

The Merit-based system for Judicial Appointments

PRESENTATION BY

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Introduction

A properly functioning justice system is a prerequisite for a genuine democracy; one that ensures respect for the rule of law and the separation of powers. The courts of higher jurisdiction presided over by judges are a major pillar of the justice system: not only are these courts important on the interpretation of the law, but, in several countries of the region, are responsible for the development of jurisprudence. It is therefore critical that only the most qualified candidates are appointed to these courts. This can only be ensured through a transparent selection process that is based on the merits of the candidates, rather than on their association or sympathy with the government in office or powerful special interests.

THE MERIT BASED SELECTION SYSTEM FOR JUDICIAL OFFICERS - ZIMBABWE

This discussion taps on the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers to discuss the extent of implementation of the guidelines in Zimbabwe as a safeguard for a transparent selection process.

In sum, the principles aim to ensure that the selection process is fair, objective, complies with constitutional provisions regulating such process, transparent and that the outcome of the process must produce a person imbued with the qualities of an ideal judge whose appointment is merited.

Zimbabwe has made great strides towards full implementation of the guidelines. It is now six years since Zimbabwe crafted a new Constitution

in 2013¹ the advent of which brought many changes. Since its promulgation, many milestones have since been achieved towards fulfilment of its spirit in entrenching democratic principles. In the same vein, the administration of justice also underwent major transformations. One area which marked a complete departure from past positions and procedures related to the appointment of judges. The 2013 Constitution ushered a paradigm shift in the method used for appointment of judges.

In the previous system, persons regarded as suitable for the office of judge would only be “tapped on the shoulder”. The criteria for determining suitability for appointment was known only to the Executive, leading to the perception that the process was based not on merit but on political patronage. Thus allegations of packing the bench were frequently made.

Section 180 of the Constitution now provides that:

“(1) (1) The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section

(2)Whenever it is necessary to appoint a judge, the Judicial Service Commission must -

(a)Advertise the position

(b)Invite the President and the public to make nominations

(c)Conduct public interviews for the prospective candidates

(d)Prepare a list of three qualified persons as nominees for the office and;

(e)Submit the list to the President;

whereupon....the president must appoint one of the nominees to the office concerned.”

¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

This new procedure outlined above guarantees the transparency, fairness and ensures that the appointment is merit based in the following ways:

a) Principle II of the Guidelines: Independence of the Selection and Appointment Authorities

The selection process is presided over by the Judicial Service Commission (“the Commission”). This is an independent Commission with a broad involvement from a wide range of representatives. Its membership is drawn from eminent lawyers seconded by the Law Society, a professor of law selected by membership of a law lecturers’ body, Judges, the Attorney General and the chairperson of the Civil Service Commission. The Chief Justice, Deputy Chief Justice and the Judge President are also members. The Chief Justice as the head of judiciary and chairperson of the Commission represents the judiciary in the selection process.

b) Principle III: Fairness the Selection Process

All participants are given equal opportunity and are similarly treated in that the same set of questions is asked. The candidates are placed in a “quarantine” room during the interview process to eliminate the possibility of other candidates having access to the questions once the interviews start. Every member of the Commission on the interview panel independently scores the candidates. This is to ensure that chances of abuse of discretion, arbitrary interference and unconscious bias are guarded against. The diversity and backgrounds of the membership also acts as a guarantee for fairness.

c) Principle IV & V: Appointees Should Exceed Minimum Standards of Competency and Ethics/ Appointments Should be Made According to Merit

A two-part interview process is done. First, the candidates participate in a short written interview where a wide range of legal questions are asked in a judgment-writing session. This session is administered by a panel of advocates of good standing. Second, the participants are then subjected to a public oral interview. This elaborate and intensive process is aimed at ensuring that the appointees meet the minimum standard of competency which entail that he/she must:

- Be independent and Impartial
- Be of reputable conduct and spotless record of integrity
- Outstanding knowledge of the law
- Excellent written and oral communication skills and analytical competency
- Commitment to the judiciary as a public institution
- Ability to strike a sound balance between a high level of productivity, the quality of judicial decisions and a careful consideration of cases

At the conclusion of the selection process, a list is prepared according to merit and the list is submitted to the President for appointment. It must be noted that section 180 (2) of the Constitution is couched in peremptory terms obliging the president to appoint from the list submitted by the Judicial Service Commission. The discretion accorded to the President to choose from the list of three is necessary to accommodate other objective considerations such as gender, ethnicity, geographical and regional representation, race, disability, diversity in different backgrounds etcetera.

Principle VII & VIII: Criteria

The criteria for selection is constitutionally prescribed. Sections 177-9 set out the qualifications for persons to be appointed to the High Court,

Supreme Court and Constitutional court benches. A law degree and a minimum of 7 years post qualification experience are prescribed. In addition, the person must also be a fit and proper person. The character and integrity of the candidates must meet the standards set out in the Judicial Service (Code of Ethics), 2012 which provides to the following effect:

(1) A judicial officer shall ensure that his or her conduct, in and outside court, is above reproach in the view of reasonable, fair-minded and informed persons.

(2) A judicial officer shall not allow family, social, political, religious or other like relationships to influence his or her judicial conduct or judgment.

(3) A judicial officer shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards, so that the integrity of the judiciary may be preserved.

Also to be noted in the provision is the broader and more pronounced role of the Commission in the whole process. Whenever a vacancy is to be filled, the Commission invites nominations from the public through an advertisement in all publicly circulating newspapers and a reasonable time given for the nomination process. All nominated persons are entitled to participate starting with the written screening interview. Those who may not have made the grade in the first stage may still be entitled to participate in the second stage, the public oral interviews.

Principles IX & X: Sourcing and Shortlisting of Candidates

The Constitution provides for the following:

- **Declaration of a vacancy** - The Chief Justice, as head of the judiciary advises the Judicial Service Commission during a meeting of the Commission of a vacancy or vacancies in any court. In practice, the Chief Justice would have in turn taken advice or would have discussed the issue with the appropriate head of the court to which the vacancy relates. This is a matter purely in the hands of the judiciary as headed by the Chief Justice and the executive has no role to play in this regard.
- **Advertisement of the vacancy** - The constitution mandates that the vacancy be advertised, this is the first of many transparent steps that the constitution demands in the process. In practice this advertisement is widely circulated in the local print and electronic media and the Judicial Service Commission website. It outlines the Court for which the vacancy has arisen, the number of vacancies available and the requisite qualifications for persons to be appointed to that court.
- The advertisement also calls upon members of the public intending to nominate candidates to obtain forms at designated offices. To ensure that interested people from the whole country can access nomination forms; these are made available at more than ten Magistrates' Provincial Court centres throughout the country and also downloadable from the Judicial Service Commission website.
- **Master-listing of Candidates for appointment** - After receiving nominations and CVs, the Judicial Service Commission produces a master-list of all the candidates nominated. This is for purposes of transparency and providing a summary of the profile of each candidate in terms of:-
 - name of candidate;
 - gender;
 - date of birth/age;

- citizenship; and
- Qualifications as provided by the Constitution.

This information is available to the public and invariably, gets published in the local press, igniting and at times fuelling public comments on the prospective candidates.

- **Shortlisting of Candidates** - In this process the Commission is guided strictly by the criteria given in the Constitution relating to qualifications. Every nominee who meets the constitutionally provided requirements and is thereby not disqualified for appointment is entitled to be interviewed in public. The prospective candidates are all invited to participate in a screening written interview followed by a public oral interview.
- The practical effect of this is that if for instance there are a hundred nominees who qualify in terms of the constitutional requirements for one post, they all have to be interviewed. In one set of interviews for judges of the High Court the Commission interviewed 46 candidates.
- **Completion of a specially designed questionnaire by each of the shortlisted candidate** - Each shortlisted candidate completes a specially designed questionnaire which is returnable to the Commission within a specified period and prior to the interviews. This form provides useful and critical information about the candidate that does not ordinarily appear on a C V such as:-
 - Health issues;
 - Indiscretions which may cause embarrassment to the nominee or to the judiciary after appointment;
 - Number of partly heard matters (if the candidate is a serving Judge seeking appointment to a higher court);
 - Number of reserved judgments (if the candidate is a serving Judge seeking appointment to a higher court);

- Contributions made to the development of the law etc.
- The duly completed questionnaire will also be part of the package that will be given to the Commissioners in preparation for interviews and some of the questions that will be put to the nominee during the public interview arise from the information disclosed in the questionnaire.
- **Release of a press statement informing all media houses and the public about the interviews** - In keeping with the public nature of the interviews, the Commission releases a press statement informing all media houses and members of the public about the dates, times and venue of the interviews as well as the names of the shortlisted candidates to be interviewed. The Commission does not invite members of the public to submit any comments that they may have on the nominees but once the names of the prospective candidates have been publicised, comments from members of the public may be received, sometimes alleging acts of misconduct or unethical behaviour on the part of some of the candidates.

Principle XIII: Decision making

The guidelines require that the selection process yield a fair, objective decision-making process that is based on a weighing of the pre-set criteria. In this regard, the interviewing panel adopts the following objective criteria to come up with a decision on who would have qualified out of the interview process:

- A set of standard questions is put to each and every candidate. Each of the commissioners is then given an opportunity to put questions to the candidate. The questions must, as far as is practicable, be uniform.
- Any adverse comments received from members of the public or other professional bodies and organisations are publicly revealed to

enable the affected candidate to comment on them. The practice is that the candidate will have been advised of this in advance to allow him/her to prepare a response to them if any.

- Each commissioner scores each candidate independently on a score sheet which is pre-agreed to by the commission.

Conclusion

The Zimbabwean model of selecting and appointing judges is a welcome development in our jurisdiction. It represents an effort to deal with a matter that is clearly of public interest in a transparent manner. It entrench not only transparency but public participation in the process. The appointment process in Zimbabwe shows substantial, if not total implementation of the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers. The strength of the model lies in limiting the power of the executive and empowers involvement of the public in the selection process.