

AN ASSESSMENT OF THE CURRENT SYSTEM OF JUDICIAL PERFORMANCE EVALUATION IN NIGERIA

Prof. Bolaji Owasanoye,

Taslim Elias Distinguished Professor of Law, Nig. Inst. of Adv. Legal Studies; Former Director of Research, Nig. Inst. of Adv. Legal Studies, Professorial Research Associate, School of Oriental and African Studies, Univ. of London 2011-2013; African Reg. Rep. Criminal Law Committee International Bar Association 2011-2013; Senior Special Fellow, United Nations Institute for Training and Research; Member Institute of Continuing Legal Education, Nigerian Bar Association; Member, Member, Governing Board, Lagos Multi Door Court House; Trustee and Ex. Dir. Human Development Initiatives (not-for-profit).

What is Judicial Performance Evaluation?

- Judicial performance evaluation (JPE) is the assessment of the performance of judicial officers.
- In Nigeria, JPE is conducted by the Judicial Performance Evaluation Committee of the National Judicial Council.

Why Evaluate?

- Any system, which expects performance, ought to involve constant evaluation.
- At the heart of the debate over whether judicial performance evaluation ought to exist at all is the perceived tension between judicial independence and judicial accountability.
- These two principles are not contradictory because *“Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require. A judge remains accountable to the fair application of the law regardless of the judge's endorsement of or belief in the law.”* Penny White "Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations."

Why Evaluate?

- JPE serves the following purposes:
 - i. providing Judges with feedback in order to enable them to improve themselves;
 - ii. providing information on the basis of which Judges can be objectively assessed and hence educating the public as to the proper role of a Judge
 - iii. In countries where judges are elected and tenure periodically renewed by re-election evaluation is a critical tool for the electorate

Why Evaluate?

- iv. The Information gotten from JP can be used to
 - a. Improve the judge
 - b. Improve justice delivery
 - c. Improve image of the judiciary
 - d. Respond to agitation for judicial accountability

Improperly Conducted Evaluation - Disadvantages

- ***JPE based solely on self assessment*** leads to inaccurate assessment of performance.
- ***JPE by a narrow range of users of the judicial system*** results in an unbalanced reflection of the true performance of the Judge.
- ***JPE conducted shoddily and unscientifically*** without the input of experts and technical assistance produces results unrepresentative of actual judicial performance

Properly Conducted Evaluation - drawback

- Cost - an ideal evaluation is expensive to conduct and as such, requires significant resources

Origins of JPE in Nigeria

- Late Justice Kayode Eso Commission set up 1994 to investigate complaints of decline in ethical standard and performance of judges
- Eso Commission recommended a **Judicial Performance Assessment Commission** to monitor the performance of judicial officers
- Eso Commission report archived until 2001 when NJC established under 1999 Const.
- NJC set up Babalakin Committee on JPE in 2003
- Committee was to determine whether the performance of judicial officers was declining.
- JPE Committee now standing committee of NJC and currently headed by distinguished Justice E.O. Ayoola JSC rtd.
- Committee entirely made up of judges except for one member

JPE Format in Nigeria

- The performance of Judges in Nigeria is assessed through an evaluation format (“JPE format”).
- This JPE format is also referred to as “Returns of Cases”
- The JPE format was designed by the Committee.
- No evidence that Committee consulted evaluation or research experts or social scientists to guide its strategy.
- JPE format appears primarily driven by concern with congestion in courts
- Format is output and quantity driven and depends on self-assessment subject to marginal administrative oversight.

Old JPE format

- For Chief Judge; Grand Khadi; President of The Customary Court Of Appeal

S/N	NUMBER OF CONTESTED CASES AND MOTIONS IN WHICH JUDGMENTS WERE GIVEN WITHIN THREE MONTHS	COMMITTEE'S GRADING
1	0	NO PERFORMANCE
2	1	VERY LOW
3	2-3	LOW
4	4-5	FAIR
5	6-9	GOOD
6	10-12	VERY GOOD
7	13 AND ABOVE	EXCELLENT

Old JPE Format: Other Judicial Officers

S/N	NUMBER OF CONTESTED CASES AND MOTIONS IN WHICH JUDGMENTS WERE GIVEN WITHIN THREE MONTHS	COMMITTEE'S GRADING
1	0	NO PERFORMANCE
2	1-3	VERY LOW
3	4-6	LOW
4	7-11	FAIR
5	12-18	GOOD
6	19-23	VERY GOOD
7	24 AND ABOVE	EXCELLENT

New JPE Format: Operative 1st Qtr. 2014

For Chief Judges

S/NO	NO OF CONTESTED CASES AND MOTIONS IN WHICH JUDGMENT WAS GIVEN WITHIN 3 MONTHS	COMMITTEE'S GRADING
1	0-1	NO PERFORMANCE
2	2-3	MARGINAL PERFORMANCE
3	4-6	FAIR
4	7-9	GOOD
5	10-11	VERY GOOD
6	12 AND ABOVE	EXCELLENT

New JPE Format: Individual Judges and Appellate Courts

S/NO	NO OF CONTESTED CASES AND MOTIONS IN WHICH JUDGMENT WAS GIVEN WITHIN 3 MONTHS	COMMITTEE'S GRADING
1	0-3	NO PERFORMANCE
2	4-5	MARGINAL PERFORMANCE
3	6-11	FAIR
4	12-18	GOOD
5	19-23	VERY GOOD
6	24 AND ABOVE	EXCELLENT

How the JPE operates

- Filed on a quarterly basis – by the 15th of the first month after the end of each quarter. By 15th July for 2nd Qtr. Of the year.
- Format focuses on judgments delivered in contested cases or motions only.
- The system operates on the basis of self-assessment
- Each Judge completes and signs the evaluation form and presents it to the Chief Judge for countersigning.
- It is doubtful that Chief Judges scrutinize or verify claims in Returns before countersigning.

How the JPE operates

- “Very good” or “Excellent” performance by a Judge (19 or more judgments) for four consecutive quarters leads to a recommendation (by the Committee) to the NJC for Commendation
- The Commendation is an advantage in consideration for appointment to a Higher bench.
- Failure to deliver any judgment within three months is graded as non performance. Non performance in two consecutive quarters will be referred to the Council for appropriate sanction
- Marginal performance (4-5 judgments in three months) over four consecutive quarters leads to the Committee reporting such a Judge to the NJC

Disadvantages of Current JPE format

- Index of assessment is quantitative and not qualitative
- Self assessment not likely to be 100% transparent nor above board
- Assessment emphasizes litigated cases and psychologically makes judges encourage litigation as barometer for judicial performance
- Judges time in ADR; Consent Judgment; and Pre-trial or Case Management Conferences are not considered.
- This discourages Judges from putting effort into these processes.
- Survey of 124 cases filed between 2009 and 2011 in the Fast Track division of the Lagos State High Court indicates that PTC/CMC was not conducted in 104 cases (83.1%) before the cases proceeded to trial.
- This is a clear contravention of the rules of court.

Disadvantages of JPE format contd.

- Delivery of Judgment as sole index reflects a shortsighted opinion of role of a Judge as mere arbiter of disputes.
- A Judge has a duty to render public service outside of the courtroom - public education and orientation; mediation; and law reform.
- Focus on quantity and speed as opposed to quality of cases encourages mediocrity
- *Justice rushed is justice crushed*
- Quality of judgment should not be left for evaluation on appeal alone especially as court of appeal is also getting congested

Disadvantages of Current JPE format

- Self Assessment not likely to be objective beyond the fact that it may trigger introspection
- Opinion of the “consumers” of judicial service is equally if not more important.
- The view of lawyers; law enforcement officials; expert witnesses, litigants; and judicial support staff are equally important

Caseload and Disposal rates of 9 states 2008-2011

National Total = 314850 Cases

STATE	2008		2009		2010		2011	
	No. of Cases	D.R (%)	No. of Cases	D.R (%)	No. of Cases	D.R (%)	No. of Cases	D.R (%)
AKWA IBOM	16420	8.8	24919	14.3	24223	13.4	10314	13.8
ABIA	1944	8.8	2020	0.0	27168	0.0	11079	17.1
ADAMAWA	3758	17.2	3696	16.4	4037	16.3	1949	20.9
ANAMBRA	48923	0.0	45372	0.0	46750	0.0	19056	5.5
BAUCHI	2854	17.2	3580	22.7	3597	21.3	1480	20.1
BAYELSA	0	0.0	7096	23.7	6565	26.2	3280	31.6
LAGOS	52298	20.1	78802	19.0	79621	21.1	39902	26.3
KEBBI	1208	0.0	0	0.0	1174	50.0	264	51.9
JIGAWA	458	40.8	447	43.4	830	39.2	400	40.5

% Caseload and disposal rates of 9 states 2008-2011

Benchmarked Against National Total of 314850 Cases

STATE	2008		2009		2010		2011	
	No. of Cases	%age of National Total	No. of Cases	%age of N.T	No. of Cases	%age of N.T	No. of Cases	%age of N.T
AKWA IBOM	16420	5.2	24919	6.1	24223	4.2	10314	4
ABIA	1944	0.6	2020	0.5	27168	4.8	11079	4.2
ADAMAWA	3758	1.2	3696	0.9	4037	0.7	1949	0.8
ANAMBRA	48923	15.5	45372	11.1	46750	8.2	19056	7.4
BAUCHI	2854	0.9	3580	0.9	3597	0.6	1480	0.6
BAYELSA	0	0	7096	1.7	6565	1.1	3280	1.3
LAGOS	52298	16.6	78802	19.2	79621	14	39902	15.4
KEBBI	1208	0.4	0	0	1174	0.2	264	0.1
JIGAWA	458	0.2	447	0.1	830	0.1	400	0.2

Disposal Rate Compared with % of National Caseload

National Total = 314850 Cases

STATE	2008		2009		2010		2011	
	D.R (%)	%age of N.T	D.R (%)	%age of N.T	D.R (%)	%age of N.T	D.R (%)	%age of N.T
AKWA IBOM	8.8	5.2	14.3	6.1	13.4	4.2	13.8	4
ABIA	8.8	0.6	0.0	0.5	0.0	4.8	17.1	4.2
ADAMAWA	17.2	1.2	16.4	0.9	16.3	0.7	20.9	0.8
ANAMBRA	0.0	15.5	0.0	11.1	0.0	8.2	5.5	7.4
BAUCHI	17.2	0.9	22.7	0.9	21.3	0.6	20.1	0.6
BAYELSA	0.0	0	23.7	1.7	26.2	1.1	31.6	1.3
LAGOS	20.1	16.6	19.0	19.2	21.1	14	26.3	15.4
KEBBI	0.0	0.4	0.0	0	50.0	0.2	51.9	0.1
JIGAWA	40.8	0.2	43.4	0.1	39.2	0.1	40.5	0.2

Caseload of Superior Courts of Record in Nigeria contrasted

Superior Court	Total Number of Cases recorded
Court of Appeal	211593
National Industrial Court	2254
Federal High Courts	277712
State High Courts	1,555,712
Customary Court of Appeal	26,496
Sharia Court of Appeal	41,085

Analysis of Disposal Rate vis-à-vis Caseload

- States with lesser caseload (such as Jigawa) have a higher case disposal rate compared to states with higher caseload (such as Lagos and Anambra).
- Using the same JPE format for Judges in states with widely disparate caseload produces a skewed assessment.
- Skewed situation of judicial caseload will always produce unbalanced and inequitable result from evaluation
- Opportunity to earn commendation is tougher for judges from states with higher caseload as they have to work twice as hard as their counterparts elsewhere
- By implication opportunity for elevation to higher court based on result of JPE is reduced except other parameters like equality of states are used for appointment to higher bench
- In the same way, if JPE is used as basis for appointment to higher bench, judges from states with lower caseload will suffer discrimination due to no fault of theirs i.e. that cases are simply not enough

Analysis of Disposal Rate vis-à-vis Caseload contd.

- Same disparate result arises by using the same JPE format for all Judges of Superior courts of record with widely disparate caseload
- Workload disparity within courts ought to be taken into account just as it should apply as between states

Other Defects of Nigeria's JPE format

Use of Data

- Non performance or marginal performance may lead to sanction of a judicial officer.
- Prospect of the imposition of disciplinary sanctions on the result of a self-assessment undermines the credibility of the data provided by individual Judges.
- In other words, we can assume that no one will report themselves to be sanctioned
- Objectivity and natural justice is already hampered since the NJC, which administers the evaluation also imposes disciplinary sanction on the judicial officer.
- If a judge were to have a “defense” for non-performance he or she is forced to present such before the “NJC prosecutor and Judge”

Other Defects

- Composition of the Committee– All Judges except one
- In the public interest, the true aim of JPE ought to be disclosed and interrogated
- It is the aim of JPE which ought to guide its design and operation
- No JPE can be completely free from flaws thus continuous assessment of the effectiveness of a JPE ought be conducted in order to ascertain whether it meets the goals of the evaluation

Learning from the US

- Nineteen US states have formal JPE programs.
- Majority of states without formal evaluation programs have unofficial evaluation operated by state and local bar associations
- Alaska was the first state to institute JPE and is considered a model. Several states in the US have adopted it with modifications to suit their local circumstances

The Alaska Model

- Judges are evaluated at the end of each term in office by the Alaska Judicial Council, an independent council set up by the Constitution of Alaska and comprises of seven members.
- Composition of the commission is three attorneys, three non-attorneys, and the Chief Justice of the state supreme court.
- Evaluators are the users of the judicial system and include lawyers; and other professionals who interact with the Judge on a regular basis - peace and probation officers, social workers, guardians ad litem, social workers, guardians, and court appointed special advocates; jurors and court staff.
- The professionals evaluate the judge based on nine indices – “legal ability; impartiality/fairness; integrity; judicial temperament; diligence; special skills; respect for parties, attorneys, and staff; reasonable promptness in issuing decisions; and overall performance.”

The Alaska Model

- Jurors evaluate judges on the bases of “impartiality, respectfulness, attentiveness, control over proceedings, intelligence and skill as a judge, and overall performance.”
- Court staff evaluate judges based on 5 indices - judicial temperament; diligence; integrity; impartiality; and overall performance.
- Performance evaluation in Alaska includes self-assessment; an evaluation of how the trial Judges’ rulings fare upon appeal; interview of the Judge; recusal records of the Judge; peremptory challenge rates; comments from public hearings; and reports from “a sophisticated network of volunteer judicial observers.”
- The Alaskan JPE model is stated to have the dual purpose of voter education and judicial performance improvement.

ABA Guidelines for JPE

Guidelines

- i. Legal Ability – knowledge of law
- ii. Integrity and Impartiality
- iii. Communication Skills
- iv. Professionalism and Temperament
- v. Administrative Capacity
- vi. Specialization where relevant
- vii. Trial or appellate

ABA Guidelines

- Possible Uses for JPE
 - i. Judicial self- improvement
 - ii. Improvement of quality of judiciary
 - iii. Guide to decision makers on retention of judges in office
 - iv. Effective assignment of judges
 - v. Improved design of continuing education programs

The O'Connor Judicial Selection Plan, 2014

- Recommends that “Judicial Performance Evaluation be created by constitution or statute rather than by rule or directive”
- Recommends the following indices
 - a. Command of relevant substantive law and procedural rules
 - b. Impartiality and freedom from bias
 - c. Clarity of oral and written communications
 - d. Judicial temperament that demonstrates appropriate respect for everyone in the courtroom
 - e. Administrative skills, including competent docket
 - f. management
 - f. Appropriate public outreach

Redesigning Nigeria's JPE

- Nigeria's JPE should focus on a determination of procedural fairness rather than output; on quality rather than quantity
- Indices of Assessment should include
 - i. attitude to counsel and litigants;
 - ii. equality;
 - iii. fairness and integrity;
 - iv. knowledge of the law;
 - v. grasp of facts;
 - vi. expedition and timeliness;
 - vii. communication skills; and
 - viii. administrative abilities

Redesigning Nigeria's JPE

- If the number of trials conducted is still taken into consideration as an index of performance this index ought to be broadened beyond merely the number of contested cases or motions in which judgments were delivered to include pre-trial or case management conference processes; alternative dispute resolution or settlement and consent judgments.
- Even if time spent on these cases will not carry as much weight as that spent on contested cases, JPE still ought to recognize this as part of judicial workload.
- Note that NJC's draft Uniform CPR includes PTC/CMC as part of procedure thus implying merit in settling cases outside litigation

Redesigning Nigeria's JPE - contd

- Evaluators must include:
 - i. litigants;
 - ii. lawyers;
 - iii. judicial officers;
 - iv. expert witnesses; and
 - v. law enforcement officials.

Redesigning Nigeria's JPE

- Differentiation - disparity in the workload among the various courts in Nigeria; the superior courts in various states; and within courts ought to be taken into consideration
- Purpose of Evaluation - NJC ought to determine by policy the goals and use of data on JPE in Nigeria and communicate same to members of the public through the enlightenment unit of the judiciary directed to be set up by the National Judicial Policy

Redesigning Nigeria's JPE

- Expertise - experts and up to date technology must be utilized in designing and conducting JPE in Nigeria
- Composition of the Committee - Committee ought to be expanded to draw its membership from various stakeholders including the Bar; and the general public. It is proposed that at least two sophisticated laypersons ought to be included in the Committee.

Conclusion

- Optimal performance of the judiciary is pivotal to constitutionalism.
- There is the need to ascertain whether the judiciary is operating optimally through a JPE which measures not merely the quantity of judicial output.
- The quality of judicial output and the judicial process are key in measuring judicial performance.
- Beyond self assessment, evaluators must include the assessment of lawyers; litigants and judicial support staff of their experience with the judicial system.
- The conventions of other jurisdictions and lessons learnt therefrom are highly useful. However, local circumstances must mold the uses to which these lessons would be put.

THANK YOU

- bowasanoye@yahoo.com
- 234-8033043340