

ABRIDGED VERSION FOR PRESENTATION

**THE ZIMBABWEAN MODEL FOR JUDICIAL
APPOINTMENTS AS IT RELATES TO THE PUBLIC
TOWN HALL STYLE**

PRESENTATION BY

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Introduction

The process leading to the appointment of Judges in Zimbabwe is elaborate. The debate on issues relating to public participation in the process is complex and riveting. It is therefore not possible for me to adequately discuss, in my presentation, the intricate details of the process in view of the limited time I have been given. I will therefore present an executive summary of the appointment process and thereafter distribute a more comprehensive paper for the benefit of esteemed delegates.

The enactment of a new Constitution in Zimbabwe in 2013 brought with it many changes to the administration of justice. For instance, it ushered a paradigm shift in the method used for appointment of Judges.

A very brief outline of the procedure used in the appointment of Judges in terms of the repealed constitutional dispensation will assist in contextualising this paper.

Then, Judges were appointed in terms of **section 84** of the repealed Constitution. The Judicial Service Commission (“the JSC”) played a peripheral role in the entire process. Persons regarded as suitable for the office of Judge were “tapped on the shoulder” with the criteria for suitability for appointment known only to the Executive. This bred the perception that the process was based not on merit but on political patronage and fuelled allegations of bench packing.

The JSC was merely consulted for its views on whether or not the proposed candidates were qualified for appointment. The President was not bound by the opinion of the JSC. This appointment method was viewed as inappropriate and therefore unacceptable, despite the long line of revered jurists it had produced. Its loudest critics argued that it did not promote meritocracy.

The perceptions of a politically compliant bench heightened at the same time that the political fortunes of the country began to wane. The view was shared by a large section of Zimbabweans, resulting

in the introduction of the new appointment framework which has very elaborate provisions for the appointment of Judges. The JSC now plays a broader and more significant role than before.

In precise language that admits of no ambiguity, the Constitution in **section 180** provides for the declaration of vacancies, the advertisement of the vacancies, a call for the public intending to nominate candidates to obtain forms at designated offices, the holding of interviews of the prospective candidates in public and the preparation of a list of qualifying candidates and submission of same to the President.

The emphasis on public participation in the selection and appointment procedure of Judges has the footprints of the public town hall style of proceedings all over it. That is both its strength and weakness. Whilst it is an attempt at opening the process to public scrutiny, it is also viewed as stifling the Head of State from exercising his powers in the appointment of key office bearers in the judiciary such as the Chief Justice. These competing

interests have resulted in the first amendment to the Constitution to restore the power of the President to appoint the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court outside the glare of the public town hall style. They will once again be 'tapped' on the shoulder, as was the practice before the adoption of the new Constitution.

The Public Town Hall Style of Judicial Appointments

The Public Town Hall Style is a style of handling public affairs adopted and adapted from municipal town hall meetings and can be traced to the 1620's in the new world. In essence, the style allows the governed and the governing to meet and exchange views on issues of a public nature and in public. It allows for stakeholder participation in public affairs and is a way of fostering democracy and public participation. It of necessity compels the governing authority to take on board the concerns of and inputs from the public.

The hallmarks of the style include the debate or discussion of public issues not only in public but with

the active participation of the public. Therefore, one can say the essential elements of the style are that the issue at hand must be a public issue; discussed in public; with the public participating.

Similarities between the appointment procedure for Judges in Zimbabwe and public town hall style meetings

To bring out the public element in the selection and appointment procedures for Judges in Zimbabwe, it is necessary to outline the entire procedure as it implements the constitutional imperatives. It is as follows -

1. Declaration of vacancy

The Chief Justice, as head of the judiciary acting on the advice of the head of a particular court, formally advises the JSC of a vacancy or vacancies in any court.

2. Advertisement of the vacancy

The Constitution mandates that the vacancy be advertised, making this the first of many transparent requirements which the Constitution demands. In practice, the advert appears in all local newspapers,

is posted on the website of the JSC and on notice boards at all major court centres. It calls for members of the public to nominate persons suitable for appointment to the advertised posts. Nomination forms for that purpose are made readily available at all major court centres countrywide and are downloadable from the JSC website.

3. Master-listing of Candidates for appointment to position of Judge

After receiving nominations and CVs, the JSC produces a master-list of all nominees. This enhances transparency and assures the public that their nominations are treated equally. The list provides a summary of the profile of each candidate by showing the name, gender, age, citizenship and qualifications, as stipulated in the Constitution. This information is availed to the public and, invariably, gets published in the local press, igniting and at times fuelling public comments on the prospective candidates.

4. Shortlisting of Candidates

In shortlisting, the JSC 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 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.

Innovative ways of determining, prior to the interviews in public, suitability of candidates have been devised in the past. These include pre-interview assessments, such as requesting the prospective candidates to write a judgment on a given set of facts.

5. Completion of a specially designed questionnaire by each of the shortlisted candidates

Each shortlisted candidate completes a specially designed questionnaire which is returnable to the JSC 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 and indiscretions which may cause embarrassment to the nominee or to the judiciary after appointment. The duly completed questionnaire will also be part of the package that is given to the Commissioners in preparation for interviews. Some of the questions that will be put to the nominee during the public interview arise from the information disclosed in the questionnaire.

6. Identification of a suitable venue for interviews

The JSC identifies a suitable venue for the interviews, which must be big enough to accommodate a sizeable number of members of the public to fulfil the dictates of the Constitution. In a number of instances, the interviews have been televised live by the public broadcaster, practically allowing every Zimbabwean to make their own assessment of each candidate.

7. Release of a press statement informing all media houses and the public about the interviews

In keeping with the public town hall style of the interviews, the JSC 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 all candidates to be interviewed. Although the public is not invited to submit comments that they may have on the nominees, once the names of the nominees are in the public domain the public may make comments, sometimes alleging acts of misconduct or unethical behaviour on the part of some of the candidates. This in some instances has led to some nominees withdrawing from further participation.

8. Soliciting for comments from the Law Society and other professional bodies on all the nominees

The Constitution provides the “fit and proper person” criterion as a requirement for one to hold the office of Judge. Whilst it is acknowledged that the phrase “fit and proper” admits of an elastic definition, the JSC has always sought the views of

the organised legal profession on the professional conduct of all nominees. Such inquiries have in past instances elicited information relating to complaints made against the nominee and his or her standing with the professional body. Any adverse comments received about a nominee from the Law Society or from the public are referred to the nominee before the interview, for his or her comment. Questions may be put to the nominee on the issue during the interview in public.

Conduct of the interviews in public

On the date of the interview no restriction is placed on who gets into the interview hall, except for security checks conducted on members of the public to ensure the safety of Commissioners, the nominees and the public gathered at the venue.

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 JSC.

Lessons from the town hall style

Since 2013 the JSC has conducted seven different sets of interviews using the new system. These included one for the post of Chief Justice, two for Supreme Court Judges, two for High Court Judges, one for appointment of Judges to the SADCAT and one for the position of Prosecutor-General, which in terms of the law is filled in the same way as that of a Supreme Court Judge. From these we drew a number of lessons -

- The process recognises that the selection and appointment of Judges is indeed a public issue which must be done publicly and must involve public participation.
- The vacancies are advertised and the candidates are nominated by the public.

- The invitation is to members of the public without qualification, to nominate whomsoever they believe is suitable for appointment as a Judge. Whilst the assumption upon which the provision is made is that the nomination by the public shall emanate on the basis of “public” satisfaction with the qualifications and propriety of the candidates, in practice the candidates have in some instances contrived nomination by distributing nomination forms to their clients, friends and relatives. In other instances though, the nomination is properly initiated by the public on the basis of a track record of performance by the proposed candidate. The contrasting scenarios bring to the fore the debate on which procedure is better between application and nomination.
- Whilst there is no specific provision calling for the public to file objections to any proposed nomination, there is equally no provision that bars the filing of such objections and in some instances the public have indeed filed

objections against the nomination of certain candidates.

- The holding of the interview in public also indirectly involves the participation of the public in the process. The performance of the candidates at the interview is invariably a subject of public debate after the interviews, particularly in the media.**

There is a downside though to the holding of interviews in public -

- Some questions put to the nominees in public about issues which cannot be proved may have the effect of denting their standing irreparably.**
- The process in terms of the Constitution is prone to abuse by chancers who accept nomination when their chances to be appointed are hopeless. They pitch up for interviews, and burden the JSC in terms of both man-hours and funding the exercise.**
- The process can be difficult to manage in a manner that is fair to all candidates where the number of candidates is high. In one set of interviews the JSC interviewed 46 candidates**

for 6 posts over a period of one week. That had the effect of distorting the attempts of the JSC at uniformity and treating candidates fairly. For instance, the standard questions posed to one group could not be asked the next day because they were already in the public domain. The JSC had to adopt and use different tests on each day but for candidates who were vying for the same post.

- In another set of interviews, the process went on until the early hours of the next day. The candidate interviewed last could have easily been disadvantaged by the long period spent waiting their turn.

Conclusion

The Zimbabwean model of selecting and appointing Judges is a welcome development. It represents an effort to deal with a matter that is clearly of public interest in a transparent manner. It marks the beginning in Zimbabwe of entrenchment, not only of transparency but public participation in the process. Admittedly it may not be a panacea to the issues dogging the selection and appointment of fit

and proper persons to the position of Judge, but it goes a long way in responding to some of the issues which in the past have clouded the selection and appointment process in Zimbabwe. The strength of the model lies in removing the Executive's unfettered discretion in the appointment of Judges but therein also lies its major weakness, which makes it unattractive to those who hold the view that the Executive must control the selection and appointment of Judges.