

REFORM OF JUDICIAL APPOINTMENT PROCEDURES: DEVELOPMENTS IN SELECTED COMMONWEALTH JURISDICTIONS AND LESSONS FOR NIGERIA

Professor Dakas CJ Dakas, *Ph.D; SAN*
Professor of Law & Senior Advocate of Nigeria;
Faculty of Law,
University of Jos, Nigeria.

E-mail: professordakas.san@gmail.com

Phone: + 234 803 452 6633

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I. INTRODUCTION

- An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice...

To secure these aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office;
appointment on merit; and

that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

- The appointment process... should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.
 - Judicial vacancies should be advertised.
- **Commonwealth (Latimer House) Principles**

II. JUDICIAL APPOINTMENTS – WHY PROCESS MATTERS

- **THE HEART OF THE MATTER:**

To appreciate fully the importance of [the process of judicial appointments] and the interest it generates, it is necessary to view the process as integral to the transformation of the judiciary.

- Justice Yvonne Mokgoro (former Judge of the South African Constitutional Court), “Judicial Appointments”, *Advocate*, December 2010, p. 43.

II. JUDICIAL APPOINTMENTS – WHY PROCESS MATTERS CONT'D

- **Beyond Machiavelli** – The end does NOT justify the means; the process is as critical as the outcome.
- An open, transparent and credible process **inspires confidence** in the men and women who are charged with the responsibility of dispensing justice:

Without armies to carry out their judgments, courts are dependent on the consent of the governed no less than the other branches [of government]...When the image of the judiciary is tarnished, the moral authority of the courts is critically undermined. The appearance of partiality...is the greatest threat that confronts our judges. A judiciary that is sufficiently armored with a good reputation for integrity can withstand other threats...

- **John P. MacKenzie, The Appearance of Justice (New York: Charles Scribner's Sons, 1974), at x.**

II. JUDICIAL APPOINTMENTS – WHY PROCESS MATTERS CONT'D

- **Worthy in Character - Integrity is key:** An open, transparent and credible process weeds out corrupt elements:

Popular saying: “why waste money hiring a lawyer when you can buy the Judge?”

A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office while still being referred to as ‘honourable’.

- Uwaifo, JSC, Valedictory Speech, *reproduced in (2005) 1 SCNJ, at 20.*

II. JUDICIAL APPOINTMENTS – WHY PROCESS MATTERS CONT'D

- **Worthy in Learning:** An open, transparent and credible process weeds out inept, indolent and incompetent elements – The outcome of a case is not necessarily the justice of the case.
- **Beyond Legality: Implications for Legitimacy and Justice:** In the perceptive words of Iyer, “Law, without justice, is legitimation of tyranny; justice, without law, is fraught with anarchy; justice riding law, with a mission and a vision, arrives at destination.”
 - **V. R. K. Iyer, Law Versus Justice: Problems and Solutions (Deep & Deep Publications, 1981), at 119.**
- **Judges wield awesome powers**, including power over life and death: “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens” – **UN Basic Principles on the Independence of the Judiciary.**
- **Role of Judges in the Sustenance of Democracy:** Given the history of our political odyssey, it is easy to discern the pivotal role of the judiciary in the success or failure of democracy, democratic experimentation or democratization agenda: Recall June 12 Imbroglio .
- **Judicial Review and Democracy Deficit Contestation - the quality of judges matters.**

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA

- **Procedure for Appointment of Judges:** Constitution of Kenya: Section 166; Judicial Service Act, 2011: Section 30 and First Schedule to the Act.

Key Features:

- Overarching objective is to **ensure transparency** in the recruitment process.
- **Elaborate procedure prescribed by Parliament and publicised.**
- **Vacancies are advertised** in the Official Gazette, on the **website** of the Kenyan Judicial Service Commission, through the Law Society of Kenya, and circulated in any other appropriate manner.
- **Reference Check.**
- **Background investigation and vetting.**
- **Publication of names of applicants.**
- **Publication of non-confidential and non-sensitive information** about the applicants.
- **The Commission invites the public to submit any relevant information** about the applicants.
- **Interview of applicants in public.**
- **The Commission deliberates, votes and nominates** qualified applicants.

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

Specific Features:

- The procedure for the appointment of Judges **“shall be published”** in the **annual reports** of the Judicial Service Commission and **posted on the Commission’s website.**
- Where a vacancy occurs or exists, **the CJ places a notice to that effect in the Gazette,** following which the Judicial Service Commission :
 - **posts a notice to that effect on its website;**
 - **sends notice of the vacancy to the Law Society of Kenya** and any other lawyers’ professional associations; and
 - **circulates the notice in any other appropriate manner.**
- The notice specifies the eligibility requirements , provides information on how to apply and prescribes the deadline for applications.
- Application forms may be obtained upon request from the Commission’s offices and **availed on the Commission’s website.**

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

- The application form requires applicants to provide :
 - background information and in particular information that may be relevant to determine qualifications for office, including but not limited to:
 - academic,
 - employment,
 - legal practice'
 - judicial or **financial discipline**,
 - community service, **pro bono activity** and non-legal interests,
 - involvement as a party in litigation,
 - criminal record, etc.
 - **3 professional references.**
 - **2 character references.**
 - detailed information about the applicant's practice of law in the last five years or, if engaged elsewhere, detailed information on that engagement in the last five years.

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

- sample of any writing by the applicant, including any legal publications authored by him/her.
- declaration of income and liabilities at the time of the application.
- a brief written summary of the applicant's bio-data including legal education and legal experience.
- An applicant's professional body or organization is at liberty to invite him/her to submit his/her application to that body or organization for evaluation and submission to the Commission. However, each individual application shall be considered on its own merits.
- The Commission shall maintain the confidentiality of sensitive and highly personal information of the applicants. The rest of the information may be made available to the public.
- The Commission reviews the applications for completeness and compliance with necessary requirements.
- The Commission undertakes a reference check of the applicants.

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

- **The Commission investigates and verifies**, in consultation with relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.
- Upon the expiry of the period set for applications, the Commission:
 - issues a **press release** announcing the names of the applicant,
 - **publicises and posts on its website** the place and approximate date of the Commission meeting for interviews,
 - causes the names of the applicants to be **published in the Gazette**,
 - **invites any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants**,
 - **interviews any member of the public who has submitted any information on any of the applicants.**
- **The Commission interviews each applicant in person or, at its discretion, arrange an interview by phone or other electronic means.**
- **All interviews shall be conducted in public.**

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

- Evaluation Criteria:

- **professional competence**, the elements of which shall include:
 - intellectual capacity,
 - legal judgment,
 - diligence,
 - substantive and procedural knowledge of the law,
 - organizational and administrative skills,
 - ability to work well with a variety of people.
- **written and oral communication skills** .
- **Integrity** .
- **Fairness**.
- **Good judgment, including common sense**,
- **Legal and life experiences relevant to the position**,
- **Commitment to community and public service**.

III. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM KENYA CONT'D

- After the interview, the Commission deliberates and nominates the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.
- Each member of the Commission votes according to his/her personal assessment of the applicant's qualifications.
- The Secretary to the Commission administers the voting.
- The President appoints Judges on the recommendation of the Judicial Service Commission.
- In the case of the Chief Justice and Deputy Chief Justice, the President appoints on the recommendation of the Judicial Service Commission but subject to the approval of the National Assembly.

IV. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM SOUTH AFRICA

Judicial appointments in South Africa, regarded by some as a major tool in the transformation of the judiciary in South Africa, often engenders not only much interest, but an equal amount of controversy generally within South African society, particularly among judges themselves. Every session of the Judicial Service Commission (JSC) which has on its agenda judicial appointments is often closely watched. To appreciate fully the importance of this process and the interest it generates, it is necessary to view the process of the appointment of judges as integral to the transformation of the judiciary. That must in turn be viewed in its historical context and the transformation of South African society generally, as envisaged in the Constitution.

- Justice Yvonne Mokgoro (former Judge of the South African Constitutional Court), “Judicial Appointments”, *Advocate*, December 2010, p. 43.

IV. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM SOUTH AFRICA CONT'D

- Procedure for the Appointment of Judges : South African Constitution: Sections 174 and 178.
- **Key Features:**
 - The President, after **consulting** the **Judicial Service Commission** and the **leaders of parties represented in the National Assembly**, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
 - The other judges of the **Constitutional Court** are appointed by the President, after **consulting** the **Chief Justice and the leaders of parties represented in the National Assembly**, in accordance with the following procedure:
 - (a) The Judicial Service Commission must prepare a **list of nominees with three names more than the number of appointments to be made**, and submit the list to the President.
 - (b) The President may make appointments from the list, and **must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable** and any appointment remains to be made.

IV. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM SOUTH AFRICA CONT'D

(c) The Judicial Service Commission must supplement the list with further nominees and **the President must make the remaining appointments from the supplemented list.**

- At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- The President must appoint the **judges of all other courts** on the **advice** of the Judicial Service Commission.
- Except in respect of appointments to the Constitutional Court, neither the Constitution nor a statute prescribes , as is the case with the Kenyan Judicial Service Act 2011, detailed procedures for the appointment of Judges. However, the Judicial Service Commission has developed its own guidelines.
- When a vacancy arises, **nominations are invited from the general public.**
- **Candidates are interviewed in public and in the presence of the media.**
- After the interviews, the Commission's deliberations, however, take place behind closed doors.

IV. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – INSIGHTS FROM SOUTH AFRICA CONT'D

- Although the South African process has its fair share of critics, Justice Mokgoro sums up the South African experience, especially in its historical context, as follows:

Relative to the judicial appointment procedure prior to 1994, the establishment of the JSC with its constitutionally created role and function indeed constituted the most radical break from the pre-1994 procedure for judicial appointments. Headed by the Chief Justice, its independence, despite a heavier presence of members of the legislature and executive in its composition, and its procedures have important spin-offs for judicial independence...Unlike the position before 1994, the procedures of the JSC allow for transparency... In general terms... the open and independent aspects of the JSC's processes have been hailed as successful.

V. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – LESSONS FOR NIGERIA

- **Current Dispensation:** Constitution of the Federal Republic of Nigeria: Sections 231, 238, 250, 254B, 256, 260, 265, 271, 276, 281,.
 - Note the composition and role of the **Federal Judicial Service Commission (FJSC)** and the **State Judicial Service Commission (SJSCs)** of each State.
Note the composition and role of the **National Judicial Council (NJC)**.
 - Note the role of the **President and State Governors**.
 - Note the role of the **Senate and the House of Assembly** of each State in the confirmation of the appointments of the Heads of the respective courts.
 - **Unlike the Kenyan situation, neither the Constitution nor any statute prescribes detailed procedures to be followed by the NJC, FJSC or SJSCs.**
 - **The NJC, FJSC and SJSCs have developed their respective Guidelines on judicial appointments. Regrettably, these Guidelines are not widely circulated and are not available, as at the time of writing, online.**
 - **Neither the NJC, FJSC nor SJSCs has a robust online presence.**
 - **Judicial vacancies are not advertised online.**

V. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – LESSONS FOR NIGERIA CONT'D

- Judicial vacancies are officially circulated only in the legal community.**
- Names of applicants or nominees are not published in the media.**
- Non-confidential and non-sensitive information about the applicants are not published in the media.**
- Comments are invited from superior court judges and the NBA, but members of the public are not invited to submit any relevant information about the applicants. However, petitions from members of the public who are aware of the process are received and treated.**
- Candidates are not interviewed, whether in private or in public.**
- On the whole the current dispensation is neither open nor transparent.**

V. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – LESSONS FOR NIGERIA CONT'D

- **Current Reform Proposals:** Excerpts from the Report of the Justice Uwais-led Stakeholders Judicial Reform Committee:

18. There is need to urgently reform the system of appointment of Judges so as to recognize court room experience, distinction in legal practice, and academic excellence.

19. There is need for the publication of the list of prospective Judges with a view to allowing public comments on the suitability or otherwise of such nominees.

20. There is need to reconsider the appointment of senior members of the Bar to the Appellate Bench as contained in the Guidelines for the Appointment of Judicial Officers, and the Constitution.

21. There is need to ensure that persons being considered for judicial appointment by the Federal Judicial Service Commission, State Judicial Service Commissions and the Judicial Committee of the Federal Capital Territory, Abuja, are subjected to an interview process.



V. REFORM OF JUDICIAL APPOINTMENT PROCEDURES – LESSONS FOR NIGERIA CONT'D

22. The Federal and State Judicial Service Commissions and Judicial Service Committee of the FCT as the case may be, must then advertise the names of the shortlisted candidates so as to invite public scrutiny and commentary on same. This list must be forwarded along with qualifications and other documents including any public comments, to the National Judicial Council so that the best candidates are appointed sequel to a rigorous screening, selection and interview process. This provision should be incorporated into the Federal Judicial Service Commission's Guidelines for Appointment of Judicial Officers.

- Commendable as these proposals are, they have, so far, not received the blessings of the NJC, FJSC, and SJSCs.
- The recommendations of the Uwais-led Stakeholders Judicial Reform Committee should be adopted, bolstered with additional insights from the Kenyan and South African experiences and implemented without much ado or any further delay.

VI. CONCLUSION

- In light of the challenges that the Nigerian judiciary grapples with, there is no disputing the fact that, as it stands today, it appears that the society we serve is not entirely satisfied with our performance. Hard as it may be to accept, it is less important to focus on whether this assessment is fair or not. The important thing is for us to look at ourselves in the mirror and transparently come to terms with the prevailing realities, accept the gap in expectations, and do our utmost to bridge it. Much as we try, we cannot wish away the perception – rightly or wrongly – of the “consumers” of justice.
 - **Justice Dahiru Musdapher, “The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy”, NIALS 2011 Fellows Day Lecture.**
- We cannot afford the “luxury” of procrastination!