembly, today all but six of the JSC members are officially nominated by the president but may or may not be approved by the National Assembly. This gives the National Assembly veto powers to approve or disprove that membership.

Chaired by the Chief Justice, the JSC includes a judge representing the Supreme Court; a judge elected by members of the Court of Appeal; a judge elected by judges of the High Court; a Chief Magistrate representing the Magistracy; and finally, two members (one man and one woman) representing the Law Society of Kenya (LSK).

The other members are more or less appointed with the tacit approval of the National Assembly. That is, if the president has sway over the National Assembly membership, as the current President has, through what in *The Elephant* has been described as the “Tyranny of Parliament by the Jubilee Party”, then the nominees have been appointed tacitly by the president in the knowledge that members of the National Assembly will raise no objections.

These other members of the JSC include the Attorney General, a member nominated by the Public Service Commission, and two members (one man, one woman) to represent the members of the public. Finally, the Chief Registrar of the Judiciary makes up the 11th member and is the Secretary to the JSC. The latter has no voting rights in decision-making.

Current context

In the current political context of the Building Bridges Initiative (BBI) debates, there are radical proposals around the JSC. Some of these include introducing an Office of the Ombudsperson, whose occupant will sit in the JSC. This has caused a political and judicial furore, particularly because it is proposed that the Ombudsperson will be appointed directly by the president.

In social and political spaces, some have opined that the Ombudsperson will be the president’s “watchman” in the JSC. It is no wonder then that there has been overt and covert resistance from the LSK, the JSC and the entire Judiciary. Kenyans have been here before and it is obvious that they do not want a return to the past.

Furthermore, the BBI intends that the two judges and one magistrate who are elected by their peers serve for a fixed term of five years. The constitution bestows the powers of nomination and election of these members on judicial officers, not on itself. Yet the BBI proposals tend to crystallise that power on the constitution. Thus, it has been argued that this is total interference with and an erosion of the independent choice of the electorate (judicial officers in this case) to hold their representatives to account.

Moreover, it is perceived as an attempt by the Executive to interfere with the Judiciary, with many recalling the president’s warning following the nullification of the August 2017 presidential poll that “we shall revisit” the judiciary. On his way out, Uhuru Kenyatta seemingly intends to make good his threat — let us also not forget that David Maraga departed office on a controversial note.

The former Chief Justice, David Maraga, ended his term by recommending that the president dissolve parliament for not conforming to Article 27 of the constitution — which provides that “The State shall take legislative and other measures to implement the principle that not more than two

thirds of the members of elective or appointive bodies shall be of the same gender” — which did not go down well with members of his inner circle, and hence perhaps the need to “tame” the Judiciary.

Therefore, in the current debate pitting the Executive against the Judiciary through the BBI process, it is incumbent upon the JSC to stand tall and protect itself. It requires members of impeccable integrity, character, tone, gravitas and bravado to face present and future challenges.

This commentary delves specifically into the role of the JSC as provided in Article 172 of the Constitution, which is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

Given that the Office of the Chief Justice is still vacant, it points out to the nuances that may emerge in the recruitment process, and why the role of each member is important, including that of the future female representative of the LSK to the JSC.

The JSC needs members with impeccable integrity, character, tone, gravitas and bravado to face present and future challenges.

This is so because currently there are only nine members, split between those who may be considered fully independent, who are five, and those representing the Executive, who are four. However, with the departure of the female representative, the “independents” go down to four: Mohammed Warsame, David Majanja, Evalyne Olwande (who represents the Judiciary) and Macharia Njeru (who represents the LSK).

It is my view that, as Philomena Mwilu is the acting Chief Justice, her legal and social history, her pending criminal cases and of course her controversial “acting capacity” as the Chief Justice, render her susceptible to the influence of “other forces” other than those she should ideally represent — her peers in the Supreme Court — when deciding who will be Kenya’s next Chief Justice. In case of a 4-4 tie, she may be called upon to be the tie-breaker. This is an important decision to make.

Electing the LSK Female Representative

As alluded to above, two members are elected directly by the membership of the Roll of Advocates (that the LSK scrutinises through an Elections’ Board) and they are formally appointed by the president through a Gazette Notice. In May 2019, Macharia Njeru — formerly the Chairperson of the Independent Policing Oversight Authority (IPOA) — won the Male Representative seat by trouncing the then incumbent Tom Ojienda. Today, Macharia represents the LSK in the JSC.

The first five-year term of the Female Representative of the LSK, Mercy Deche, came to an end on 24 March 2021 and although she is eligible for a second five-year term, she will be stepping down. In her view, Deche has served her term and is satisfied with her performance; she therefore wants to be succeeded.

However, since institutions are led by people, they reflect the personal convictions and commitments of those within them. The current JSC has been led by former Chief Justices Willy Mutunga and David Maraga, with the latter exiting the scene only recently in January 2021. The JSC advertised its search for the third Chief Justice following the “paradigm shift” in the appointment of members of the JSC referred to above.

This article aims to point out issues as they appear, issues that should be dealt with, and issues that should make advocates line up to vote in large numbers for whoever their choice will be. It is an

election that advocates cannot afford to ignore, particularly in view of the ongoing BBI debates previously referred to.

Politics at the LSK

The LSK is in crisis — with some members seeking to remove the current president, Nelson Havi while others support him. Already a meeting to remove Havi had been called for the 27th March 2021.

With regard to the Female Representative position, the advertisement was made on 18 December 2020 by beleaguered Chief Executive Officer Mercy Wambua, who is not on good terms with Havi. The deadline for the submission of interest in the position was 18 January 2021. However, since then, the LSK has been suffering a severe crisis of leadership — both at the level of the Secretariat and at the Council which is led by Havi.

It is therefore inconceivable that the LSK will be a composite body with a leadership capable of successfully steering the election processes.

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Unless something is done by the whole Council working together in harmony, with unity of purpose, and demonstrating ethical leadership, the upcoming elections are bound to be perhaps the most controversial in LSK's history since the promulgation of the 2010 Constitution.

As stated, unlike the former Male Representative, Tom Ojienda, who sought a second term in accordance with the JSC Act, Mercy Deche is not seeking re-election. That election was very competitive since the difference between Ojienda and Njeru was not more than 300 votes. With Deche not in the race, the power of the incumbency is non-existent unlike during the Ojienda poll, which was a huge challenge.

With a divided Council, a seemingly authoritarian president who is accused of not consulting by some members of the Council, and a CEO faced with a dictatorial president, and court cases flying left and right, LSK is in troubled waters.

Changes in the Judicial Service Commission

As changes are happening to the LSK and the Judiciary, the JSC is also facing imminent changes. The biggest change has been the retirement of the former Chief Justice Maraga and the search for his replacement.

Since Maraga retired, media and other pundits, including lawyers, have been very vocal about the eligibility of the "acting Chief Justice", Philomena Mwilu, to be given such a role considering the various criminal matters facing her in court. Indeed, a petition was also filed by Okiya Omtatah seeking a constitutional interpretation regarding this transition, and her eligibility and/or the legality of her position as "acting Chief Justice".

Moreover, even within the JSC itself, similar questions have been raised both by the Commissioners and in the Secretariat, not to mention the murmurs at the top echelons of the Judiciary. Therefore, as the Commissioners seek to recruit the next Chief Justice, the politics of the institution will be laid bare.

The JSC will most likely be split in their opinion based on how they join(ed) the JSC. As mentioned above, only the Chief Justice is appointed through a public process and the nominee is sent to the president for formal appointment. The president's "direct nominees" are four compared to the four who may be called "independent". This is because, currently, the seat of the Female Representative of the LSK fell vacant on 24 March 2021. The Acting Chief justice is likely to lean towards the former group of "conservatives" as I shall demonstrate.

Therefore, as campaigns for the position of the LSK's Female Representative begin in earnest, all the eight candidates for this position and the voting advocates will need to bear in mind what is going on in the JSC, as that is the institution they seek to join together with the new Chief Justice who will be the chairperson of the JSC.

The Campaign environment

In addition to the foregoing, there are other issues that shaped the campaign agenda in the period between the submission of papers on January 18, and the election on March 24, 2021. Already, we observed stay orders emerging from the courts stopping the LSK's Elections Board from proceeding with the shortlisting and processes of preparing for the election of the LSK Female Representative.

Campaigning in the midst of the COVID-19 pandemic

There is no doubt that COVID-19 has altered our social, economic and political landscape. This elections taking place in an environment which is largely restricted through: limiting the number of gatherings; observing physical and social distancing even if the campaign is done in public halls; and no campaigns outside curfew hours, among other COVID-19 protocols that must be respected.

In this context, violation of the protocols could cost a candidate the seat. This could happen since the media will be watching, as will advocates. If candidates cannot observe the law, then their reputations are at serious risk.

Second, candidates who are tech-savvy will have an advantage, since campaigns will be done on new media, using Facebook, Twitter, Zoom meetings, and other such platforms. Those that will attract the biggest number of followers are likely to tip the balance of this campaign.

Finally, any candidate who wishes to win this election should of necessity be seen to be supporting the government, especially the Ministry of Health. This is not because one should support blindly, but in order to create linkages with the Ministry to support efforts to have Kenyans respect COVID-19 protocols and encourage them to get vaccinated. This could be as easy as linking one's campaign sites with the relevant information from the Ministry, especially their daily updates.

Political knowledge and the IEBC

Running for political office requires knowledge of politicking, and the ability to debate issues without losing arguments. One should be consistent in messaging whether on social media or on traditional media such as pamphlets, television, radio, etc. Second, politics has neither permanent friends nor permanent enemies. It's bare knuckles in political debates, but with respect when differences emerge.

Third, this is a political position, not a legal position and candidates need to learn this fast. In a period of less than eight weeks or so, things will turn hot, and it is not the best legal mind that will win the position, but the one with political guts.

Finally, the Independent Electoral and Boundaries Commission (IEBC) will oversee the elections.

Knowledge of this institution will prove very vital for any candidate. The institution has a series of codes of conduct, protocols, regulations, and so on. Familiarity with the IEBC rules of procedure is essential for candidates.

The IEBC is an institution that has faced serious issues of integrity during every electoral cycle in Kenya. However, it has conducted itself professionally for other institutional elections such as that of the LSK. Candidates' knowledge of past LSK elections and whether there were complaints concerning voting, counting, tallying, verification and announcement of the eventual winner is a valuable asset.

The typologies of voters

In his book, *The Science of Election Campaigning*, Afrifa Gitonga makes the argument that there are three types of voters in the world of politics. These typologies have been manifested variously in political competition and they include voters who are rational and who seek to question everything the candidate has done, if seeking re-election, or is committing to do for them for them by seeking office.

Second, sentimental voters are those attracted by sensual appeal and they will vote on that very basis. These voters are impressed by the looks, by the mannerisms and by the beauty of the candidate, and even by how they dress.

Thirdly, Afrifa talks of conformist voters who, unlike the two above, simply conform to how the tide is moving, by asking questions like "who are we voting for?" They go with the flow and do not make any rational or sentimental decision.

The advocates may or may not understand these concepts fully. Back in 2007 I wrote about the three typologies above and added two more: there are those who vote with the head (rational), those who vote with the heart (sentimental), and those who vote with the wind (conformist).

In addition, there are those who vote with the tongue (ethnicity of a candidate, which is very familiar in Kenya) and, finally, those who vote with the stomach (those whose decision is based on what they have "eaten" from the candidate). These typologies exist even amongst the advocates despite references to "learned friend" or "senior".

Role of young lawyers

It is evident that there has been a debate between the long-serving "seniors" and the "juniors" — recently admitted advocates. The debate is basically about what young lawyers feel about the old and established advocates and the young lawyers' role in the advancement of the legal profession in Kenya in the absence of equal and fair opportunities for progress. This debate has not ended, and it is not ending any time soon. It should be approached with caution and information on where this debate is headed could be a great piece of the puzzle in the elections.

There are those who vote with the tongue and those who vote with the stomach.

In my opinion, since each candidate has at least 15 years of practice as per the requirements, they belong to the "seniors" category. Those who have been practicing for less than 15 years have different perspectives about what these elections are about, unlike the "seniors" who know the difference between practicing law under the old legal framework of the repealed constitution and under the current decade-old constitution.

This was a hot issue during the May 2019 and is not to be ignored by any candidate as it could be a deciding factor in the forthcoming election.

Selling the agenda

Selling the agenda is the most important matter for consideration. It should document what the first five years, between 2021 and 2026, would involve. There are many problems mentioned in the policies — such as the BBI proposals — in the laws being proposed, the LSK leadership wrangles, the possible splits between the “independents” and the “conservatives” in the JSC, etc. Prioritising what is to be tackled, and in which sequence, should not just be documented but should also be verbalised throughout the campaigns.

This should include appreciating, upholding and defending the advances made by the 2010 Constitution; providing a considered legal opinion about the BBI process; transforming the case management system to reduce the backlog of cases and ensure the speedy dispensation of justice; and, strengthening ethics and integrity by enforcing the codes of conduct, among others.

Eight candidates have been cleared to run for the position of Female Representative of the LSK to the JSC and they have formally submitted their nomination papers. The election board will vet these aspirants and determine who actually appears on the electoral ballot. Using the above typologies, lawyers are spoilt for choice, but this independent and objective assessment should help advocates select the best female candidate to represent the LSK at the JSC. Be on the lookout.

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