

The Presentation

In Nigeria the issue of appointment of Judges, which hitherto was sacrosanct and carried out in a manner akin to the appointment of a Pope has unfortunately come to the front burner and is an issue jeered at, maligned, adversely treated and ridiculed due to rivalry, conflict, disharmonious and confrontational postures by the institutions constitutionally empowered to carry out this responsibility.

In some states of the federation, the issues of appointment of High Court Judges or the appointment of the Chief Judge of the State have assumed the Status of open confrontation, derogatory paid advertisement, scandalous interviews and press releases by the appointing authorities as a body or by individuals who participated in the process of appointment. The resultant effect in the recent past is that the populace have jeered at the process and lampooned a system that has become fallible and indefinite. At the Federal level, the Executive as exemplified by the President of the Federal Republic had vehemently refused to confirm a nominee of the NJC as the President of the Court of Appeal on the pretext of exercise of powers that he, the President does not possess and which are at variance with constitutional provision. Therefore, unless I confine myself to worthy platitudes, I am bound to offend several people in and outside this auditorium. This chance I am obliged to take and would have successfully done so if this conference jumpstart the process of reformation of the appointment process.

Be that as it may, the issue of appointment of judges is important, politically sensitive and indeed controversial. I am aware that the whole issue of diversity in appointment is important, as it is necessary to periscope the reasons why the High Court Benches are dominated by females. At the end of this presentation, we may come to a very depressing conclusion that the whole subject is bedeviled by an unthinking resort to sterile formulae and an unwillingness to ask awkward questions or address real dilemmas. This does no justice to an important and difficult issue which calls for a more honest and objective appraisal than it has so far received.

Of course, the Judicial Service Commission (JSC) is fallible like all human institutions. And of course, there are things that could be done to improve its procedure of appointment of Judges to the State High Court. But by and large the Commission does a difficult job about as well as can be done.

According to Lord Sumption in a Bar Council Law Reform Lecture who said that: **“The evidence is that in a world where professional and judicial careers are separate streams with very little in the way of transfer between them, men will opt disproportionately for professional practice”**. This is because as is perceived to bring higher financial rewards, greater independence and more status than the judiciary, at a cost in terms of hours and working conditions which men are more willing to pay than women are. The current situation results from an artificial reduction in the pool from which judges are chosen to the wholesale withdrawal of men. This hardly seems to be in the public interest and is no more compatible with a diverse judiciary”.

I totally agree with this view and if juxtaposed with the Nigerian situation, there are scanty applications by men to fill vacancies to the High Court bench. Furthermore, the majority of the applicants are women who are by nature, not by choice, bugged down by marital and social responsibilities, sustenance of their marriages and in some cases jealous spouses who detest in unspeakable terms the revered manner in which their wives “Her ladyships” are treated with awe and respect. Beverlay MacLachlin, former Chief Justice of Canada distanced herself from gender inequality that view women judges differently from men, or come to the business of judging with different ethical preconceptions. However, she argues that the quality of justice is nevertheless improved by a diverse bench for a different reason, namely that a diverse judiciary is able to draw on a wider range of collective experience. According to Her Ladyship “Jurists [she says] are human-beings and, as such, are informed and influenced by their backgrounds, communities and experiences. For cultural, biological, social and historic reasons, women do have different experiences than men”.

The theme of this Conference is: **“Putting Our Best Foot Forward: The Judiciary and the challenges of satisfying justice needs of the 21st Century”**. Its main component and the thrust of papers to be presented by Resource Persons, scholars, academicians, legal practitioners and Jurists

would be reform of Judicial Appointments and Performance Management Systems – within the context of growing public and professional calls for changes in how both processes or functions are undertaken or managed.

It is appropriate that the National Judicial Council is also part of this historic conference because of the important role this body plays in appointment of judges, performance evaluation, discipline and allied related matters. At its conclusion, this conference would duly be deemed successful if it is able to come up with recommendations, suggestions on how the judiciary can function at its optimum level in delivering justice service to Nigerians, foreigners and all and sundry.

It is also crucial for the justice system to meet the legitimate expectations of fairness, efficiency, accessibility and justice, irrespective of any extraneous consideration as is exemplified in the blindfolded symbol of a lady with the balance scale of justice.

The organizers have also opined and I absolutely concede that “reform of the current methods of judicial recruitment and performance measurement in Nigeria are, furthermore, needed to protect the fragile progress the Judiciary has made since the return to democratic rule”.

The Presentation would address the subject as framed by the organizers: **“whether the Judicial Service Commission (JSC) as presently constituted under the Constitution can operate fully independently and exercise full autonomy over the matters it has been given authority over by the constitution?”**

In a nutshell: “Can the JSC ignore in its entirety political pressure from the 3 arms of government – the legislative, the executive and the judiciary and take autonomous independent decisions in recruitment and appointment of Judges and make dispassionate choices solely merit driven, devoid of the afore-stated political interruption, gerrymandering, interlopers, instructions and subtle blackmail in these appointment?. With respect I categorically submit that it cannot. In the course of this presentation, all would see that the mode of appointment within the context of the

guidelines is fraught with interruptions from extraneous persons and institutions who overtly or covertly attempt to influence the choice.

The Powers of the JSC is expressly stated in relevant sections of the Constitution of the Federal Republic of Nigeria which clearly stipulates the duties and functions of the Judicial Service Commission and the National Judicial Council, on one hand as the appointing authorities, while the Governor is the approving authority.

Section 292 (1) of the Constitution states that Judicial Officers in Nigeria are Judges who preside over superior or courts of record, which includes the State High Court and Judges of the Customary Court of Appeal of the Federal Capital Territory and States. 2. 271 (3) relates to State High Courts states that a lawyer must have been called to the Bar for not less than ten years before he may be qualified for appointment as a Judge of a High Court of Nigeria.

The Judges of the State High Court are appointed by the Governor on the recommendations of the National Judicial Council and there is no requirement for the confirmation of such appointment by the House of Assembly of the State.

Nigeria is a federal state which implies that there is a central authority that represents the whole, and acts on behalf of the whole in external affairs and in such internal affairs as are held to be of common interest, and in which there are also state governments with powers of regulation and administration within the spheres allocated to them by the Constitution.

The distinctive feature of federation is the formal division of governmental powers between the federal, the State and the Local Governments. Both the units and the federal authority may exercise their legislative, administrative and judicial powers only within the limits set out in the Constitution. The supremacy of the Constitution is therefore a fundamental feature of federalism.

An incidence of federalism and a key feature which is accepted by all as indispensable is the doctrine of Separation of Powers. The framers of the

Constitution of the U.S.A. consciously adopted this principle in the Massachusetts Constitution of 1780 which explicitly states thus: **“In the government of the commonwealth, the Legislative department shall never exercise the executive and judicial powers of either of them; and the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them to the end that it may be a government of laws and not of men”**.

Because of acts of human imperfection and the synergy in governance, it has been impracticable to rigidly apply this doctrine in its raw and unabated form as above postulated. Even in the United States of America, the President appoints the judges, and has the power of pardon except in cases of impeachment. Judges may sit in judgement over the conduct of government officials, and they have the powers to declare laws passed by Congress unconstitutional. Within the limits set by the general principles, there must be points of contact and interaction between the three departments, so that there must be the maximum harmony and co-operation between them in the essential task of government.

Summary of Guidelines for Appointment

i. The Chief Judge is to get the approval of National Judicial Council (NJC) to appoint a specified number of Judges based on the need. ii. Once the approval is given by the NJC, the Chief Judge to notify the Governor of intention to commence the process of appointment. iii. The Chief Judge would call for nomination from serving Judges in and outside the State. iv. Shortlisting of candidates who have applied. v. Circulation of shortlisted candidates to the Nigerian Bar Association Branches in the State and to the State Security Services. vi. The Chief Judge would present to the Judicial Service Commission the shortlisted candidates and their NJC's Form A duly filled with its attachments completed. vii. Outcome of the JSC meetings and its recommendation to be forwarded to the NJC with the assurance that all what the Judges so appointed would need to perform are in place. Two Lists - Priority and Reserve are to be sent to NJC with comment of every member of the JSC on each of the candidates.

With this emphasis on the important role of Judges in society, we now examine the process of appointment as stipulated in the NJC Guidelines and make juxtaposition with Great Britain, a Commonwealth Country with which we share common values.

The process commences with the Chief Judge's call for nomination from serving judges in and outside the State. The question is why is the nomination limited to Judges only?. This in my view is a major flaw in the system, which permeates the entire process and results in a limited pool of applicants. In my view, it is better to advertise for the vacancy and involve the Bar Associations, Ministries of Justice, the Magistracy and other agencies whose members are eminently qualified to be appointed Judges.

In England the **Judicial Appointment Commission** has three key statutory duties: - to select "solely on merit", to select only candidates of good character, to have regard of the need to encourage diversity in the persons available for selection. Fairness and transparency are at the heart of the Judicial Appointments Commission's operation. The JAC publishes all exercises on its website, in relevant publications and through key interested parties.

The JAC applies an evidence based process based on the following qualities and abilities (competencies) are: Intellectual ability, an ability to understand and deal fairly, personal qualities, authority and communication skills, efficiency/leadership and management. Candidates applications include: (i) a self-assessment prepared by candidates providing evidence of the extent to which they meet the qualities and abilities; (ii) up to three references of their own choice; (iii) one judicial or professional reference from a list prescribed by the JAC; (iv) a good character declaration by candidates including anything in their past conduct, or present circumstances which would affect their application.

The short listing of candidates depends on the nature of individual exercises. The JAC will apply one of 2 methods of short listing. (i) Online tests; generally for larger exercises, and generally set in the jurisdiction concerned; or (ii) a paper sift; generally for smaller/more senior exercises and based on a candidates self assessment and their references.

The highest scoring candidates in the online test will be invited to a selection day (the ratio called to interview will vary between 2 and 3 times the number of vacancies) and the selection day involves interview and a combination of the following, namely: (i) a presentation by the candidate on a subject specified by the JAC (ii) a role play exercise in a court setting (usually for entry level posts). (iii) situation questioning laid by a judicial panel member whereby a candidate will be asked specific legal questions around a set scenario; and/or (iv) competence based questions around the qualities and abilities required for the office. Top scoring candidates are subject to character checks with Legal Professional Bodies, Police, HM Revenue and Customs and the Judicial Conduct and Investigation Office for serving judges.

You will all agree with me that this process is open and transparent compared with our mode of appointment viz the JSC and NJC, which with utmost respect is shrouded in secrecy and is from commencement and almost to conclusion an act of judges nominating and choosing new members of their 'Club'.

In England the process of appointment is open and transparent and merit driven, such that the best among the applicants for office would emerge. A candidate need not have a Godfather sponsor, know a serving Governor, friends with the CJ or be classmate of any serving judge or judges to succeed in being appointed as a judge.

It is my recommendation that the JSC/NJC should review the present process of selection of Judges and make it merit driven, open and transparent. This process of nomination by serving judges is awkward, restrictive, limiting in nature and forecloses other constituencies like the Magistracy, the Ministry of Justice and private practitioners as relevant in the exercises.

It is important to emphasise that due to the large number of applicants that desire and seek appointment as judges in Lagos State the JSC has introduced a qualifying test for purposes of selection and short listing. Other jurisdictions may want to consider this option.

An important part of the appointment process is the submission of two lists namely Priority and Reserve, which are sent to the NJC with comments of every member of the JSC on each of the candidates. This process of selection is not merit driven and is further compounded by the submission of the Priority and Reserve Lists.

I suggest an abolition of these 2 Lists. In future, the JSC should forward the exact number of persons to fill the vacancies. After all, the JSC and not the NJC interviewed and observed the performance of these candidates prior to making recommendations. The NJC should cease to have the prerogative of tampering with the lists. If NJC is dissatisfied with the choice of any candidate its sole prerogative is to give in unequivocal terms reasons for such rejection, and request for clarification or replacement.

In summary, members of the JSC and the NJC (to a limited extent) involved in the selection and appointment of applicants for judicial office, for promotion to higher judicial office and/or for specific roles within the judiciary should make their decisions by reference to sound, objective criteria, on the basis of each candidates personal merit, experience, competence, performance, skills and abilities.

Power to Appoint the Chief Judge

Honourable Justice Umezulike in a publication titled “**Appointment of a Chief Judge of a State in Nigeria - My Experience and the Ascent of Pragmatism and Constitutionalism**” stated that the norm that the NJC must send the name of the most senior judge in the list and insist that such judge must be appointed by the Governor is an unwarranted obligation which the NJC imposed on itself. It is neither supported by any law nor by the provisions of the Constitution. There are weightier consideration than mere seniority such as incorruptibility, distinction in character and learning and acceptability by the state or organs of the state. **As between the Governor and the nominees, there must exist deep mutual respect, deep confidence, courtesy and civility. He further submitted that it is obvious that in practical terms, any friction between the NJC and the Governor may occasion paralysis in the State Judicial system. As between the NJC and the Governor relative to the process, there should be back-slapping rather than back-stabbing.**

In his contribution to the debate in an article titled NJC's directive to the Rivers State Judiciary - whither the Rule of Law?, Somina Peter Johnbull stated that the NJC at its 67th Meeting directed the most senior judges in Rivers State Judiciary to oversee the assigning of cases and also perform other related administrative duties. In his views our laws are not the problem but those charged with its implementation. It is the litigants in Rivers State that will suffer unnecessarily and without any justification. For a jurisdiction reputed as the busiest after Lagos and arguably the Federal Capital Territory, Abuja, this is really sad. Moreso, the judiciary is now a victim of the secular politics in Rivers State.

According to S. B. Johnbull "the NJC does not have the power it seeks to confer on the most senior judges of the Rivers State Judiciary to assign cases and other related administrative duties. This is because, the power to assign cases and other related administrative duties is a function of the Chief Judge of Rivers State by virtue of Sections 36-41 of the High Court Law of Rivers State. These powers include; (i) Assigning and distribution of cases; (ii) Transfer of Judges; (iii) Transfer of Cases". "These functions can only be performed by the Chief Judge of the State or any person acting in that office. With respect, the NJC is not the Chief Judge of Rivers State and therefore cannot delegate the functions of the office of the Chief Judge. Afterall, delegation can only be effectual, where the delegate has power that he is delegating. The maxim *nemo dat quad non habet* is apt here".

According to May Agbamuche-Mbu in her Column in This Day Law 24/6/14. **"This whole saga is not in any way to the advantage of the Judiciary, but it is rather a case of 'Physician heal thyself'.** If this impasse cannot be resolved how then can the public have confidence in the judiciary and its ability to resolve their own problems or adjudicate on their cases?"

Professor Oba Nsugba QC, SAN had earlier reiterated in November 2013 that the NJC possesses guidelines on the appointment of judges which seek to ensure that only candidates of impeccable character and with sound legal backgrounds are recommended for appointment. **However, judging by the present outcry, both in public and in private about the quality of**

justice dispensed by many of the nation's judges, it is more than arguable that Nigeria's system of Judicial selection and appointment is in a drastic need for an overhaul.

He further submitted that there is need to completely demystify the system of judicial appointment in Nigeria from the beginning to the end. The pertinent question is: Exactly what is needed of the applicant; when; who will assess; how will it be assessed; who will be spoken to; against what criteria, etc. There needs to be more transparency about the appointment procedure. The lack of it acts as a disincentive to many aspiring judges.

Controversies regarding nomination of Chief Judges have occurred before as in 2012 when Governors Rauf Aregbesola (Osun State), Abdufatah Ahmed (Kwara State) and Murtala Nyako (Adamawa State) had issues with the NJC concerning the governors' own preferred choice of nominee as Chief Judge in their respective states. The 1999 Constitution does not at any juncture recognize hierarchical succession to the position of Chief Judge. The constitution only mandates the State governor to appoint a person with minimum 10 years post call experience who must be a member of the Nigerian Bar Association or the Bench.

The organizers have requested that we explore 2 pertinent posers thus:

(i) Whether the JSC can effectively ignore political pressure from outside and not be disturbed by such distractions and (ii) whether these political pressures may or may not influence the choices JSC makes particularly when filling judicial vacancies.

The answer is in the affirmative, but in a limited extent in our own jurisdiction of Lagos State (City of Excellence) Eko o ni baje o. Suffice to say that the caliber of persons in the Commission most especially the Chief Judge of the State and its Attorney-General and Commissioner of Justice are the only ones who have direct contact with the Executive and the Legislative as it were. Subtle phone calls, pep talk and peer pressure are indispensable from eminent citizens, godfathers, traditional rulers, very senior lawyers, but these can be ignored and quite rarely form the basis of those chosen. As I categorically stated earlier in this presentation, applicants for judicial appointment in Lagos State write a qualifying Aptitude Test. No one who fails that test can proceed to the next stage.

Our most revered Professor ‘Yemi Osinbajo SAN, can confirmed the veracity of this statement. I recommend this procedure to other jurisdictions and we are willing to avail others the template that we have designed to ensure that our process of appointment is merit driven.

I am grateful to the organizers of this conference and indeed our indefatigable and quintessential Chief Judge, Her Ladyship Ayo Phillips for availing me this unique opportunity to make my humble contribution to reform of mode of Judicial Appointments in Nigeria. I hope I have discharged the obligation required of me and justified the urgent need for reform.

I do not expect everyone in this auditorium or elsewhere to agree with the views that I have expressed in respect of the process of appointment of judges as presently stipulated. These views are necessarily provisional.

What I hope I have persuaded you to accept is that the subject of judicial appointment is an extremely complex and delicate one. We have to make choices and to accept compromises with a view to reform the process. The alternative is to do serious harm to the quality and standing of the judiciary, undermining an institution which however imperfect has been the most successful among the three arms of government, and which akin to the “Rock of Gibraltar” remain solid in protection of our societal values and protection of our rights as a people.

Thank you.

Chief Kunle Uthman,
Honourable Commissioner,
L/S Judicial Service Commission.
Friday, 4th July, 2014.