`The Rise of the Judicial Age of Secrecy: Assessing the Judicial Service Commission's Interview for the Court of Appeal Judges

By Joshua Malidzo Nyawa

Etienne Mureinik in his seminal paper "*A Bridge to Where? Introducing the interim Bill of Rights"*, wrote about the nature of transformative constitutions. These are constitutions that demand a shift from a culture of authority to a culture of justification. That for every act, it must be justified and to him, the new Constitution of South Africa was a bridge away from a culture of authority and it must lead to a culture of justification. He captures this shift in the following words:

> "A culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion".

This calls for an open and accountable society. Inherently, in this shift is the value of transparency and the right to information. That citizens have the right to access information held by the state[1] and that the state is founded on good governance, integrity, transparency and accountability[2]. Whereas Kenyans (or a majority of them) thought that this shift had completely occurred as has been recognised by our courts in some of its judgments *inter alia* in *Samura Engineering Ltd & Others v Kenya Revenue Authority* Nairobi petition No. 54 of 2011, where Majanja J. noted that:,

> "By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution".

Similarly in *Hon. Justice Kalpana Rawal and Others v Judicial Service Commission and Others*, Applications No. 11 and 12 of 2016 Mutunga CJ noted:

[1] See Article 35 of the 2010 constitution.
[2] See article 10 of the 2010 constitution.

> "By recalling the words of a South African scholar Etienne Mureinik, writing in the post-apartheid moment, (in a journal article 'A Bridge to Where? Introducing the Interim Bill of Rights,' 10 SAJHR 31, 32 (1994)), I state that ours is a new era of constitutional "justification" in which the exercise of all public power is constrained by the Constitution, its values and principles".

The events of 17th June 2019 leave us with doubts on whether or not the shift has really occurred. On the morning of a chilly Monday, Kenyans who were eager to follow the interviews of the nominees to fill the court of appeal bench were disappointed to learn that the same would not be possible. The disappointment was conveyed by the Chief Justice, Hon David Maraga who noted that the venue was small and the media would not be allowed in. To him (the Judicial service commission), the media would only be allowed to take photos before the start of the interviews and thereafter leave the room. The Judicial service commission would later on allow the live streaming of the interview from its Facebook page. This paper seeks to show that the denial of the media to air the interview raises questions on the transparency of the interviews. Secondly, that the carrying of the interview on the first day without the media or the Facebook live streaming is troubling, this is because the judicial service commission is chaired by the chief justice, then does it mean that the president of the judiciary has not grasped the ethos and demands of the 2010 constitution. Thirdly, the carrying of the interview in secrecy (the Facebook live streaming is only for the elite who can access Facebook) would affect public confidence in the judiciary.

The 2010 Constitution as a Value Based Constitution

The 2010 constitution neither an empty shell nor an empty tin, it is filled by the aspirations of the people[3] who gave it to themselves the constitution[4]. These are the values that the people of

[3] In *S v Makwanyane 1995 3 SA (CC) para 262* Mohamed J referred to a supreme constitution in the following ringing tones:

> All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist,

Kenya hold dear and chose to live by, because some of them reflect the country's own history and experience, *historical economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya*[5] the court stated in *Republic v Cabinet Secretary*[6]**,** that

> "Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality"[7].

The constitution is embedded with values that run through the constitution, starting from our preamble which recognizes the country's aspirations and values[8]. The Supreme Court rightly observed that 'although these values are set out in the Preamble to the Constitution which describes them as essential, they are fleshed out in Article 10, Chapter Four on the Bill of rights,

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authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspiration ally egalitarian ethos, expressly articulated in the Constitution.

[4] Majanja J has reinstated this fact in *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR*, at para (45) that ;

> While I agree with counsel for the 3rd respondent that the values contained in Article 10 of the Constitution may not be of themselves justiciable, it must be remembered that a Constitution devoid of values and principles is like an empty tin. These values are what give real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. They must be given full effect by every person and authority at all times.

[5] *In the matter of the Interim Independent Electoral Commission,* Constitutional Application No. 2 of 2011 [2011] eKLR paragraph 86

[6] *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another* [2017] eKLR

[7] Ibid at para 86

[8] The Supreme Court in *Speaker Of The Senate & Another V Hon. Attorney-General & Another & 3 Others [2013] eKLR, Advisory Opinion Reference 2 of 2013at* Para observed thus:

> '[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on –*"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."*And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.'

and Chapter Eleven on devolved government'.[9] The centrality of the values was also echoed by Justice Lenaola[10], when he expressed himself on public participation as follows;

> "The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement".

Being value-laden, the Constitution has been described by the Supreme Court as transformative in nature because it is aimed at engineering society in a particular desired direction. In *Speaker of the Senate*, the Court observed that

> '[u]nlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.'[11]

Through this transformative approach, the values are intended to achieve 'desirable goals of governance consistent with dominant perceptions of legitimacy'.[12] This desired goal is therefore the observance of the values. The desired goal/aspiration is the shift from the closed door approach to openness. The values in the constitution must guide the state and its state organs in everything that it does. Even when making public appointments or recruitment, these values

[9] *Speaker of the Senate* para 51.
[10] *Nairobi Metropolitan Psv Saccos Union Limited &25; Others vs. County of Nairobi Government & 3 Others* [2013] eKLR
[11] *Speaker of the Senate* para 51.
[12] *Speaker of the Senate* para 52.

cannot be bypassed. In the case of *Community Advocacy*[13] the Court in relation to public appointments stated,

> "27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of 'jobs for the boys' era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments".[14]

Similarly Majanja J (as he then was) held in *COFEK*[15] that ' These values and principles provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution. Thus when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles'[16].

Judicial Service Commission is bound by Constitutional Values

Article 10 of the constitution provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons. Article 260 on the other hand defines a state organ to include a commission established under the constitution. The court of appeal in **CIVIL APPEAL NO. 52 OF 2014** correctly classified the JSC as a state organ and was such bound by the values under article 10. The court expressed itself thus 'A commission is included in the definition of a "**state organ**" in article 260. More relevantly, JSC as a state organ is bound by national values and principles of governance entrenched in article 10 and as provided by article 20(1) also bound by the Bill of Rights'. The High Court also held in *Hon. Mr. Justice Joseph Mbalu Mutava*[17] that

> "In our view it is clear that as long as person's right or fundamental freedom is likely to be adversely affected by the administrative action, he or she is entitled to be given the

[13] *Community Advocacy and Awareness Trust and Others v Attorney General* Nairobi Petition No 243 of 2011 (Unreported),
[14] Ibid at para 73
[15] *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others* [2012] eKLR,
[16] Ibid at 42
[17] *Hon. Mr. Justice Joseph Mbalu Mutava Versus Attorney General,* PETITION NUMBER 337 OF 2013 at para 124.

reasons for the action. In addition in implementing the provisions of the Constitution the Commission is guided by the values of Article 10 which include the value of good governance, transparency and accountability. Giving reasons for actions undertaken by a constitutional body is in our view a key hallmark of good governance, transparency and accountability".

Secondly, as an independent commission, JSC exercises its powers as donated to it by the people and they have a duty to safeguard the sovereign power of the people and in the exercise of their powers, they must bow to the will of the people. The court recognised in *J Harrison Kinyanjui Versus the Hon. Attorney General*[18]that

When it comes to the exercise of such power through the said representatives, it is important to note that under Article 1(3) the people's representatives only exercise a "delegated" function. In other words, in the exercise of their power, the said representatives are enjoined to exercise such power in accordance with the will of the people as expressed in the Constitution. Consequently, in performing their delegated function the said representatives must abide by the letter and spirit of the Constitution and must bow to the will of the people.

JSC is therefore subject to the law and the constitution. It is bound by the values in the preamble, the bill of rights and the other provisions of the constitution.

Transparency in Judicial Appointments

The values and principles of openness (transparency) accountability and responsiveness stand at the gateway to the Constitution[19]. These values encapsulate the kind of society we seek to build and the values that must permeate its people and its institutions. These values shape and inform the practical realisation of our Constitution. The objects of the commission and the judiciary include *inter alia* being accountable to the people of Kenya[20]. Section 30 of the judicial service Act on the other hand demands that appointment process be transparent[21].

[18] *J Harrison Kinyanjui Versus The Hon. Attorney General* , Constitutional Petition No. 74 Of 2011
[19] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 at para 158.
[20] Section 3 of the judicial service Act
[21] See also *Hon. (Lady) Justice Kalpana H. Rawal versus Judicial Service Commission*, PETITION NO. 386 OF 2015.

It is a worldwide practice that judicial appointment should be made on the basis of clearly defined criteria and by a publicly declared process[22]. The ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** provides that:

"*Transparency requires that such specific criteria or approaches to evaluation should also be published, alongside the basic constitutional and statutory criteria so that both those interested in judicial office and the wider public may be aware of the qualities that are sought in a judge. The second aspect of transparency, which is much more the responsibility of the commission, is to ensure that judicial selection occurs by way of a 'publicly declared process'. There is a close link with the criteria for judicial office, as the very purpose of having criteria would be undermined if they were not applied throughout the process of selection."*

Similarly, the human rights committee has stated that "The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encourages. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary."[23] Similarly, the ***International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners' Guide No.1*** at page 49 provide as follows:

> "*Judges should be appointed on their professional qualifications and through a transparent procedure. Even though international standards do not forbid that appointments be carried out by the executive or the legislature, it is preferable that the selection be entrusted to an independent body so that political considerations do not play any role in the proceedings. Irrespective of the body in charge of appointing judges, the outcome of such selection must always guarantee that the candidates appointed to the judiciary possess the necessary skills and independence".*

Article 9 of the ***Universal Charter of the Judge***, which was developed and approved by the International Association of Judges (IAJ) provides that the appointment of judges must be

[22] *Commonwealth (Latimer House) Principles on the Three Branches of Government*, November, 2003.
[23] The *Concluding Observations of the Human Rights Committee on the Congo*, UN document CCPR/C/79/ADD. 118 para. 14.

carried out by an independent body according to objective and transparent criteria based on proper professional qualification.

If the independence of the judiciary is to be achieved, then this needs to start as from the recruitment of the judges. When the integrity of the recruitment process is doubtful or has been shrouded with secrecy or in mystery, equally the independence of the judiciary would be brought into question. While arguing on this point, **Muna Ndulo** in his seminal paper **"*Judicial Independence: An overview of Judicial and Executive Relation in Africa*"**, has observed that *"In order to guarantee the independence and impartiality of the Judiciary, best constitutional practices and International law require States to appoint Judges through strict selection criteria and in a transparent manner''.* The High Court[24] has also held that

> "In our view, the current system of appointment of judges was informed by the need to infuse a sense of integrity in the said process that would ensure independence of the judiciary and judicial officers. The determination of the independence of the judiciary, it is our considered view, is not based on one event but the whole process starting from the manner in which the judicial officers are appointed, how they are to carry out their mandate and the manner of their removal from the office. All these must be cumulatively considered in order to determine whether the judiciary is independent and the extent of such independence. Independence is therefore a culmination of several factors. It presumes that there is an appropriate appointment process; subject to strict procedures for removal of judges, a fixed term in the position; and a guarantee against external pressures"[25].

Unlike in the past(pre-2010) where judicial appointments were at the whim of the presidency and where the appointments were excluded from public scrutiny, the constitution now seeks to introduce a radical departure from the past. It calls for transparency and public scrutiny in the appointments. Our situation can be compared to that of South Africa and as **Andrews Penelope**[26] notes that:

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[24] *The Law Society of Kenya V the Hon. Attorney General*, CONSTITUTIONAL PETITION NO. 313 OF 2014

[25] ibid at para 51

[26] Andrews Penelope E in 'The South African Judicial Appointment Process' [2006] *Osgoode Hall Law Journal* 565 at 572.

"The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa's political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under the system had been at the discretion of the President on the recommendation of the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid."

Similarly, the South African constitutional court pointed out in *Cape Bar Council v Judicial Service Commission*[27] that 'the lack of transparency in the Judicial Service Commission's recommendation criteria leads to the creation of speculation that perhaps only executive-minded candidates will be recommended for judicial appointment' and further that since the Judicial Service Commission is a public body created to serve the public's interest, it must perform its functions openly and transparently. Such a requirement is consistent with a culture of justification which signals a decided rejection of past odious laws, policies and practices.[28] This court then recognised the radical departure from the apartheid era to the post-1992 constitutional dispensation. In Kenya, This radical departure can be well expressed in the poetic words of the High Court that

> ***"Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams.***

[27] *Cape Bar Council v Judicial Service Commission* 2012 2 All SA 143 (WCC).
[28] Cape Bar Council case para 29; see also *President of RSA v M & G Media Limited* 2011 4 BCLR 363 (SCA) para 9.

> ***It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health."***[29]

Transparency and public scrutiny are the only means of preventing a return to the past. The two can be said to be the mechanisms and processes of appointments which prevent the unwarranted political interference in appointments in order to enhance the legitimacy and independence of the commission.[30]

Public Confidence and the Judiciary

For the enforcement of its decisions, the court unlike the executive and the legislature cannot execute its own decisions. The judiciary solely depends on public confidence. This is what Kriegler J called moral authority. He held in *S v Mamobolo* that

> "In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State"[31].

Where there is no public confidence, the judiciary is as good as dead. David B. Rottman and Alan J. Tomkins, once observed that 'A court that does not have the trust or confidence of the public cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body. This is true regardless of whether we are talking

[29] *Federation of Kenya Women Lawyers (FIDA-K) & Others vs. Attorney General & Others* Nairobi HCCP No. 102 of 2011 [2011] eKLR

[30] J Sarkin, Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *South African Journal on Human Rights* 588.

[31] *S v Mamobolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 16.

about a trial court or the supreme appellate court'[32], in the same regard, Le Dain J held in *Valente v The Queen* that:

"Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."[36]

History reminds us of the occurrences in the post-election violence (2007-2008) where the country went through one of, if not its worst episode(s) in its independent history. This was as a result of the disputed presidential election results of 2007 when a section of the politicians declined to take their grievances for determination by the courts on the basis that the courts as then composed were not amenable to dispensation of justice[33]. Hon Mutunga, the chief justice emeritus, expressed this concern in in the **JMVB case** at para 212 where he stated that ***"During the process of formulating the new constitution, it became clear that the public's confidence in the judiciary was severely eroded. The Kenyan people wanted all sitting Judges and Magistrates who were in office on or before 27th August, 2010 retired[34].***

The Constitutional court of South Africa has also recognised the import of public confidence. Justice Madlanga while writing for the majority in *Helen Suzman foundation*[35] held that the uultimate power of the court must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."[36]

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[32] David B. Rottman and Alan J. Tomkins, Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges, The journal of the American Judges Association, vol 36 (1999).
[36](1986) 24 DLR (4th) 161 (SCC).at 172.
[33] See *Law Society of Kenya -Versus- The Attorney General*, Constitutional Petition No. 3 of 2016 at para 198.
[34] *Judges & Magistrates Vetting Board & 2 Others vs. Centre for Human Rights & Democracy & 11 others* [2014] Eklr.
[35] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8.
[36] Mahomed "The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 *SALJ* 111 at 112.

This public confidence in the judiciary can be built when the appointment of judges was done in a transparent manner. The ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** has noted to the effect that:

"...the process of appointment must also be legitimate in the eyes of the public, if the courts are to build and retain trust and secure the voluntary co-operation of the public in sufficient numbers to ensure the orderly administration of justice...A legitimate process may be achieved in part through the demonstrable quality of those who are appointed, but it will also be influenced by other factors, including who decision-makers are, how transparent the selection process is, and what provision is made for scrutiny and review in individual cases."

The actions and processes of the Judicial Service Commission and by extension the Judiciary ought not to unnecessarily attract suspicion from either the public. This is because lack of accountability and real independence in the appointment process is likely to undermine public confidence in the judicial system and erode the importance of the judiciary as one of the three pillars upon which a responsible government relies[37]. *Walter Ochieng* has argued that 'the appointment procedures of the JSC commissioners must guarantee that patronage is not used to gain influence in the commission, to avoid the possibility of capture of the JSC by political interest groups'[38].

Conclusion

There is a need that the appointment process be open and transparent while adhering to objective criteria not only in accord with the court and political institutions but also with the general public itself.[39] Robert F. Kennedy one day told us that **"There is a Chinese curse which says, 'may he live in interesting time.' Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind''** and I dare say that like it or not, we live in interesting times, where we have started with

[37] Anita Nyanjong And Ochiel J Dudley, 'Rethinking Judicial Independence And Accountability Under A Transformative Constitution: Kenya Post-2010' In Jill Cotrel Ghai (Ed) Judicial Accountability In The New Constitutional Order, 12th Edition ICJ Kenya Series Of Judiciary Watch Reports (2016)

[38] Walter Khobe Ochieng, 'The Composition, Functions, And Accountability Of The Judicial Service Commission From A Comparative Perspective' In Jill Cotrel Ghai (Ed) Judicial Accountability In The New Constitutional Order, 12th Edition ICJ Kenya Series Of Judiciary Watch Reports (2016).

[39] Sanchez, Laura Patallo*, the Role of the Judiciary in Post- Castro-Cuba: Recommendations for Change. Institute For Cuban and Cuban-American Studies*, University of Miami. ISBN: 0-9704916-7-0. Published in 2003.

Facebook live streaming before we shift to closed doors appointments and before we know it, we will be at handpicking and guess what we will have an extension of the executive as our judiciary!