

The Judicial Service Commission as a Constitutional Hinge: Independence, Accountability and Judicial Governance in Kenya



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Abstract

The Judicial Service Commission is often described by listing its powers. That account is accurate but incomplete. The Commission is the institution through which the Constitution of Kenya attempts to reconcile three demands that do not naturally move together. Judges and judicial institutions must remain independent from executive, legislative, internal, professional, private and popular pressure. Judicial government must remain accountable to the public. The courts must also possess the people, resources and administrative systems required to deliver justice. This article argues that article 172 places those demands in one constitutional office. The JSC is therefore more than a recruitment panel or disciplinary body. It is a constitutional hinge between independence, accountability and effective judicial government. The article first locates the Commission within the post-2010 rejection of executive patronage. It then explains why article 171 requires effective institutional representation rather than factional delegation, and why the advocate representatives must carry the organised



Bar's evidence into the Commission while exercising independent constitutional judgment. The article next maps the JSC's functions across recruitment, discipline, conditions of service, performance review, training, finance and advice. It examines the pressure points revealed by Kenyan law and practice, including opaque selection methods, presidential obstruction, incomplete disciplinary procedure, delayed proceedings, the proposed publication of individual performance reports, institutional capacity and conflicts of interest. It proposes bounded independence through published criteria, assessment methods that test judgment and temperament, fair and timely disciplinary rules, performance safeguards, transparent recusal, research capacity and public reporting. Every exercise of JSC power

should be independent in source, lawful in method, reasoned in form and credible in public effect.

Introduction

The Judicial Service Commission sits where constitutional principle becomes institutional practice. Article 172 charges it to promote judicial independence and accountability while facilitating the efficient, effective and transparent administration of justice.¹ Those words do more than announce a mandate. They place the Commission at the point where Kenya decides who may judge, how the judicial workforce is governed, whether misconduct is punished fairly, and whether the Judiciary has the human and material capacity to make constitutional rights real.

The usual account starts with powers. The JSC recommends judges, disciplines judicial officers and staff, reviews conditions of service, organises training and advises the government on the administration of justice.² That catalogue is necessary, but it conceals the constitutional problem. Each power can protect the Judiciary from external domination; each can also become a source of internal domination, secrecy or delay. A council created to guard judges may itself require guarding. A commission designed to disperse patronage may reproduce it behind a more respectable institutional form.

This tension offers the central puzzle of the Kenyan JSC. How can an institution be sufficiently insulated to resist the Executive and Parliament, yet sufficiently answerable

to justify decisions that shape the third arm of government? How can representative membership broaden legitimacy without turning commissioners into personal delegates? And how can public interviews, written rules and judicial review become genuine safeguards rather than ceremonial signs of transparency?

The basic answer is that independence and accountability are not rival destinations. Properly understood, they are mutually constitutive conditions of lawful judicial government. Independence identifies the actors and pressures from which a decision must be protected. Accountability identifies the law, reasons and procedures through which that decision must be justified. Walter Khobe's work on Kenya's independent institutions makes the point in institutional terms: constitutional entrenchment is important, but design and practice determine whether a commission becomes an effective force for accountability.³ Comparative scholarship reaches a similar conclusion. Judicial councils may rebalance power, but their existence alone does not guarantee judicial quality or institutional legitimacy.⁴

This article calls the resulting ideal bounded independence. The Commission must enjoy decisional space from political command, partisan bargaining and private influence. But that space is bounded by the Constitution, the Judicial Service Act, fair administrative action, equality, public ethics, reasoned decision-making and judicial review. Independence without those boundaries becomes corporatism. Accountability without independence becomes control.

¹Constitution of Kenya 2010, art 172(1).

²*Ibid* art 172(1).

³Walter Khobe Ochieng, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) 4 *Kabarak Journal of Law and Ethics* 135, 139.

⁴Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *American Journal of Comparative Law* 103, 105.

I. The constitutional problem the JSC was designed to solve

A. From executive patronage to plural judicial government

Kenya did not create the post-2010 JSC in an institutional vacuum. It emerged from a constitutional history in which judicial appointments and administration were vulnerable to executive influence, centralised discretion and the political uses of public office. Khobe therefore locates the significance of independent commissions in the effort to dismantle and democratise the inherited state.⁵ The point is not that every pre-2010 appointment was improper. It is that a constitutional system should not depend upon the virtue of the appointing authority where structural protection is possible.

Article 171 answers that history by dividing membership among judges, a magistrate, advocates, the Attorney-General, a Public Service Commission nominee and members representing the public.⁶ No single constituency can constitute the Commission by itself. The design fragments appointment power and forces different professional and public perspectives into a common deliberative forum. In this sense, plural composition is not demographic decoration. It is an anti-capture device.⁷

The Supreme Court has treated that design as deliberate constitutional architecture. In *Law Society of Kenya v Attorney General*,

it held that giving the President a power to appoint even by gazetting elected or nominated commissioners would forget the history and mischief article 171 sought to cure.⁸ The Court accordingly invalidated the statutory provision that purported to confer that power over commissioners selected through constitutionally complete routes.⁹ The decision matters beyond appointments to the Commission. It affirms that constitutional dispersal of authority cannot be recollected through ordinary legislation or administrative habit.

Plurality, however, does not automatically produce independence. A commission may be formally diverse and still be dominated by blocs, informal alliances or the institutional weight of its chair. Comparative research cautions that judicial councils are designed in many forms and that the relationship between design and judicial quality is weak unless formal arrangements are matched by credible practice.¹⁰ The constitutional question is therefore not merely who occupies the seats. It is how those occupants discharge effective representation.

B. Effective Representation

Article 171 does more than distribute seats among occupational groups. It places several institutional perspectives inside the Commission so that judicial government is not designed only by judges, the Executive or any single professional bloc. Judges and magistrates bring knowledge of adjudication

⁵Khobe Ochieng (n 3) 136; Walter Khobe Ochieng, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (OUP 2016) 289.

⁶Constitution of Kenya 2010, art 171(2).

⁷Walter Khobe Ochieng, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (ICJ Kenya 2016) 47, 47.

⁸*Law Society of Kenya v Attorney General and 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR) [100].

⁹*Ibid* [101].

¹⁰Garoupa and Ginsburg (n 4) 133. Their empirical finding was not that councils are irrelevant, but that formal council design showed little necessary relationship with measured judicial quality; this cautions against treating institutional form as a substitute for practice.

and court administration. Advocates bring the experience of court users and the organised profession. The Attorney-General, the Public Service Commission nominee and the public representatives add further constitutional and administrative perspectives. Once appointed or elected, every commissioner exercises delegated sovereign authority and must serve the whole constitutional mandate.¹¹

For the two advocate commissioners, effective representation begins with article 171(2)(f), but it does not end there.¹² The Law Society of Kenya Act requires the Society to assist the courts in the administration of justice, uphold constitutionalism and the rule of law, promote access to justice and represent its members.¹³ The elected seat therefore secures more than professional visibility. It creates a constitutional route through which the organised Bar's accumulated knowledge may shape judicial governance.

That mandate is neither a licence for instruction nor an invitation to detachment. An advocate commissioner should consult the Society, understand the position developed through its Council, branches and specialist committees, test the evidence supporting that position, and then exercise independent judgment under the Constitution. The Society may inform the commissioner's judgment, but it cannot own her vote in an individual recruitment or disciplinary matter. Conversely, the oath of office does not erase the institutional reason for which advocates elect her. Effective representation therefore has three parts. The first is consultation. The representative must listen regularly and through predictable channels rather than

rely on personal networks or the loudest complaint. The second is translation. She must convert practice experience into questions the Commission can lawfully act upon, including delays, registry failures, integrity concerns, infrastructure gaps, technology problems and barriers to access to justice. The third is accountability. She must report the systemic matters pursued and the institutional progress achieved, subject to confidentiality and collective responsibility.

Advocates hold information that no other constituency holds in the same form. They appear in court daily, observe judicial conduct, encounter registry practice, experience adjournment and technology failure, and see how administrative choices affect litigants. The Law Society is consequently a repository of evidence about judicial administration. Effective representation requires a dependable route by which that evidence reaches the JSC in a form that is verified, prioritised and capable of institutional action.

That route should be structured rather than personality-driven. The advocate representatives should hold scheduled consultations with the LSK Council, branches, practice committees and members on systemic questions. The Society should prepare short evidence-based position papers on appointments, judicial integrity, performance management, infrastructure, court technology and access to justice. The representatives should then communicate what can be disclosed about the Commission's response and explain where law, confidentiality or jurisdiction limits further action.

¹¹Constitution of Kenya 2010, arts 1(1), 1(3)(c), 2(2) and 73(1)(a).

¹²*ibid* art 171(2)(f).

¹³Law Society of Kenya Act 2014, ss 4(a), 4(b), 4(c), 4(h) and 6; Constitution of Kenya 2010, arts 73(1)(a), 171(2)(f) and 172(1).

A JSC Representation Charter would give that relationship institutional form. It should prescribe a consultation calendar, a secure method for receiving systemic evidence, standards for distinguishing an individual grievance from an institutional problem, periodic non-confidential reporting, disclosure and recusal rules, and a review of performance against published commitments. The Charter should also make clear that consultation cannot dictate an outcome, authorise disclosure of confidential deliberations or convert an elected commissioner into a private agent.¹⁴

Effective representation thus rejects a false choice between allegiance to the Judiciary and allegiance to the Law Society. The representative serves the Constitution first, but she does so by ensuring that the organised profession's informed voice is consistently, thoughtfully and responsibly integrated into judicial government.

C. Independence, accountability and public reason

Judicial independence has multiple dimensions. It protects judges from interference by the Executive, Parliament, litigants, financiers and public pressure. It must also protect individual judges from improper pressure within the Judiciary itself. John Ferejohn captured the distinction between independent judges and a dependent judiciary: personal adjudicative

autonomy can coexist with institutional dependence, just as institutional autonomy can coexist with internal hierarchy.¹⁵ The JSC must attend to both dangers.¹⁶

Comparative scholarship frames the difficulty in sharply different ways. Garoupa and Ginsburg describe judicial councils as institutions intended to balance independence and accountability, while warning that councils show little necessary relationship with judicial quality.¹⁷ Kosař argues that expanding judicial power makes accountability unavoidable, particularly where conventional controls remain weak.¹⁸ Bobek and Kosař add a different warning: judicial self-government may replace external political capture with internal corporatism, elite reproduction and opaque housekeeping.¹⁹ These accounts are not contradictory. Together they show why a JSC must be independent from command but dependent upon law, reasons and review.

Public reason supplies the connecting principle. A public body does not justify a decision merely by pointing to its constitutional status or the good faith of its members. It must explain the criteria it used, the evidence it accepted, the conflicts it managed and the route by which it reached its conclusion. Article 47 constitutionalises that obligation by requiring lawful, reasonable and procedurally fair administrative action and written reasons

¹⁴Khobe Ochieng (n 3) 142.

¹⁵John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353, 362.

¹⁶Patricia Kameri-Mbote and Muriuki Muriungi, 'Internal Mechanisms for Ensuring Independence and Accountability in the Judiciary in Kenya' in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (ICJ Kenya 2016) 73, 73.

¹⁷The literature identifies overlapping but distinct accountability problems. Garoupa and Ginsburg frame councils as an institutional balance between independence and accountability: Garoupa and Ginsburg (n 4) 106. Ferejohn distinguishes the autonomy of individual judges from the institutional dependence of the judiciary: Ferejohn (n 15) 362. David Kosař argues that the expansion of judicial power makes the search for credible accountability mechanisms unavoidable: David Kosař, 'The Least Accountable Branch' (2013) 11 International Journal of Constitutional Law 234, 259. Michal Bobek and David Kosař warn that judicial self-government may generate internal capture and corporatism rather than independence: Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257, 1268. This article draws from all four accounts but treats public reason as the mechanism that connects institutional autonomy to constitutional justification.

¹⁸Kosař (n 17) 259.

¹⁹Bobek and Kosař (n 17) 1268.

where rights are adversely affected.²⁰ For the JSC, reasons are not an administrative courtesy. They are part of the constitutional price of independence.

II. A functional map of the commission's powers

A. Recruitment and the transmission of judicial authority

Recruitment is the Commission's most visible function because it determines who may exercise judicial authority. The Constitution assigns the JSC power to recommend persons for appointment as judges and requires competitive and transparent processes guided by gender equality.²¹ The Judicial Service Act translates that command into advertisements, applications, shortlisting, interviews, evaluation and nomination.²²

Merit is indispensable, but it is not self-defining. The First Schedule identifies professional competence, communication, integrity, fairness, judgment, legal experience, public service and related qualities.²³ International standards similarly require candidates of integrity and ability with appropriate legal training or qualifications.²⁴ The difficulty begins after these principles are stated. Commissioners must decide what evidence proves each quality, how competing qualities are weighted, and how individual assessments become an institutional decision.²⁵

Public interviews solve only part of that problem. They allow citizens to observe questioning and hear a candidate's responses. They do not disclose the significance assigned to prior judgments, professional references, integrity complaints, writing ability, administrative experience or constitutional philosophy. A process can be visible and still be methodologically opaque. Transparency therefore requires more than opening the interview room. It requires an auditable connection between published criteria and final recommendations.

The courts have already supplied the legal foundation for that conclusion. In *Kinuthia v Judicial Service Commission*, the High Court treated judicial recruitment as administrative action subject to article 47 and the duty to give written reasons.²⁶ In *National Gender and Equality Commission v JSC*, the Court recognised that merit, non-discrimination and diversity must be read together rather than arranged as mutually exclusive commands.²⁷ The JSC must therefore show not only that it considered relevant values, but how it reconciled them in the actual decision.²⁸

Recommendation also transfers constitutional authority. Article 166 requires the President to appoint judges in accordance with the JSC's recommendation.²⁹ *Katiba Institute v President* rejected the idea that the President retains a second merits review;

²⁰Constitution of Kenya 2010, arts 47(1) and 47(2); Fair Administrative Action Act 2015, ss 4(1), 4(2) and 4(3).

²¹Constitution of Kenya 2010, arts 166(1), 172(1)(a) and 172(2).

²²Judicial Service Act (Cap 8A), s 30 and First Schedule paras 1(2), 3 and 5.

²³Judicial Service Act (Cap 8A), First Schedule para 13.

²⁴United Nations Basic Principles on the Independence of the Judiciary (1985), para 10.

²⁵Judicial Service Act (Cap 8A), First Schedule paras 14(1) and 14(2).

²⁶*Kinuthia v Judicial Service Commission; Mumbi and 3 others (Interested Parties)* (Petition 251 of 2019) [2020] KEHC 9224 (KLR) [80].

²⁷*National Gender and Equality Commission and another v Judicial Service Commission and another; Lenaola (Interested Party)* (Petitions 446 and 456 of 2016 (Consolidated)) [2017] KEHC 8343 (KLR) [34].

²⁸National Gender and Equality Commission (n 27) [29].

²⁹Constitution of Kenya 2010, art 166(1).

the presidential act is formal because the substantive selection power belongs to the Commission.³⁰ *Muchelule* later held that prolonged refusal to appoint recommended candidates violated fair administrative action and the constitutional demand for timely performance.³¹ A recommendation that the Executive may indefinitely suspend is not a recommendation in the constitutional sense. It is an invitation to re-create the veto that article 166 removed.

B. Discipline, removal and the boundary of adjudication

Discipline tests the Commission more severely than recruitment. Appointment asks whether a person should enter judicial office. Discipline asks whether an existing officer has breached duties serious enough to justify sanction, while preserving fairness, independence and the presumption that accusation is not proof. The Constitution gives the JSC direct disciplinary authority over registrars, magistrates, other judicial officers and Judiciary staff.³² For superior court judges, article 168 assigns the Commission a preliminary screening role before a presidential tribunal determines removal.³³

That division of labour is constitutional, not semantic. In *Mboya v Judicial Service Commission*, the High Court emphasised that the JSC conducts a preliminary inquiry into a complaint against a judge; it does not

try or convict the judge.³⁴ The Commission must decide whether the petition discloses a ground for removal and whether the allegation has sufficient substance to justify the next constitutional stage. It must do enough investigation to avoid forwarding speculation, but not so much adjudication that it prejudices the tribunal.³⁵

The danger runs in both directions. A timid Commission may shield misconduct behind the language of judicial independence. An overreaching Commission may use preliminary inquiry as a trial without the safeguards of a trial. The Court of Appeal's older formulation in *Mutava* remains useful: fair administrative action includes legality, reasonableness and procedural fairness, and natural justice must shape the Commission's process.³⁶ Independence cannot excuse a defective investigation; accountability cannot excuse an unfair one.

Staff discipline presents the same constitutional stakes in a different legal setting. Section 32 and the Third Schedule to the Judicial Service Act govern appointment, discipline and removal of judicial officers and staff.³⁷ In *Kamande v JSC*, the Supreme Court held that these proceedings are administrative action subject to articles 47 and 50.³⁸ It distinguished the Chief Justice's preliminary role from the Commission's responsibility for a full hearing and insisted upon an effective opportunity to confront adverse evidence.³⁹

³⁰*Katiba Institute v President of the Republic of Kenya and 2 others; Judicial Service Commission and 3 others* (Interested Parties) (Petition 206 of 2020) [2021] KEHC 442 (KLR) [73].

³¹*Muchelule and 5 others v Attorney General; Judicial Service Commission* (Interested Party) (Petition E311 of 2023) [2024] KEHC 12116 (KLR) [67].

³²Constitution of Kenya 2010, art 172(1)(c).

³³*ibid* art 168.

³⁴*Mboya and another v Judicial Service Commission and another; Rawal and 5 others* (Interested Parties) (Petitions 204 and 218 of 2016 (Consolidated)) [2020] KEHC 9225 (KLR) [209].

³⁵United Nations Basic Principles on the Independence of the Judiciary (1985), paras 17 and 20.

³⁶*Judicial Service Commission v Mutava and another* (Civil Appeal 52 of 2014) [2015] KECA 741 (KLR) [23].

³⁷Judicial Service Act (Cap 8A), s 32 and Third Schedule.

³⁸*Kamande v Judicial Service Commission* (Petition E005 of 2025) [2025] KESC 48 (KLR) [46].

³⁹*ibid* [56].

Kamande is important because it treats procedural design as an institutional substance. A disciplinary body does not become fair merely by allowing written representations or convening a hearing. Fairness depends upon disclosure, the attendance of material witnesses, an opportunity to challenge adverse evidence, impartial decision-makers and a reasoned conclusion. The Commission has statutory powers to summon witnesses and obtain information; failure to use those powers where credibility is central can turn into unfairness.⁴⁰

Delay can decide a disciplinary case before the Commission does. In *Kamande*, the Supreme Court regarded a twenty-three-month process as inordinate and rejected the absence of a statutory deadline as an excuse.⁴¹ Article 259(8) requires constitutional obligations without prescribed time to be performed without unreasonable delay.⁴² A suspended officer loses income, reputation and professional direction while memories fade and institutional responsibility diffuses. Speed is therefore not opposed to fairness. Unexplained delay is itself unfair.⁴³

Recent litigation over petitions for the removal of judges shows why article 168 requires a settled procedural architecture. The Commission had developed an internal sequence for receiving, screening and hearing complaints, but the process lacked a comprehensive published instrument.

In December 2025, the High Court held in *Lubengu v Judicial Service Commission* that the JSC could not lawfully continue processing removal petitions without regulations under section 47 of the Judicial Service Act. The Court of Appeal stayed that prohibition in March 2026 pending appeal. The stay restored the Commission's ability to act, but it did not answer the institutional criticism that a process affecting security of tenure should not depend on unpublished practice.⁴⁴

The draft Judicial Service (Petition for Removal of a Judge) (Procedure) Regulations, 2026 respond directly to that gap. The JSC opened the draft for validation and later presented it to the National Assembly Committee on Delegated Legislation. The draft seeks to regulate petitions filed by members of the public and proceedings initiated by the Commission on its own motion. It proposes registration, preliminary evaluation, service of allegations and supporting material, investigation, pre-hearing management, oral evidence, cross-examination, written submissions, a report and notification of the outcome.⁴⁵

The detail matters. The draft contemplates a panel of commissioners, defined response periods, powers to summon witnesses and obtain documents, protection for vulnerable witnesses, electronic filing and physical or virtual hearings. It also allows the Commission to record reasons when it closes a matter and to continue

⁴⁰*ibid* [73] and [74]. The Court's reasoning is institutionally important: a hearing body with coercive powers cannot remain passive where the absent evidence is central to credibility and fairness.

⁴¹*ibid* [78].

⁴²Constitution of Kenya 2010, art 259(8); *Kamande* (n 38) [79].

⁴³*Kamande* (n 38) [81].

⁴⁴Judicial Service Commission, 'JSC Chairperson Chief Justice Martha Koome 2026 New Year Address to the Commission' (7 January 2026) <<https://jsc.go.ke/jsc-chairperson-chief-justice-martha-koome-2026-new-year-address-to-the-commission/>> accessed 30 July 2026; *Lubengu v Judicial Service Commission* (Constitutional Petition E110 of 2025) [2025] KEHC 18839 (KLR); *Judicial Service Commission v Lubengu and 2 others* (Civil Application E003 of 2026) [2026] KECA 442 (KLR) [21], [26]–[27].

⁴⁵Judicial Service Commission, Draft Judicial Service (Petition for Removal of a Judge) (Procedure) Regulations 2026 (final validation draft, 2026); Judicial Service Commission Kenya, 'The JSC today appeared before the National Assembly's Committee on Delegated Legislation' X (14 May 2026) <<https://x.com/jsckenya/status/2054925339063730394>> accessed 30 July 2026.

a matter in the public interest even after a petitioner seeks to withdraw it. These provisions would make the process more predictable for complainants, judges and commissioners.

Procedure must nevertheless preserve the division of labour created by article 168. The JSC decides whether the material discloses a constitutional ground serious enough to justify a tribunal. It does not conduct the final trial of the judge. In *Chitembwe v Tribunal Appointed to Investigate the Conduct of Justice Said Juma Chitembwe*, the Supreme Court required the Commission to evaluate the material and satisfy itself that a prima facie ground exists, but warned against definitive findings that pre-empt the tribunal.⁴⁶

The final regulations should therefore distinguish investigation from threshold determination. Where the same panel gathers evidence, questions witnesses and recommends referral, the rules should require disclosure of material gathered, an opportunity to answer it, recorded decisions on disputed evidence and reasons explaining why the article 168 threshold has or has not been met. The Commission should also adopt an articulated recusal test and, where its numbers permit, avoid assigning a commissioner who directed an investigation to dominate the later threshold decision.

The regulations must also separate error from misconduct. A complaint that merely disputes a judge's interpretation of law belongs to appeal or review. The JSC should intervene only where independent material plausibly discloses incapacity, breach of the judicial code, bankruptcy,

incompetence, gross misconduct or misbehaviour. Without that screen, discipline may become a collateral appeal and expose decisional independence to pressure from disappointed litigants.

Finally, confidentiality and transparency must be reconciled rather than asserted together. Evidence may require protection to preserve privacy, witness safety and the integrity of a pending process. The Commission should still publish a reasoned summary when a matter ends, stating the legal threshold applied, the broad nature of the material considered and the basis of the disposition without disclosing protected information. A predictable procedure protects judges from arbitrary accusation and protects the public from unreasoned institutional closure.⁴⁷

C. Conditions of service, performance, human capital and institutional culture

The quieter functions of the JSC often determine whether the visible functions succeed. Article 172 requires the Commission to review conditions of service for judges, judicial officers and Judiciary staff, prepare continuing education programmes and advise the national government on improving the administration of justice.⁴⁸ These powers concern institutional ecology: recruitment brings capable people into the system, but conditions, training and administrative support determine whether capability survives.

Training performs a related constitutional function. Legal doctrine changes, technology alters procedure, social context complicates adjudication and new forms of

⁴⁶*Chitembwe v Tribunal Appointed to Investigate into the Conduct of the Hon Justice Said Juma Chitembwe* (Petition E001 of 2023) [2023] KESC 114 (KLR) [175]–[178].

⁴⁷Judicial Service Act (Cap 8A), s 47; Judicial Service (Code of Conduct and Ethics) Regulations 2020, regs 78 and 81.

⁴⁸Constitution of Kenya 2010, art 172(1)(b), (d) and (e).

vulnerability reach the courts. Continuing education should therefore extend beyond technical updates. It should include judgment writing, case management, trauma-informed adjudication, equality, disability access, emerging technology, judicial ethics, leadership, wellbeing and the constitutional relationship between decisional independence and public explanation. The Consultative Council of European Judges, commonly referred to as the CCJE, treats selection, promotion, evaluation, ethics, discipline, training, court administration and public confidence as connected tasks of a judicial council.⁴⁹

Performance management belongs within the same institutional ecology, but it serves more than one purpose. The Judiciary's Performance Management and Measurement Understandings system evaluates courts and administrative units against agreed targets. Properly used, institutional data can reveal backlog, staffing gaps, registry weakness, uneven deployment and practices worth replicating. It can also support the JSC's conditions-of-service, training and advisory functions. The data should diagnose the system before it is used to judge the individual.⁵⁰

The case-weighting initiative announced in 2026 adds an important layer. Raw disposal figures treat a short uncontested application and a complex constitutional trial as equivalent units of work. A credible weighted-caseload method can estimate

the time and institutional support required by different case types, improve deployment and expose stations carrying structurally heavier burdens. Section 12(3) of the High Court (Organization and Administration) Act already permits the JSC to assess judicial needs and recommend a weighted caseload formula.⁵¹

Case weighting should not become an invisible algorithm. The Judiciary should publish the categories, time assumptions, sample design, treatment of multi-judge matters and method of periodic review. Judges, judicial officers, registrars, advocates and court staff should participate because each sees a different part of the work. A formula designed only from completed files may ignore the labour of urgent applications, case management, judgment writing, administrative leadership and matters delayed by external actors.

The proposed publication of individual performance reports makes these safeguards urgent. In July 2026, the Judiciary indicated that individual reports would follow reporting, verification, validation and approval. A constitutional challenge was filed soon afterwards, alleging that publication lacked a sufficient legal and policy framework. Whatever the result of that case, the dispute identifies the prior question the JSC must answer: what does an individual score measure, and what will prevent it from influencing the substance of judicial decision-making?⁵²

⁴⁹Consultative Council of European Judges, Opinion No 10 (2007) on the Council for the Judiciary at the Service of Society, para 42.

⁵⁰Office of the Chief Justice, 'Launch of the Performance Management and Measurement Understandings (PMMUs) Evaluation Report 2022/2023' (26 July 2024) <<https://ocj.judiciary.go.ke/launch-of-the-performance-management-and-measurement-understandings-pmmus-evaluation-report-2022-2023/>> accessed 30 July 2026; Judiciary of Kenya, Performance Management and Measurement Understanding Evaluation Report for the Financial Year 2024/2025 (Judiciary 2026).

⁵¹High Court (Organization and Administration) Act (Cap 8C), s 12(3); 'JSC rolls out plan to track judges' performance and workload' People Daily (5 February 2026) <<https://peopledaily.digital/news/jsc-rolls-out-plan-to-track-judges-performance-and-workload>> accessed 30 July 2026.

⁵²Felix Kipkemoi, 'Judiciary to publish performance reports of individual judges from July' The Star (3 July 2026) <<https://www.the-star.co.ke/news/2026-07-03-judges-performance-reports-to-go-public-this-month>> accessed 30 July 2026; Carolynne Kubwa, 'Petition filed to stop JSC from publishing judges' individual performance reports' Eastleigh Voice (15 July 2026) <<https://eastleighvoice.co.ke/news/379564/petition-filed-to-stop-jsc-from-publishing-judges-individual-performance-reports>> accessed 30 July 2026.

A legitimate framework may consider timeliness, case management, delivery of reserved judgments, treatment of urgent matters, administrative leadership, training and compliance with ethical duties. It must adjust for case complexity, inherited backlog, transfers, illness, vacancies, staff shortages, security conditions and the availability of technology. It must not reward agreement with appellate courts, political acceptability, settlement rates or the popularity of outcomes. Nor should it rely on disposal counts that encourage hurried hearings, avoidance of difficult cases or abbreviated reasons.

The JSC should distinguish developmental review from discipline. Performance review should ordinarily identify support, mentoring, training, workload adjustment and administrative reform. Persistent failure may eventually justify a separate process, but no adverse employment or disciplinary consequence should arise from an unverified score or without notice and a fair opportunity to respond. The CCJE regards evaluation as compatible with judicial independence only where criteria are objective and transparent, evaluators understand judicial work, the judge may comment on the material, and the system does not control the content of decisions.⁵³

Before publication, the Commission and Judiciary should disclose the legal basis, indicators, data definitions, weighting method, verification process, qualitative moderation, correction procedure and review mechanism. The affected judge or judicial officer should see and answer the proposed report. Public reports should explain material constraints and avoid

league tables that imply false precision. Performance information can deepen accountability only when the method is as transparent as the result.

D. Finance, administration and advice

Judicial independence can fail through the budget without ever being attacked in a speech. Courts require buildings, registries, technology, interpreters, security, research support and sufficient personnel. Article 173 establishes the Judiciary Fund and requires expenditure to be administered by the Chief Registrar, subject to law.⁵⁴ The JSC's advisory and conditions-of-service functions place it close to the evidence needed to defend those resources.

Financial independence does not mean financial immunity. The Judiciary must budget transparently, procure lawfully, account for expenditure and demonstrate how resources improve access to justice. The African Principles and Guidelines recognise adequate resources as a condition of judicial independence.⁵⁵ But resources acquire constitutional legitimacy only when linked to service: fewer adjournments, accessible courts, reliable records, safer stations, timely judgments and support for judicial officers.

The Commission's advisory function should therefore be evidence-producing rather than episodic. It should identify the administrative causes of delay, quantify personnel gaps, evaluate the effects of new courts, measure training outcomes and publish reasoned recommendations to the government. Garoupa and Ginsburg caution that the mere existence of a council does not

⁵³Consultative Council of European Judges, Opinion No 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, paras 6–12, 29–31 and 42–49.

⁵⁴Constitution of Kenya 2010, art 173(1), (3) and (4); Judiciary Fund Act (Cap 8B), ss 4 and 5.

⁵⁵African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), s A(4)(h).

produce quality.⁵⁶ A Commission that cannot convert administrative data into reform proposals may remain formally independent while operationally dependent.

III. The post-2010 strains

A. Transparency without an auditable method

The first strain is the distance between visible procedure and explainable result. Public interviews are a major constitutional gain because they expose candidates to scrutiny and prevent appointments from occurring wholly through private communication. They are not a complete assessment method. A candidate may recall doctrine fluently while lacking the capacity to organise a difficult record, write a clear judgment, manage a tense courtroom or treat vulnerable litigants with patience and dignity.

The comparative warning is straightforward. Bobek and Kosař show that enthusiasm for judicial councils often focused on composition and formal independence while neglecting transparency, accountability and the ordinary work of administration. Kenya should not repeat that mistake by treating a broadcast interview as the whole of transparency. The Commission should disclose the assessment architecture while protecting the confidentiality of deliberation.⁵⁷

A stronger method should separate eligibility from judicial capability. The first stage should verify constitutional and statutory qualifications, integrity and professional record. The second should

use an anonymised written exercise based on an unfamiliar record and require the candidate to identify the issues, evaluate evidence, apply law, reach a disposition and give concise reasons. This would test judgment writing rather than memory.

The third stage should use structured situational questions or a carefully designed role play. Candidates could be asked to manage an unrepresented litigant, respond to apparent bias, control an abusive advocate, prioritise urgent matters, address a conflict of interest or explain a difficult ruling. The assessment should test listening, fairness, decisiveness, courtroom control, empathy, self-awareness and the ability to remain composed under pressure. These are the practical dimensions of judicial temperament and emotional intelligence.

The fourth stage should be a structured behavioural interview. Instead of asking only what the law provides, commissioners should require concrete examples of independence, ethical judgment, leadership, resilience, management of disagreement and willingness to learn. Questions should be standardised around published competencies, with follow-up questions used to test the evidence rather than reward performance or rhetorical confidence.

The United Kingdom's Judicial Appointments Commission uses a skills and abilities framework that includes legal skill, intellectual capacity, reasoned decision-making, communication, resilience, integrity and personal qualities. Its selection exercises may include situational questions, role play and a short judgment. Kenya need not copy that system. It demonstrates,

⁵⁶Garoupa and Ginsburg (n 4) 123.

⁵⁷Bobek and Kosař (n 17) 1275. Their critique is especially relevant to Kenya because a commission may satisfy international design expectations while remaining opaque in selection, discipline, administration and internal governance.

however, that an interview can sit within a broader assessment of the work a judge will actually perform.⁵⁸

Broader assessment also creates new risks. The JSC should not use unvalidated personality tests or impressions about accent, confidence, age, disability or social style as proxies for temperament. Exercises should be job-related, piloted, accessible to candidates with disabilities, moderated for bias and scored against published indicators. Independent quality assurance and a complete audit trail would make the method both fairer and more defensible.⁵⁹

B. Recommendation without timely appointment

The second strain is executive obstruction after the Commission has completed its work. The Supreme Court has already rejected presidential control over constitutionally elected JSC members.⁶⁰ The High Court has likewise rejected a presidential merits veto over recommended judges.⁶¹ The remaining problem is practical: delay can exercise the power that the constitutional text denies.

Muchelule demonstrates the cost. Recommended candidates waited for more than three years after the JSC process, despite the absence of presidential discretion to revisit their merit.⁶² The Court held that the candidates' legitimate expectation crystallised and that failure to provide written reasons

violated article 47.⁶³ The episode injured more than individual careers. It disrupted staffing, signalled that constitutional recommendations could be selectively honoured and invited the public to read appointments through partisan preference.

C. Accountability without settled procedure

The third strain appears when the Commission acts without sufficiently settled procedures. Recruitment rules are more developed than the public architecture for complaints, preliminary inquiries, recusals and publication of outcomes. The absence of complete procedural rules creates discretion at precisely the point where personal reputation, judicial independence and public confidence are most vulnerable.

Kamande exposes the danger in staff discipline. The Supreme Court found that the Commission failed to meet constitutional and statutory standards, including through delay and an inadequate opportunity to confront material evidence.⁶⁴ The Court also set out factors for evaluating unreasonable delay, including the nature of the matter, explanation offered, prejudice and the conduct of the parties.⁶⁵ Those principles should now be converted into an operational code rather than rediscovered case by case.

A complete code should specify intake, screening, disclosure, preliminary inquiry,

⁵⁸Judicial Appointments Commission, 'Judicial Skills and Abilities Framework: Legal Roles' (29 July 2025) <<https://judicialappointments.gov.uk/corp-publication/judicial-skills-and-abilities-framework/>> accessed 30 July 2026; Judicial Appointments Commission, 'Guidance for Selection Days' <<https://judicialappointments.gov.uk/corp-publication/guidance-for-selection-days/>> accessed 30 July 2026.

⁵⁹United Nations Basic Principles on the Independence of the Judiciary (1985), para 10; Judicial Appointments Commission, 'Judicial Skills and Abilities Framework: Legal Roles' (29 July 2025) <<https://judicialappointments.gov.uk/corp-publication/judicial-skills-and-abilities-framework/>> accessed 30 July 2026.

⁶⁰Law Society of Kenya (n 8) [100].

⁶¹Katiba Institute (n 30) [70].

⁶²Muchelule (n 31) [67].

⁶³ibid [70] and [73].

⁶⁴Kamande (n 38) [84].

⁶⁵ibid [80].

hearing, witness attendance, interim measures, recusal, decision, reasons, publication, review and timelines. It should distinguish complaints against judges, judicial officers and staff because the constitutional pathways differ. It should also identify the circumstances in which information must remain confidential and when public interest requires a reasoned summary.

D. Institutional independence without capacity

The fourth strain is a less dramatic form of dependence: inadequate capacity. A Commission may resist political pressure yet remain unable to investigate complaints promptly, analyse appointment records, model staffing needs or track compliance with its own decisions. Capacity is therefore part of independence. An institution that lacks information, personnel or technology will depend upon the actors it is meant to supervise.

This problem is familiar in comparative accounts of judicial self-government. Councils often acquire prestigious constitutional functions without the research, administrative and evaluative machinery required to perform them.⁶⁶ The result is a gap between high constitutional language and low institutional capability. Kenya should treat the JSC secretariat as a constitutional knowledge institution, not merely a meeting-support office.

E. Pluralism without conflict rules

The fifth strain lies inside plural representation itself. Commissioners

may have professional relationships with candidates, colleagues, complainants, law firms, judicial officers or institutions appearing before the JSC. A plural commission cannot avoid all connections. It can, however, distinguish ordinary professional familiarity from interests that reasonably threaten impartiality.

The Constitution requires state officers to exercise authority in a manner that promotes public confidence in the integrity of office.⁶⁷ That standard should be operationalised through written disclosure and recusal rules. A commissioner should disclose a relevant relationship on the record; the Commission should decide recusal by an articulated test; and the decision should be recorded without unnecessarily publishing private information.

Internal accountability requires more than recusal. Khobe warns that oversight can itself become a route through which Parliament interferes with independent institutions, including the JSC.⁶⁸ The answer is not to reject oversight. It is to separate legitimate demands for reports, expenditure accountability and reasons from attempts to direct particular outcomes. The Commission should be transparent enough to withstand scrutiny and independent enough to reject command.

IV. A reform programme for bounded independence

A. Recruitment that can be understood

The first reform is to make selection auditable without making it mechanical.

⁶⁶Bobek and Kosař (n 17) 1285; Garoupa and Ginsburg (n 4) 105.

⁶⁷Constitution of Kenya 2010, arts 10(2)(c) and 73(1)(a).

⁶⁸Khobe Ochieng (n 3) 159. Khobe's concern is not that parliamentary oversight is always illegitimate, but that powers of oversight and removal can be deployed to interfere with institutions whose independence frustrates vested interests.

Before applications open, the JSC should publish the criteria, indicators, weighting ranges, assessment exercises and treatment of equality and diversity. The process should combine record review, an anonymised written judgment exercise, structured situational assessment, behavioural evidence and public interview. After completion, the Commission should publish an institutional report explaining the applicant pool, shortlisting method, integrity verification, assessment design, deliberative framework and basis of the recommendation. Unsuccessful candidates should receive concise individual reasons.

Scoring should inform rather than replace judgment. Numerical evaluation can expose inconsistency and compel commissioners to engage every criterion, but it cannot measure constitutional judgment or temperament with mathematical precision. The Commission should permit a reasoned departure from aggregate scores only where the departure is recorded and justified. It should retain an audit trail showing how written work, scenarios, professional evidence and interview performance contributed to the final decision. Transparency is strongest when it disciplines judgment rather than pretending judgment has disappeared.

B. Complaints and discipline that are fair and timely

The second reform is a comprehensive complaints and discipline code. The Commission should set an initial screening period, a preliminary inquiry period, a hearing period and a time for reasons. Extensions should be exceptional, written and communicated. Article 259(8) already supplies the constitutional principle;

procedural rules should give it institutional form.⁶⁹

The code should preserve the different constitutional status of judges, judicial officers and staff. Complaints against superior court judges require the article 168 threshold and a preliminary recommendation, not a final finding of guilt. Staff and subordinate judicial officers require a full disciplinary process under article 172, section 32 and the Third Schedule. Clear differentiation will prevent the Commission from doing too little in one category and too much in another.

C. Capacity, finance and institutional learning

The third reform is to connect constitutional functions to professional capacity. A research and policy directorate should analyse recruitment outcomes, diversity, workload, staffing, disciplinary trends, training needs and access-to-justice indicators. Its work should inform JSC advice to the government and the Judiciary's budget priorities. Constitutional advice should emerge from evidence rather than episodic crisis.

The Commission should adopt a public performance framework for its own constitutional work. Relevant indicators include vacancy-to-recommendation time, complaint disposal, compliance with procedural timelines, implementation of training programmes, stakeholder consultation, resolution of audit issues, publication of reasons and implementation of recommendations made to the national government. The framework should measure institutional delivery without inviting any outside actor to direct the

⁶⁹Constitution of Kenya 2010, art 259(8).

outcome of an individual recruitment or disciplinary matter.⁷⁰

The individual judicial-performance initiative requires a separate framework. It should combine verified quantitative data, weighted caseload, qualitative review and the institutional context in which the judge or judicial officer worked.⁷¹ It should identify whether the purpose is professional development, deployment, promotion, public information or discipline because each purpose demands different safeguards. A single score should not silently perform all five functions.⁷²

Before individual reports are released, the Commission and Judiciary should publish the indicators, data definitions, verification process, moderation rules, correction procedure and review mechanism. The affected judge or judicial officer should see and answer the proposed report before publication. Public reporting should avoid ordinal rankings that imply false precision and should explain resource constraints that materially affected performance. Accountability requires usable information, not a league table.

Comparative caution supports modesty here. Bobek and Kosař argue that smaller functional reforms in appointment, staffing and case administration may sometimes achieve more than grand institutional transplantation.⁷³ Kenya already has the constitutional institution. The next phase should focus less on redesigning its existence and more on improving the quality of its routines.

D. Ethics, recusal and collective responsibility

The fourth reform is a JSC-specific code of ethics. General constitutional standards remain essential, but the Commission's mixed membership creates recurring issues that deserve precise treatment: campaign support, professional relationships, confidentiality, communication with candidates, contact with complainants, collective decisions and public criticism of pending processes.

The code should require annual interest declarations, matter-specific disclosure, recorded recusal decisions and a prohibition on private assurances about outcomes. It should also state that commissioners may explain institutional policy but must not disclose confidential deliberations or undermine collective decisions through selective accounts. Collective responsibility does not forbid dissent. It requires dissent to be expressed through lawful institutional channels.

Public confidence will not be secured by demanding silence from commissioners. It will be secured by consistent rules governing when they speak, what they disclose and how they separate personal political activity from constitutional office. The Venice Commission has emphasised that judicial councils must be structured to protect independence while avoiding corporatism and self-interest.⁷⁴ Ethics is the bridge between those aims.

⁷⁰Judicial Service Commission, Strategic Plan 2022–2027 (JSC 2022) 31–38; Judicial Service Commission, 'Outcome 1: Efficient, Effective, and Accountable Administration of Justice' <<https://jsc.go.ke/outcome-1-efficient-effective-and-accountable-administration-of-justice/>> accessed 30 July 2026.

⁷¹Consultative Council of European Judges, Opinion No 10 (2007), para 50.

⁷²Consultative Council of European Judges, Opinion No 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, paras 6–12, 29–31 and 42–49.

⁷³Bobek and Kosař (n 17) 1285.

⁷⁴European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, para 32.

E. Public reporting and enforceable institutional boundaries

The fifth reform is a disciplined system of public reporting. The Commission should publish an annual constitutional accountability report distinct from general Judiciary reporting. It should address each article 172 function, identify decisions and unresolved constraints, disclose compliance with timelines, explain the use of public funds and state the reforms proposed to the government.

These boundaries follow from the Constitution's allocation of sovereign power. Article 252 gives commissions powers necessary for investigation, conciliation and the performance of their functions.⁷⁵ Article 249 protects their independence while keeping them subject only to the Constitution and law.⁷⁶ Bounded independence is therefore not a political compromise. It is the structure the constitutional text already demands.⁷⁷

V. The advocate representative and effective institutional representation

The advocate representative occupies a distinctive position. She understands the institutional life of the courts from outside the Bench but inside the justice system. Advocates observe judicial conduct, confront registry practice, experience technology and infrastructure failure, and see how delay or administrative design affects litigants. The office should convert that dispersed professional experience into reliable institutional knowledge rather than repeat the loudest complaint.

Her first duty is structured consultation. The representative should maintain scheduled channels with the LSK Council, branches

and specialist committees, commission short evidence-based position papers and identify recurring problems that deserve the JSC's attention. Consultation should include advocates outside Nairobi and practitioners in specialised and high-volume courts so that the Commission does not mistake the experience of a narrow professional circle for the experience of the Bar.

Her second duty is preparation. In recruitment, she should understand the vacancy, the court's needs, the candidate's record and the published criteria. In discipline, she should test jurisdiction, disclosure, delay, witness sufficiency, conflicts and the correct legal threshold. On administration, she should bring verified evidence about registries, infrastructure, technology, performance management and access to justice. Independence is not performed by a courageous vote at the end. It is built through disciplined inquiry before the vote.

Her third duty is accountable independence. The representative should report the systemic matters pursued, the evidence placed before the Commission and the progress achieved, while respecting confidentiality in individual cases. She should also resist executive obstruction, legislative encroachment, professional lobbying, internal corporatism and popular pressure whenever any of them seeks an unlawful result. The source of pressure does not determine the constitutional response. The test is whether the proposed action is authorised, fair, reasoned and consistent with the JSC's mandate.

The LSK seat is therefore an office of translation and institutional connection. It carries the organised profession's

⁷⁵Constitution of Kenya 2010, art 252(1)(a) and (b).

⁷⁶*ibid* art 249(2).

⁷⁷Khobe Ochieng (n 3) 144.



The Chief Justice (CJ) plays a central constitutional role in safeguarding judicial independence, accountability, and effective judicial governance in Kenya. Under the 2010 Constitution, the Chief Justice is not merely the head of the courts but also a key guardian of the rule of law and constitutionalism.

evidence into the Commission, translates constitutional standards into administrative design, and explains institutional policy back to the profession and the public. Article 171 creates an elected route to the Commission.⁷⁸ Article 172 supplies the common mandate after election.⁷⁹ Effective representation joins the two: constitutionally independent, institutionally informed and professionally accountable.

A Representation Charter would give this conception practical form. It should set a consultation calendar, require a secure mechanism for receiving systemic evidence, provide for periodic non-confidential reports, create a performance review against published commitments and define the limits imposed by recusal, privacy and collective responsibility. Its purpose would not be to subordinate a commissioner to the Society. It would ensure that representation remains continuous, evidence-based and visible rather than depending on personal

style or election-season promises.

VI. Conclusion

The JSC's powers are easiest to describe and hardest to integrate. Recruitment, discipline, conditions of service, training, administration and advice appear as separate functions. In practice they form one system of judicial government. Poor recruitment burdens discipline. Weak conditions of service undermine retention. Inadequate training affects quality. Scarce resources produce delay. Opaque procedure weakens confidence in every outcome.

Kenya's answer should not be maximal insulation or maximal exposure. It should be bound to independence: protection from command, submission to law, discipline by reasons, fairness in procedure, timeliness in action and candour in public reporting. That model does not weaken the Commission. It makes its independence defensible.

⁷⁸Constitution of Kenya 2010, art 171(2)(f).

⁷⁹ibid art 172(1).