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Working Paper

Selection and Appointment of Judges in Nigeria

Analysis and Recommendations

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1 Senior Advocate of Nigeria

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List of abbreviations

CCJE	Consultative Council of European Judges
CJFHC	Chief Judge of the Federal High Court
CJN	Chief Justice of Nigeria
DSS	Department of State Services
FCT	Federal Capital Territory
FCT-JSC	FCT Judicial Service Committee
FJSC	Federal Judicial Service Commission
JSC	Judicial Service Commission/Committee
NBA	Nigerian Bar Association
NJC	National Judicial Council
NJI	National Judicial Institute
PCA	President of the Court of Appeal
PCCA	President of the Customary Court of Appeal
PFRN	President of the Federal Republic of Nigeria
PNIC	President of the National Industrial Court
SJSC	State Judicial Service Commission
SSS	State Security Service
UNODC	United Nations Office on Drugs and Crime
Venice Commission	European Commission for Democracy through Law

1.1 Background

Effective, fair, humane, accessible and accountable justice systems that enjoy the trust and confidence of citizens and businesses alike are indispensable for upholding the rule of law and are a critical building block for the socioeconomic and political development of any nation.

The judiciary, made up of the courts, the judges or judges and the staff of the courts, is fundamental to the rule of law and justice. This is because the rule of law, reinforced by the principles of separation of powers through which separate arms and branches of government are manned by separate persons, requires that laws enacted by the legislature are to be interpreted by an independently constituted body of persons. It is therefore self-evident that the success or performance of the judiciary of every country, including Nigeria, depends, among other factors, on the level of independence of the judiciary. This includes the calibre of the persons appointed or selected as judges and their capacity to adjudicate over disputes and interpret the law.

On the same basis, the selection and appointment of judges are vital to the fair and independent adjudication of disputes, as well as the enforcement of human rights and the duties and obligations of parties who come before the courts. In furtherance of this, not only are judges expected to uphold the rule of law and the highest standards of integrity and independence, their selection and appointment from one level to another must not undermine their independence and judicial decisions, whether undertaken by the selecting, recommending or appointing committees.

Moreover, since judges hold powerful individuals and government institutions to account for their actions and inactions, the judicial function must neither be performed at the pleasure of anyone, nor at the pleasure of the executive or the legislature; nor are judges to be selected or appointed to serve other apparent or perceived objectives other than adjudication, interpretation of legislation and the determination of the rights, interests and obligations of aggrieved parties in legal proceedings. Despite these stipulations, the reality is that judges are often subjected to various types of pressures that can compromise their ability to function efficiently and effectively. These influences or interferences begin during the process of selection and appointment.

These and many other factors formed the basis for the development by the National Judicial Council (NJC) of a National Judicial Policy in 2016, which recognised that for the courts to promote and protect the rule of law, the judiciary must protect its independence and the process of selection and appointment of judges must be transparent and reviewed periodically. Despite the efforts of the judiciary itself and of the Government, civil society and international development partners to work towards the establishment and maintenance of such a system in Nigeria, the Nigerian judiciary appears to fall short of these expectations. Nigeria was ranked 108 out of 128 countries in the World Justice Project Rule of Law Index 2020.² The World Justice Project scores

² World Justice Project, *World Justice Project Rule of Law Index 2020* (Washington, D.C., 2020). This index also scored the criminal justice system 0.40 on a scale of 0-1 and ranked the judiciary 109 out of 128 judiciaries in terms of absence of corruption.

and ranks nations based on eight factors, including the state of the criminal justice system, where it measures whether criminal judges and other judges are competent and make speedy decisions.

Moreover, the second corruption survey, conducted in 2019 by the National Bureau of Statistics and the United Nations Office on Drugs and Crime (UNODC), found that 20 per cent of those who had contact with the Nigerian judiciary were confronted with a request for the payment of a bribe.³ Even though this represents an improvement from the 31 per cent estimated in 2016, it shows that corruption in the judiciary is still widespread in Nigeria.

Indeed, corruption in the Nigerian judiciary is extensive and both male and female judges are party to it. However, as shown by the 2020 UNODC study on gender and corruption in Nigeria, on a comparative basis, male judges are far more likely to be involved in bribe-seeking conduct than their female colleagues.⁴ These and other factors have led to the erosion of public confidence in the judiciary.

The current process for the selection and appointment of judges in Nigeria has been described as requiring further reform due to several factors, which include following: the incomplete advertisement of vacancies; the absence of rigorous methods of selection that should include written exams, oral interviews, including public hearings for the most senior positions; insufficient background checks and assessment of candidates, as practised in other jurisdictions across the world to ensure that only candidates of impeccable integrity and outstanding professional excellence qualify for judicial office. As observed by the Vice President of the Federal Republic of Nigeria, Professor Yemi Osinbajo, if Nigeria leaves “it to the system that is going on at the moment, we are clearly headed in the wrong direction, because interests, whether private, political or group, influence how judges are appointed”.⁵

The present study focuses on whether the current process of selection and appointment of judges in Nigeria is transparent, rigorous and merit-based, and whether an effective procedure to select and appoint judges of the highest standards of conduct and competence exists in the country.

1.2 Aims and objectives

The overall aim of the present study is to strengthen the process of selection and appointment of judges. The objectives of this study include reviewing the system and processes of selection and appointment of judges in Nigeria; and specifically:

- i. to identify the inadequacies of the present system and process for the selection and appointment of judges;
- ii. to provide an overview of existing relevant regional and international standards and good practices for the selection and appointment of judges;

3 National Bureau of Statistics and UNODC, *Corruption in Nigeria: Patterns and Trends, Second Survey on Corruption* (Vienna, 2019). The same survey noted that the criminal justice system in North Central Nigeria appears to be most affected by bribery with prosecutors and judges representing the public officials most frequently resorting to bribe-seeking behaviour (45 per cent of prosecutors and 39 per cent of judges/magistrates). Available at https://www.unodc.org/documents/nigeria/Corruption_Survey_2019.pdf.

4 UNODC, *Gender and Corruption in Nigeria* (Vienna, 2020) found that female judges, despite constituting 30 per cent of all judges, were responsible for fewer than 7 per cent of bribe requests. Available at https://www.unodc.org/documents/nigeria/Gender_Corruption_Dec2020.pdf.

5 Osinbajo, Yemi, “Selection and appointment of judges: lessons for Nigeria”, webinar presentation. Available at <https://www.premiumtimesng.com/news/headlines/...thisdaylive.com/> (accessed on 10 September 2021).

- iii. make recommendations on strategies for strengthening the judicial selection and appointment system in Nigeria, drawing on regional and international good practices; and
- iv. to provide a draft revised procedure for the selection and appointment of judges.

1.3 Methodology

Given the focus of the present study, which is to explore the system and process of selection and appointment of judges in Nigeria, a qualitative research design was adopted. Additionally, the study is aimed at providing understanding of the strengths and weaknesses of the existing systems and practices, responsible factors, perceptions of actors, as well as recommendations on how to improve the Nigerian system and process.

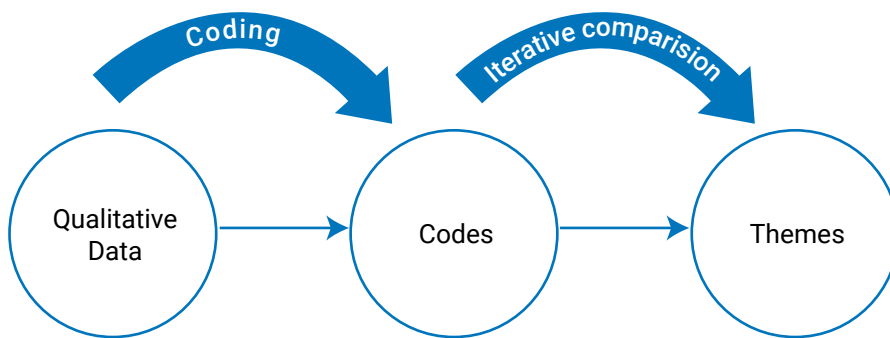
To elicit comprehensive and best possible responses in the areas of focus, the research technique adopted was in-depth, semi-structured interviews with purposefully selected respondents. An interview guide was developed with open-ended questions so as to generate detailed responses and elicit information not anticipated in the original design (see annex 1 of the present study). Semi-structured interviews were preferred because of their flexibility and because they provide the opportunity to ask probing questions and generate reliable qualitative data on the selection and appointment process. The interview guide covered two main areas: the selection process and the appointment process. A total of 17 lead questions were generated with multiple probing questions in order to guide the interview process. The draft interview guide was validated at a meeting between UNODC and Konrad Adenauer Stiftung and reviewed with inputs from stakeholders in the Nigerian justice sector. It was further amended following a pilot in order to make it less cumbersome and much easier to administer.

Interviews were arranged with 51 purposefully selected respondents that included serving and retired judges, academics, members of professional bodies (including the Nigerian Bar Association (NBA)), staff of the Nigerian Law Reform Commission, police officers, correctional services personnel and other stakeholders; the respondents were selected based on their knowledge and experience of the process. While every effort was made to interview all the selected respondents, not all of them could be reached due to the busy schedules of a number of those who were sitting judges or active serving members of the judiciary. For example, efforts to meet with members of the NJC Judicial Appointments Committee, including the NBA President, failed to yield results.

Of the proposed interviewees, 36 were successfully interviewed in Abuja, Anambra, Lagos, Benue, Cross River, Ondo, Plateau, Imo, Enugu, Kaduna, Rivers and Katsina States. Interviews were planned around respondents' schedules and events that took a considerable number of them to Abuja. Respondents outside Abuja were interviewed either telephonically or by research assistants who were trained in how to administer the interview guide. Given the complexity of the sector and the schedules of the selected respondents, the interviews were conducted over a period of 30 days in the months of September, October and November 2021.

The transcripts and recordings of the interviews were analysed using thematic and discourse analysis mainly focusing on the two major themes identified in the interview schedule, namely (1) selection and (2) appointment.

Figure 1: Thematic analysis of data



The flow process of the analysis is shown above. Data generated through the 36 interviews (recorded and transcribed) were analysed to generate codes, that is keywords and phrases that appeared throughout the interviews. The codes, which are both descriptive and interpretative, allow for easy sorting of the bulk of the data generated. After the labelling process, similar codes are then grouped into themes outlining causal relationships, similarities, differences and even contradictions. Categories are then grouped into concepts, which are more generalized ideas based on the thematic issues. The distribution of responses from respondents is expressed thus: all respondents – 36 (100 per cent); vast majority – between 27 and 35 (75–99 per cent); majority – between 18 and 26 (50–76 per cent); many – between 9 and 17 (25–49 per cent); some – between 4 and 8 (11–24 per cent), few – 2 to 3 (1–10 per cent), one – 1, and none – 0. These are presented and discussed in chapter 3 of the present study.

1.4 Structure

Following on from the general background provided in this chapter, chapter 2 undertakes a detailed examination of the selection and appointment of judges in Nigeria. Chapter 3 presents the findings of the interviews conducted, which are supplemented with existing literature on the subject matter with reference to Nigeria in particular. Chapter 4 focuses on international standards and examples of good practices in the selection and appointment of judges, which includes five country case studies: Germany, India, Kenya, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Finally, chapter 5 presents the recommendations from the study on measures to strengthen the process of selection and appointment of judges in Nigeria.

2

Overview of the system and process of selection and appointment of judges in Nigeria

2.1 System of selection and appointment of judges in Nigeria

This chapter examines both the system and process⁶ of selection and appointment of judge in Nigeria and identifies the key features of both. This analysis is anchored in the need for the judiciary in Nigeria to consider periodic reforms to the system and process of appointment of judges as envisaged under the National Judicial Policy of 2016.

Suffice to note that the Nigerian system largely follows the professional model, in which judges are recruited from serving and experienced legal professionals. Appointments are tied to specific vacancies and there are clear constitutional and statutory as well as institutional guidelines regulating the process. Similarly, the system involves the participation of other branches of government, namely the executive and the legislature.

There have been recurrent complaints about the judiciary in Nigeria in terms of insider dealings in the selection and appointment process, competence of persons appointed as judges, trial delays, and a host of other complaints concerning the system and process of appointment. This has generated questions about the suitability of the current processes and system of appointment of judges in Nigeria. Many have argued that there is an urgent need to review the entire process so as to ensure that those appointed to judicial offices are competent, knowledgeable, upright and free to carry out their duties without fear or favour, failing which public confidence in the judicial system will continue to wane.

A distinction is to be made at the outset between the words “selection” and “appointment”, although they bear similarities and provide necessary inroads into the discussion that underlies the system of sourcing holders of judicial office in Nigeria. This is because the institutions responsible for each and the procedures that follow are different. In the context of the recruitment of judges in Nigeria, the word “selection” refers to the process by which specific statutory institutions are engaged in choosing from among several applicants, persons who are qualified and who may have expressed an interest in being appointed to a particular judicial office. “Appointment”, on the other hand, refers to the choice, designation and assigning of a person to a judicial office by the authority statutorily conferred with powers to do so.⁷

Nigeria operates a constitutional democracy that is presidential and federal as contained in section 1 of the Constitution of the Federal Republic of Nigeria 1999, as amended (the “Constitution”). This being the case, the system for selecting and appointing judges as provided by the Constitution is dual. For judges for courts in the Federation, the responsible body is the Federal Judicial Service Commission (FJSC), while for courts in the Federal Capital Territory (FCT), Abuja, the process is handled by the Judicial Service Committee (FCT-JSC)

6 “System” as used in this study refers to the functions and role of the various institutions established by the constitution in the selection and appointment of judges. It also includes the qualifications specified by the constitution. The “process” refers to the related activities and actions taken by the institutions created by the constitution and vested with responsibilities in the selection and filing of judicial vacancies.

7 Garner, Bryan A. and Campbell Black, Henry, *Black’s Law Dictionary* (St. Paul, Minnesota, Thomson Reuters, 2014).

of FCT. On the other hand, the selection for appointment of judges for courts in the States is handled by the Judicial Service Commission (SJSC) of each of the 36 States of the Federation, respectively. In the case of courts in the Federation, the President of the Federal Republic of Nigeria approves appointments, while in the case of the States, the Governor of each State appoints judges of the superior courts of records of the State.

The system of appointment of judges in Nigeria is further dependent upon whether the appointment is for a head of court or other judicial offices of a court of the Federation or a State.⁸ The system operates on the principle of separation of powers but involves cooperation between the three arms of government. According to Nwabueze,⁹ since the overall business of government is entrusted to the executive and legislature through the popular vote, the involvement of the executive and the legislature in the system of appointing judges is in line with the concept of separation of powers and accountability. Thus, the President makes the appointment upon the recommendation of the judiciary and the legislature approves.¹⁰

2.2 Constitutionally established institutions to advise or recommend the appointment of judges in Nigeria

The Constitution establishes four types of institution in relation to the appointment of judges and vests them with the power to either advise or make recommendations to the relevant appointing authorities in matters of selection and appointment of judges in Nigeria. These institutions are NJC, FJSC, SJSC of the 36 States of the Federation and FCT-JSC. The compositions of the four institutions are as follows:

2.2.1 The National Judicial Council

The Constitution of the Federal Republic of Nigeria, 1999 establishes and assigns NJC the functions of appointment and discipline of judges, etc.¹¹ It also provides NJC with the following membership:¹²

- i. the Chief Justice, who shall be the chair;
- ii. the next most senior Justice of the Supreme Court, who shall be the deputy chair;
- iii. the President of the Court of Appeal (PCA);
- iv. five retired justices selected by the Chief Justice of Nigeria (CJN) from the Supreme Court or Court of Appeal;
- v. the Chief Judge of the Federal High Court (CJFHC);
- vi. the President of the National Industrial Court (PNIC);
- vii. five Chief Judges of States, to be appointed by CJN from among the Chief Judges of the States and FCT in rotation, to serve for two years;
- viii. one Grand Kadi, to be appointed by CJN from among Grand Kadis of the Sharia Courts of Appeal, to serve for two years;

8 These are the Supreme Court, Court of Appeal, Federal High Court, National Industrial Court, High Court of FCT, Abuja, Sharia Court of Appeal of FCT, Abuja, and Customary Court of Appeal of FCT, Abuja, the High Court in the 36 States, the Sharia Court of Appeal (in States that have it) and the Customary Court of Appeal (in States that have it).

9 Nwabueze, B., Will National Conference Be Effective in Realizing Our Aspirations for a New, Better, United Nigeria? The Guardian Newspapers, 8 April 2014.

10 Constitution of the Republic of Nigeria, 1999, sects. 271 (1), 276 (1) 281 (1).

11 Constitution of the Republic of Nigeria, 1999, sect. 153 and paragraph 21 of the Third Schedule.

12 Ibid., para. 20 (1), Third Schedule, part I.

- ix. one President of the Customary Court of Appeal (PCCA), to be appointed by CJN from among the Presidents of the Customary Courts of Appeal, to serve for two years;
- x. five members of NBA who have been qualified to practice for a period of not less than 15 years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by CJN on the recommendation of the National Executive Committee of NBA, to serve for two years and subject to reappointment. These five members shall only sit in council to consider the names of persons for appointment to superior courts of record; and
- xi. two persons, not being legal practitioners, who in the opinion of CJN are of unquestionable integrity.

The Constitution further provides for recommendations to be made by NJC to the President in the case of the Federal Courts of the Federation or the Governor in the case of State Courts, but this must be from the list of nominees submitted to NJC by FJSC, FCT-JSC and SJSCs.¹³

2.2.2 The Federal Judicial Service Commission

The Federal Judicial Service Commission (FJSC) is made up of the following:

- i. CJN, who shall be the chair;
- ii. PCA;
- iii. the Attorney-General of the Federation;
- iv. CJFHC;
- v. PNIC;
- vi. two persons, each of whom has been qualified to practice as a legal practitioner in Nigeria for not less than 15 years, from a list of not less than four persons so qualified recommended by NBA; and
- vii. two other persons not being legal practitioners who in the opinion of the President are of unquestionable integrity.

2.2.3 The Judicial Service Commission of the States

At the level of the States, the Judicial Service Commission (JSC) is made up of the following members:

- i. the Chief Judge of the State, who shall be the chair;
- ii. the Attorney-General of the State;
- iii. PCCA of the State, if any;
- iv. the Grand Kadi of the Sharia Court of Appeal of the State, if any;
- v. two members who are legal practitioners and who have been qualified to practice as legal practitioners in Nigeria for not less than 10 years; and
- vi. two other persons not being legal practitioners who in the opinion of the Governor are of unquestionable integrity.

¹³ Constitution of the Federal Republic of Nigeria, 1999, Third Schedule, part III para. 2 (a) and Third Schedule, part II para. 6

2.2.4 The Judicial Service Committee of the Federal Capital Territory, Abuja

The Judicial Service Committee of FCT, Abuja, is made up of the following members:

- i. the Chief Judge of FCT, Abuja, who shall be the chair;
- ii. the Attorney-General of the Federation;
- iii. the Grand Kadi of the Sharia Court of Appeal of the FCT, Abuja;
- iv. PCCA of FCT, Abuja;
- v. one other person who is a legal practitioner and who has been qualified to practice as a legal practitioner in Nigeria for a period not less than 12 years; and
- vi. one other person not being a legal practitioner, who in the opinion of the President is of unquestionable integrity.

2.3 Process of selection and appointment of judges in Nigeria

The process of selecting and appointing judges in Nigeria is regulated by the Constitution through the appointing institutions discussed above based on the Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judges of All Superior Courts of Record in Nigeria, 3rd November, 2014 (Extant Revised NJC Guidelines). The process of appointment is outlined below in figure 2. To further provide clarity to the process of appointment of judges in Nigeria, there is a need to explain who a judge is in the context of Nigeria. However, neither the constitution nor any other existing law in Nigeria defines a judge. Rather, the Constitution defines judicial “office” and refers to the holders of the judicial offices listed therein.¹⁴

The selection process for appointment to a judicial office typically commences at the Federal level whenever the Head of a Federal Court decides that there are vacancies in the Federal Courts, he/she is required to notify CJN, who doubles as the chair of FJSC, stating the number of judges to be proposed for appointment.¹⁵ In the case of FCT, the chair of FCT-JSC is expected to notify the Chief Justice/chair of NJC of any proposed appointments to the Office of Judge in FCT.¹⁶

Where the vacancy is for a head of court, the outgoing head of court gives notice of retirement to FJSC, which communicates to NJC by submitting the name of the next most senior justice or judge of the court concerned to be appointed in an acting capacity. The name is thereafter forwarded by NJC to the President of the Federal Republic of Nigeria for approval of the name in an acting capacity.

14 Section 318 of the Constitution provides that “Judicial Office” means the office of Chief Justice of Nigeria or a Justice of the Supreme Court, President or a Justice of the Court of Appeal, the office of the Chief Judge or Judge of the Federal High Court, President or Judge of the National Industrial Court, the office of Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, the office of the Chief judge or Judge of the High Court of a State, the Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, the Grand Kadi or Kadi of the Sharia Court of Appeal of a State, the President or Judge of the Customary Court of Appeal of the Federal Capital Territory, the President or Judge of the Customary Court of Appeal of a State. This definition is adopted by the Code of Conduct for Judicial Officers in Nigeria but expanded to include holders of similar offices or tribunals where the duties involve adjudication, and this includes Magistrates.

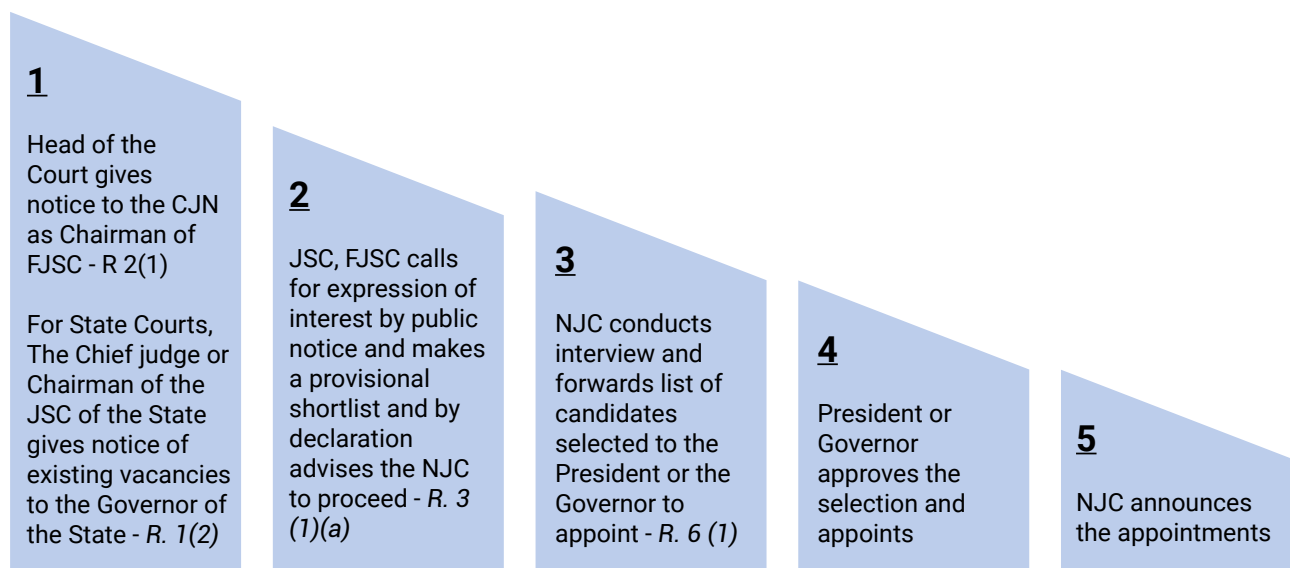
15 Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial officers of All Superior Courts of Record in Nigeria, 3rd November, 2014, rule 2 (2) (a).

16 Ibid., rule 2 (2) (b).

At the State level, the process commences with the Chief Judge who is also the chair of an SJSC giving notice to the Governor of the State and CJN that he or she proposes to embark on the process of appointment of candidate(s) to judicial offices in the State, stating the number of judges intended to be appointed.¹⁷ Upon receipt by the JSC concerned of the decision of CJN rendered pursuant to rule 2(4) advising that the exercise can proceed, the next step in the process is a call for expression of interest by either FJSC or JSC by way of public notice placed on the institutions' websites, notice boards of the courts, as well as the notice boards of the various branches of NBA. The advertisement states the methods and requirements for the submission of applications, including the closing date for such submissions.¹⁸ On the expiry of the closing date and after the applications have been received, the Head of Court prepares a provisional shortlist out of the applications received.¹⁹

In furtherance of the process, the Head of Court or chair of JSC forwards or directs the Secretary of JSC to forward a form known as NJC Form A to all shortlisted persons who are required to complete and return same to the chair, with all necessary attachments.²⁰ The shortlist of nominees, together with NJC Form A, is submitted to NJC by FJSC or SJSC for further action. While the Extant Revised NJC Guidelines do not require any written or oral examination of candidates, in some cases such examinations have been conducted. It is also worth noting that under the Extant Revised NJC Guidelines, CJN as the chair of NJC has the power to decline the process of appointment to proceed and the exercise of his or her discretion in this regard is to be communicated to the Head of Court or chair of SJSC who initiated the process.²¹

Figure 2: Appointment process for judges (non-heads of courts) of the Federal and State Courts as provided in the Extant Revised NJC Guidelines



17 Ibid., rule 2 (1).

18 Ibid., rule 3 (1) (a) (i).

19 Ibid., rule 3 (4) and rule 3 (6).

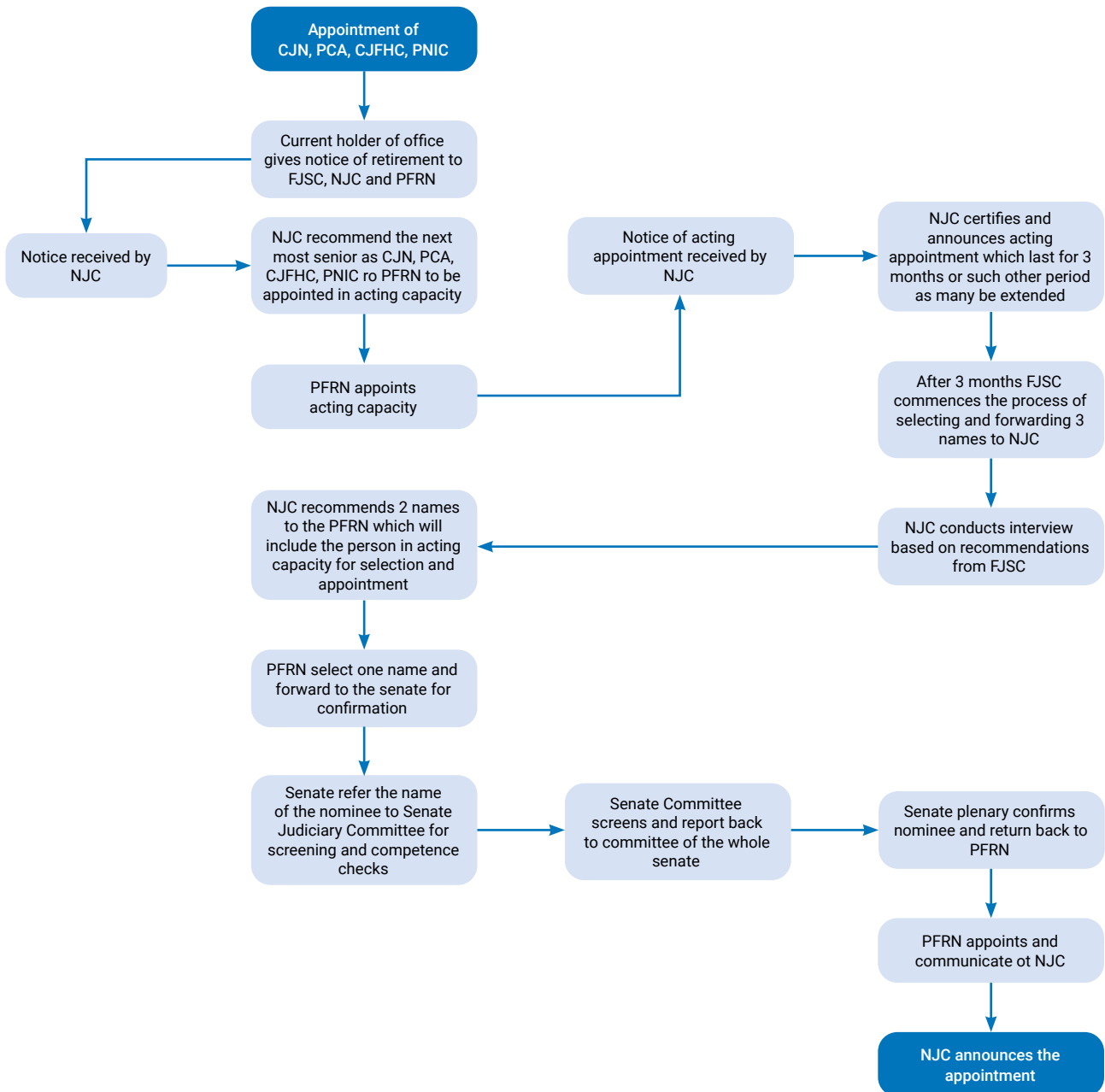
20 Ibid., rule 4 (1).

21 Ibid., rule 2 (6).

2.3.1 Chief Justice of Nigeria, President of the Court of Appeal, and Heads of Courts

When CJN, PCA, or a Head of Court for courts of the Federation are to be appointed, FJSC compiles a shortlist of candidates based on nominations received from heads of courts, serving justices of the Court of Appeal, the Supreme Court and the President of NBA and forwards the list to NJC. FJSC, after review and further evaluation, then recommends the selected candidates to the President, who in turn forwards the same to the Senate for approval.²² Upon approval, the President appoints the candidate to the respective judicial office.

Figure 3: Appointment process for Chief Justice of Nigeria (CJN), President, Court of Appeal (PCA), Chief Judge of the Federal High Court (CJFHC) and President, National Industrial Court (PNIC)



22 Constitution of the Federal Republic of Nigeria, 1999, sects. 231 (1), 238 (1) 254 B (1), 256 (1) 261 (1) 261 (1) (2), 266 (1) (2).

2.3.2 Justices of the Supreme Court and Court of Appeal

When a Justice of the Supreme Court or Court of Appeal is to be appointed, FJSC compiles a shortlist of candidates based on nominations received from heads of courts, serving justices of the Court of Appeal, the Supreme Court and the President of NBA and forwards the list to NJC. FJSC, after review and further evaluation, then recommends the selected candidates to the President of the Federal Republic of Nigeria.

In the case of Justices of the Supreme Court, the President forwards the recommendation of FJSC to the Senate for approval before appointing the candidate to the respective office. In the case of Justices of the Court of Appeal, the approval of the Senate is not required and the President appoints the candidate based on the recommendations of FJSC.²³

For a person to be appointed as a judge in any of the Federal Courts, he or she must have been qualified to practice as a legal practitioner in Nigeria for a period of not less than the number of years prescribed by the Constitution: CJN or a Justice of the Supreme Court (15 years);²⁴ PCA and Justice of the Court of Appeal (12 years);²⁵ Chief Judge and Judges of the Federal High Court, PNIC and Judges of the National Industrial Court, the Chief Judge and Judges of the High Court of FCT, the Grand Kadi and Kadis of the Sharia Court of Appeal of FCT, and the President and Judges of the Customary Court of Appeal of FCT (10 years).

2.3.3 Judges of the Courts of Record of the States

There are 36 states in Nigeria and the system of appointment of judges for Courts of Record of the States mirrors that of the Courts of the Federation, albeit with slight variations. The appointment of the Chief Judge and other heads of these courts are made by the Governor of the State on the recommendation of NJC and subject to confirmation by the House of Assembly of the State.²⁶ In situations where the office of the Chief Judge of a State becomes vacant, the Governor appoints the most senior Judge of the High Court to perform those functions for a period of no longer than three months until the vacancy is duly filled.²⁷ Except on the recommendation of NJC, a person appointed in an acting capacity shall cease to hold office after three months, when the Governor appoints another person and will not re-appoint a person whose appointment has lapsed.

23 Ibid., sects. 250 (3); 254B (2); 256 (3); 261 (3) (a); 266 (3) (a). These sections provide for how CJN, Justices of the Supreme Court, PCA, CJFHC, the President and Judges of the National Industrial Court, the Chief Judge of the High Court of FCT, Abuja, FCT and States, the Grand Kadi of the Sharia Court of Appeal of FCT, Abuja, FCT and States, and the President of the Customary Court of Appeal of the Federal Capital Territory, Abuja, FCT are to be appointed.

24 Ibid., sect. 231 (3).

25 Ibid., n. 25, sect. 238 (3).

26 Ibid., sects. 271 (1) (2); 276 (1) (2); S. 281 (1) (2). The offices referred to are: the office of the Chief Judge, the Grand Kadi and President of the Customary Court of Appeal of a State.

27 Ibid., sects. 271 (4), 276 (4) (5) and 281 (4) (5).

The requirements with regard to the number of years of experience as a legal practitioner are as follows: Judge of the High Court of a State (10 years);²⁸ Grand Kadi and Kadis of the Sharia Court of Appeal of a State (10–12 years, with additional requirements that include a recognized qualification in Islamic Law as prescribed and considerable experience in the practice of Islamic law);²⁹ President or Judge of the Customary Court of Appeal of a State (10 years and adjudged by NJC to have considerable knowledge of and experience in the practice of customary law).³⁰

In this regard, Ukhuegbe³¹ observes certain anomalies and a lopsided application of the constitution concerning internal recruitment to the apex courts. He analyses the situation as follows: prior to 1980, 19.5 per cent of all appointments to the Supreme Court were of persons who were external to the judiciary, while were 71 per cent of selections and appointments made directly to the Supreme Court were from the High Court, with only 10 per cent of the appointees coming from the Court of Appeal. This practice appears to have changed fundamentally since then, with all Justices of the Supreme Court having previously served as Justices of the Court of Appeal.

2.3.4 Judicial appointments under the National Judicial Policy, 2016

The emphasis the National Judicial Policy places on securing an independent judiciary, capable of promoting and protecting the rule of law and human rights is of great importance in the selection and appointment process. It demands that the process of judicial appointments must be transparent, merit- and skill-based.³² In this regard, the National Judicial Policy creates space for constant reform of the appointment process that encourages the assessment and evaluation of candidates and evidence of the requisite qualifications, skill, experience competence and integrity.³³

28 Constitution of the Federal Republic of Nigeria, 1999, sect. 271 (3).

29 Ibid., sect. 276 (3) (a) (b) (i) (ii).

30 Ibid., sect. 281 (3) (a) (b).

31 Ukhuegbe, Solomon, "Recruitment and tenure of Supreme Court justices in Nigeria", *SSRN Electronic Journal* (November 2011), pp. 25–35.

32 The National Judicial Policy, 2016, para 2.1.1. Available at <https://www.njc.gov.ng/national-judicial-policy> (accessed on 2 June 2022).

33 Ibid., paras. 2.1.3–2.1.6

The key features of the system and process of judicial appointments in Nigeria are summarized below.

Box 1: Key features of the system and process of selection and appointment of judges in Nigeria

The President of the Federal Republic of Nigeria appoints judges of the Superior Courts of Record of the Federation upon the recommendations of NJC and upon approval of the Senate, where applicable.^a

The Governor of a State appoints judges of the superior Courts of Record of the State; subject, in the case of the Chief Judge, to confirmation of the appointment by the House of Assembly of the State.^b Persons who have ceased to be members of JSC, FJSC and NJC are disqualified from being selected for appointment as judges for three years.^c

The President and Judges of National Industrial Court require considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria.^d

Candidates for the position of Grand Kadi and Kadis of the Sharia Court of Appeal must also have been qualified for not less than 10 years and either have considerable experience in the practice of Islamic Law or be a distinguished scholar of Islamic Law.^e

In the appointment of Judges of the Customary Court of Appeal, considerable knowledge and experience in the practice of customary law is required, either with or without 10 years of post-call experience.^f

Grounds for disqualifications are set out under rule 4 (4) (ii) of the National Judicial Policy.

The National Judicial Policy emphasises transparent, merit- and skill-based appointments; requires assessment, evaluation and evidence of requisite qualifications, skill, experience competence and integrity of candidates. It also emphasizes constant reform of the process of appointment of judges.^g

a Constitution of the Federal Republic of Nigeria 1999, sects. 231 (1), 238 (1) 254 B (1). 256 (1) 261 (1).

b Ibid., sects. 271 (1), 276 (1) 281 (1).

c Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judges of All Superior Courts of Record in Nigeria, 3rd November, 2014, rule 1 (2).

d (s.254B (2).

e Constitution of the Federal Republic of Nigeria, 1999, sect. 261 (3) (a) (b) (i) (ii).

f Ibid., sect. 266 (3) (a) (b).

g National Judicial Policy, 2016, para. 2.1.3-2.11.6 and para. 2.1.1).

3

Stakeholder views on the system and process of selection and appointment of judges in Nigeria

This chapter provides a critical review of the current system and process of appointment of judges in Nigeria, which combines the findings of the interviews conducted and any pre-existing analysis. All of the respondents interviewed for the present study had direct knowledge of the system and processes involved in the selection and appointment of judges, as they had either served as chairs, members or secretaries of Judicial Service Commissions or had been involved in the process, either by recommending applicants or selecting candidates for judicial office. Overwhelmingly, they described the experience as an enriching career achievement; this was true for lawyers and non-lawyers alike.

3.1 Membership of the selecting and appointing institutions

The dual memberships of individuals in both FJSC/SJSC and NJC, the institutions concerned with the selection and appointment of judges in Nigeria, was identified by the majority of respondents as problematic. In particular, they expressed concerns about the sometimes overly dominant role played by Chief Judges and other heads of courts rather than JSCs in the overall process. The majority stated that this has sometimes led either to undue interference by those individuals or opened avenues for powerful interest groups in the political sphere to push specific candidates.

Moreover, many respondents observed that membership of both FJSC and NJC limits the degree to which the system allows for checks and balances between the two bodies. Indeed, CJN, PCA, CJFHC and PNIC are all members of both FJSC, responsible for the solicitation of applications, initial evaluation of candidates and the drawing up of the shortlist, and NJC, tasked with the final evaluation of candidates and the drawing up of the list of recommended candidates.

The majority of respondents also expressed concerns about the overly dominant position of CJN in the system as he or she not only serves as the chair of both FJSC and NJC but is also responsible for the appointment of 14 of the 24 members of NJC, namely:

- i. five retired Justices from the Supreme Court or Court of Appeal;
- ii. five among the Chief Judges of the States and the Chief Judge of FCT, Abuja;
- iii. one Grand Kadi of the Sharia Court of Appeal;
- iv. one PCCA; and
- v. two persons, not being legal practitioners, who in the opinion of CJN are of unquestionable integrity.

Respondents felt that this vests considerable power in CJN to influence NJC deliberations and decision making. They perceived it as unlikely that NJC members who depend for their appointment on the goodwill of CJN would openly express dissent or contrary views in situations where candidates being proposed for judicial appointments were lacking merit or competence. Consequently, not only is the quorum at meetings of NJC in favour of CJN, but also the unrestrained discretionary powers he/she enjoys inevitably make it easy

to influence decisions or indicate a preference for a particular candidate in the course of the selection and appointment process.³⁴

In addition, respondents noted several other weaknesses in the composition of the bodies involved in the system and the process of selecting and appointing judges. Most prominently, the vast majority of respondents noted the absence of any person with human resource management expertise in the process. Similarly, the vast majority of respondents expressed concern about the lack of clarity regarding civil society involvement, and many respondents felt that judges, whether serving or retired, are too dominant in the process, which does not favour a diversity of opinions when it comes to the assessment of candidates.

3.2 Compliance with constitutional provisions and guidelines

The majority of respondents observed that whereas the procedures for the selection and appointment of judges appear sound on paper and based on some objective criteria, even if not well developed and laid out, they are not always strictly adhered to in practice.

Similarly, several scholars have pointed to instances of lopsided compliance or outright violation of constitutional and statutory provisions. For instance, Aliyu³⁵ argues that the system of appointing those already holding offices in an acting capacity as heads of courts is not sourced from the Constitution. Moreover, Adangor³⁶ opines that the Constitution vests too much discretion in the executive when it comes to the rejection of recommended candidates. This observation was made with reference to difficulties encountered in the filling of vacancies at the Court of Appeal for 301 days, as well as the difficulties encountered in the appointment of a Chief Judge for Rivers State, which left the State without a Chief judge for almost two years, between 20 August 2013 and 31 May 2015.

Many respondents further observed that the practice of exclusively considering judges as opposed to any person from the body of legal practitioners for appointment to the Court of Appeal and Supreme Court is discriminatory and not in line with the Constitution. However, they also felt that the consideration of such “external” candidates would need to be properly managed so as not to erode the independence, self-confidence, commitment and industry of the judiciary.

Moreover, some respondents expressed concern about the practice that usually considers only Appeal Court judges for appointment to the Supreme Court. The vast majority of respondents also criticised the fact that the requirement to advertise judicial vacancies publicly was not applied to positions of heads of courts and judges of the Court of Appeal and the Supreme Court. The majority of respondents, some of whom had participated in the selection and appointment process as applicants and candidates in 2019 and 2021, felt that the practice by FJSC, JSC AND FCT-JSC of recommending the next most senior judge as Head of Court forecloses the need for advertisement. They also agreed that since vacancies in the Court of Appeal and Supreme Court are filled exclusively from within the judiciary, public advertisements are unnecessary.

Another important point raised by respondents relates to the non-specification of the quality of legal practice and skills required for certain judicial positions. The majority of respondents concurred that the lack

34 Davies, Arthur E, “Independence of the judiciary: problems and prospects”, *African Study Monographs*, vol. 10, No. 3 (1990), pp. 125–36.

35 Aliyu, B. P., “The appointment, discipline and removal of judicial officers: the role of the National Judicial Council under the 1999 Constitution as amended”, *Ebonyi State University Law Journal* (2015), p. 230.

36 Adangor, Z., “Depoliticising the appointment of the Chief Judge of a State in Nigeria: lessons from the crisis over the Appointment of the Chief Judge of Rivers State of Nigeria”, *Journal of Law, Policy and Globalization*, vol. 44 (2015), p. 44.

of specification of requirements to be considered for various judicial offices, beyond the number of years qualified, to practice as a legal practitioner in Nigeria is problematic. Neither the constitutional provisions nor the guidelines on the selection and appointment of judges indicate the quality of legal practice and skills required to be considered for appointment to the Bench. Given that the Constitution provides only a minimal standard, it has been observed that more than half of the total number of persons who constitute the legal profession in Nigeria already possess these constitutional requirements.³⁷

The majority of respondents also observed the inconsistency with which the Constitution sets criteria for candidates to be considered for different judicial offices, placing excessive discretion in the judicial service commissions and NJC when considering candidates. Apart from the nature of qualifications and experience indicated for the appointment of judges to the Customary and Sharia Courts of Appeal, the Constitution does not state the nature of specialization in the 10, 12 or 15 years of legal qualification required for the other categories of judicial appointment to the Supreme Court, the Court of Appeal, the Federal High Court or the State High Courts.

As noted by Aliyu:³⁸ “The dichotomies in constitutional qualifications show that in some offices, the requirements are stringent and watertight, while in others, discretion has been given to the NJC to determine the qualifications. Experience has shown that such discretion has not always been exercised based on reasonable assessments or conclusions.”

3.3 Transparency

In general, the vast majority concurred that the system and process of selection and appointment of judges are not as transparent as they should be, with the vast majority of respondents agreeing that they are therefore easily manipulated by the executive and the heads of courts. Many respondents felt that the lack of transparency makes the process vulnerable to political interference, nepotism and corruption, and undermines the equal opportunity for candidates to succeed, while weakening the legitimacy of the system and process in the eyes of candidates, the legal profession and the public at large.

It seems that this view is also shared by some critics in the literature. Guobadia,³⁹ for example, holds the view that the opacity of the system and processes for selecting and appointing judges leads to the emergence of non-suitable candidates, which in turn, in her view, is responsible for the shortcomings and poor performance of the Nigerian judiciary in general.

The vast majority of respondents criticized the lack of transparency in the method of evaluation of candidates, with many raising specific concerns about the lack of clarity about why some applicants were invited for interviews while others were not. In some cases, even though the assumption is that JSC had evaluated the applicants and drawn up a shortlist, according to some respondents the reality seemed to be that either the Governor of the State, personally or acting through the Attorney General of the State or the Head of Court, sits alone and “evaluates” the applicants and draws up a shortlist of candidates. This further affirms claims of the undue influence exercised by the executive over the process.

37 Giwa, Ayuba, “Appointment of judicial officers: an examination of the governing considerations”, Public lecture, Law Week Symposium, Nigerian Bar Association, Warri branch (2021).

38 Aliyu, B.P., “The appointment, discipline and removal of judicial officers: the role of the National Judicial Council under the 1999 Constitution as amended”, *Ebonyi State University Law Journal* (2015).

39 Guobadia, Ameze, “Ethical considerations in judicial appointments in Nigeria: the role of special judicial bodies”, *Legal Ethics*, vol. 20, No. 1 (2017), pp. 21–42.

The majority of respondents also felt that the poor documentation of the process and related management of records as well as the lack of involvement of civil society contributed to the opacity of the process. Some respondents noted that, overall, the practice of keeping records of voting is not uniform and, in many cases, no such records are kept. Moreover, the majority of respondents felt that the outcomes of every stage of the process are not made public and many noted the absence of feedback mechanisms for unsuccessful candidates.

With reference to the previously mentioned practice of not advertising vacancies for some specific judicial positions, many respondents expressed concern about the unsolicited “expression of interest” foreseen in the Extant Revised NJC Guidelines, which in their view creates room for lobbying.

3.4 Political interference, corruption, ethno-religious sentiments and discrimination

The vast majority of respondents indicated that, in their view, the selection and appointment process was vulnerable to political, ethnic, religious and emotional bias as well as nepotism. They were able to point to instances in which they perceived judicial appointments as having been dictated by political officeholders and other people of influence. The major culprits identified by respondents are, among others, members of the executive, especially state governors, who use judicial appointments to dispense favours, settle political scores and secure their influence over future judicial decision-making.

Moreover, the majority of respondents indicated being aware of cases of candidates resorting to corrupt practices when seeking selection and appointment. One such case was recently petitioned by Access to Justice, a judicial watchdog non-governmental organization that petitioned NJC to cancel the appointment of judges to the Abia State High Court and to set up a committee to investigate allegations of bribery in the selection and appointment process. Access to Justice alleged that a magistrate in Abia State sold her property for 15,000,000 Nigerian Naira in order to bribe members of the Abia State JSC and officials of the State Ministry of Justice to ensure that her name was included on the shortlist of candidates to be sent to NJC. This alleged case was widely reported in the Nigerian media and it was alleged that the magistrate subsequently died of a heart attack when she failed to secure the position.⁴⁰

In another instance, the Open Bar Initiative raised concerns in a petition to the President of the Federal Republic of Nigeria on 6 May 2020 in which it alleged that 17 nominees for judicial office submitted to NJC were not qualified and had only been included because of their connection to or family affiliation with senior judges.⁴¹ Similarly, Aliyu⁴² states that the inherent weaknesses in the selection and appointment process create space for exploitation and cronyism, and Mohammed and Asesomoju⁴³ note that the selection and appointment process is affected by corruption, unethical conduct and nepotism.

Some respondents reported the writing of frivolous petitions by candidates to discredit competitors, as well as the harassment of candidates through threats, blackmail and the utilization of security agencies to intimidate competitors. Some also suggested that ethnic and religious bias sometimes become factors in the process,

40 Nwokoro, Silver, “Group urges NJC to cancel Judges’ appointment in Abia, alleges bribery”, *The Guardian* (Nigeria), 9 November 2021.

41 Yahaya, Halimah, “Controversy as NJC recommends relatives of Supreme Court judges, others to Buhari for appointments”, *Premium Times*, 8 May 2020.

42 Aliyu, B.P., “The appointment, discipline and removal of judicial officers: the role of the National Judicial Council under the 1999 Constitution as amended”, *Ebonyi State University Law Journal* (2015).

43 Asesomoju, Ade, “How lobbying, godfatherism weaken Nigerian judiciary – Ex-CJN Mukhtar”, *Punch*, 5 March 2018.

citing the already mentioned example of the appointment of the Chief Judge of Cross River State, which was stalled by the Cross River State House of Assembly refusing to confirm the appointment of the candidates recommended by NJC because she is an indigene of Akwa Ibom State but is married to a Cross River man.⁴⁴

The majority of respondents considered all stages of the process vulnerable, which includes the determination of interview questions, the marking of answers, the preparation of the shortlist, the accurate documentation of the process as well as the processing of documents.

3.5 Non-merit-based system

The vast majority of respondents agreed that the present system of selection and appointment promotes mediocrity at the expense of merit. As such, many respondents felt that the current system and processes are not robust enough to reliably allow for the most-qualified and best-suited candidate to emerge successfully. Many respondents therefore concluded that only “anointed” or “favoured” candidates were being seriously considered; a view that seems to have been shared by Olumide Akpata, the current NBA President, in a recent interview following his participation in the consideration of 20 candidates for appointment to the Court of Appeal.⁴⁵

The vast majority of respondents also criticized the lack of mandatory written and oral examinations of candidates. As NJC does not always know the candidates being proposed, in such cases it relies exclusively on the documents submitted by applicants, letters of recommendation by heads of courts or other judges and the assessment of JSC. The vast majority of respondents seemed to favour written and oral examinations but some expressed reservations about the appropriateness of such assessment tools, in particular in the evaluation of candidates for appointment to the courts of superior record. Moreover, many respondents felt that even in those States where examinations had been conducted, this did not guarantee that, in their view, the best candidate emerged successfully.

As one respondent stated: “Many people do not support the idea of written examinations. How can you subject the highly exalted position to the ridicule of a written examination? That is their perception. But even if this is accepted, the eventual shortlisting is at the whims of the Chief Judge, which thus makes nonsense of the written examination.”

Indeed, in a few States where written exams have been introduced as criteria for appointment or promotion, the success rates have been low. For instance, of the 21 candidates that took the written examination for the position of Shariah Court of Appeal Kadi in Jigawa State in 2021, only 8 passed.⁴⁶

Some respondents stated that written examinations are particularly desirable at the level of the High Courts, since at that level it is also common for candidates from outside the judiciary, including the bar, ministries, court registries, academia, magistracy, etc., to apply.

44 Uchechukwu, Ike, “Cross River House of Assembly again rejects request to confirm Justice Ikpeme as substantive Chief Judge”, *Vanguard*, 2 June 2020. Available at <https://www.vanguardngr.com/2020/06/cross-river-house-of-assembly-again-rejects-request-to-confirm-justice-ikpeme/>

45 Olorok, Friday, “I was misquoted, NBA president recants on Appeal Court judges’ appointment”, *Punch*, 25 March 2021. Available at <https://punchng.com/i-was-misquoted-nba-president-recants-on-appeal-court-judges-appointment/>.

46 Salami, Biodun, “Only 8 out of 21 candidates for Jigawa Shariah Court of Appeal pass written exams”, *Nigerian Sketch*, 5 November 2021. Available at <https://nigeriansketch.com/only-8-out-of-21-candidates-for-jigawa-shariah-court-of-appeal-pass-written-exams/>.

Regarding some of the recent experiences of conducting examinations, the majority of respondents criticized the absence of psychometric tests, which were considered critical given the psychological peculiarities of activities and decision-making undertaken by judges. The majority of respondents also expressed concern about the lack of clearly established parameters for the evaluation of written and oral examinations. Rather, they indicated that ratings seemed to rely exclusively on the subjective assessment of the judges tasked with conducting the examinations. In this context, many respondents also noted the lack of a standardized system for developing interview questions to assess the qualifications, knowledge and experience of candidates, further adding to the subjectivity of the process. As one respondent observed: “Insiders say that in 95 per cent of the cases, there is no substance to the concept of an interview. It is very inadequate and wishy-washy.”

In the event of differences between members in the evaluation of candidates, the Chief Judge has the casting vote. However, in many instances, no individual rating takes place and the evaluation is conducted by consensus.

The majority of respondents were also critical of the use of non-merit-based criteria in the consideration of candidates, and some decried basing appointments on such factors as “federal character” and quotas. Another hindrance to merit, as observed by many respondents, related to the appointment of heads of courts, which appear to be solely based on seniority.

3.6 Vetting of candidates

The Extant Revised NJC Guidelines provide for the vetting of candidates for judicial positions. However, many respondents criticized the vetting process carried out by the State Security Service (SSS), the Independent Corrupt Practices and Other Related Offences Commission, and the police as being superficial and that even when the process resulted in negative findings, they did not always seem to be considered.

Many respondents felt that curricula vitae and other documentation provided by candidates were not scrutinized sufficiently. They also noted that service records, including disciplinary records, appeared to be rarely available to JSCs when considering candidates. Similarly, respondents claimed that negative assessments by NBA were not reliably considered.

Overall, respondents seemed to concur that the vetting process was not robust and many felt that the “preferred” candidate tended to prevail.

3.7 The role of the legislature

Despite the concerns expressed by the majority of respondents about the greater involvement of the legislature in the appointment of judges potentially reducing the independence of the judiciary, they seemed nevertheless to be in favour of expanding the requirement for all judges and not only the heads of courts to be confirmed by the legislature.⁴⁷

⁴⁷ The Constitution of the Republic of Nigeria makes appointments of the various Heads of the Federal Courts subject to the legislative scrutiny of the Senate, while those of the State Courts are subject to the scrutiny and confirmation of the State Houses of Assembly. The same does not apply to any of the other categories of judges serving on those courts: sects. 231 (1) (2), 238 (1) (2), 250 (1) (2), 256(1) (2), 261 (1) (2), 266, 276 (1) (2) 281 (1) (2).

This requirement has been discussed in the literature, with some authors arguing that not subjecting all appointments to legislative confirmation creates the impression that the heads of courts are not recruited from the same judicature,⁴⁸ while others contend that excluding some judicial appointments from requiring confirmation by the legislature may diminish accountability. Judges should feel they owe their allegiance to the people and not the appointing authorities. The inclusion of legislative oversight is aimed at enabling the other arms of government to have an input in the selection and appointment of judges, especially of the direct representatives of the people.

Many respondents recommended the establishment of an ombudsman function to be headed by a retired Supreme Court Justice or Chief Justice in a similar way to what was recommended by the Justice Kayode Eso Panel with regard to the establishment of a Judicial Performance Review Commission.⁴⁹

The majority of respondents seemed to agree that there was a need to strengthen the present system, including the involvement of the legislature in the appointment process, with many arguing for a change to the Constitution and special legislation regulating the selection and appointment process for judges. The goal of the legislation should be to promote transparency, efficiency and effectiveness as well as the proficiency of candidates aspiring to join the Bench.

3.8 Inclusiveness and diversity

The constitutional and statutory provisions for the appointment of judges do not discriminate based on gender, ethnicity, religion, etc. At the time of writing, approximately 30 per cent of judges are women.⁵⁰ Beyond the requirement of “federal character” there are no specific provisions in the Constitution or the Extant Revised NJC Guidelines promoting inclusivity or diversity, in particular as far as gender parity or the inclusion of people living with disabilities are concerned. While many of the respondents acknowledged this gap, only some were in favour of establishing quotas, ensuring greater gender balance in selection and appointment panels, or any other provision or policy that would promote greater inclusivity and diversity.

3.9 Conclusion

In summary, the interviews helped several weaknesses in the system and process of the selection and appointment of judges to be identified, some of which have also been highlighted in the literature. In the view of the respondents, those weaknesses collectively affect the quality and effectiveness of the administration of justice in Nigeria.

While the National Judicial Policy adopted in 2016 by NJC indicated that persons appointed to judicial positions should not only be qualified lawyers but also be persons of competence and integrity who are free to perform their functions without fear or favour, the present system, process and practice of selecting and appointing judges does not seem fully adequate to achieve this objective.

48 Shehu, Ajepe Taiwo and Imam-Tamim, Muhammad Kamaldeen, “Suspension of justice Isa Ayo Salami: implications for the rule of law, judicial independence and constitutionalism”, *African Journal of Criminology and Justice Studies* (2016), pp. 41–49.

49 UNODC, *Strengthening Judicial Integrity and Capacity in Borno, Nigeria*, Report of the First Integrity Meeting or Borno State Judiciary (September 2002).

50 UNODC (2010), p.31. *Op Cit. Fn. 4*

4

Overview of international standards and practices for the selection and appointment of judges

4.1 Introduction

This chapter provides an overview of international and regional standards for the selection, appointment and promotion of judges. In addition, a comparative overview of five selected country models in the United Kingdom, Germany, India, Kenya, and the United States illustrates different practices for the selection and appointment of judges around the globe.

4.2 International standards

The selection and appointment of judges are core aspects of judicial independence, a universal tenet of the rule of law. Article 14(1) of the 1966 International Covenant on Civil and Political Rights, a legally binding international treaty to which Nigeria is a State Party, provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The United Nations Human Rights Committee, in its General Comment 32S, sets out the nature and scope of obligations under article 14 of the International Covenant on Civil and Political Rights, stating that “the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges [...]”. This chapter outlines international and regional standards as well as good practices that have been developed from the international legal obligation resulting from the International Covenant on Civil and Political Rights.

4.2.1 United Nations Basic Principles on the Independence of the Judiciary, 1985

The United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985,⁵¹ was the first international document to provide guidance on the selection and appointment of judges. While principles 1–7 emphasise the independence of the judiciary with particular attention to the separation of powers between the different arms of government, principle 10 explicitly underscores the consideration of integrity, merit and competence and prohibits varying degrees of discrimination in the selection and appointment of judges (with the exception that a candidate or nominee for a judicial appointment is to be a national of the country concerned).

51 Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at: https://www.unodc.org/res/ji/import/international_standards/basic_principles_on_the_independence_of_the_judiciary/basic_principles_on_the_independence_of_the_judiciary.pdf.

4.2.2 International Association of Judges the Universal Charter of The Judge, 1999 (updated, 2017)

With the 1999 Universal Charter of the Judge, updated in 2017,⁵² the International Association of Judges developed standards (articles 1, 2-3, 4-1, 5-1 and 5-2) that should be applicable to all persons exercising judicial functions, including non-professional judges (article 9-1), with a view to providing guarantees for judges and prosecutors throughout the world.

Article 2-3 provides that: “In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means. The Council for the Judiciary must be completely independent of other State powers. It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation. The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary. The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.”

Article 4-1 provides that the selection of applicants for appointments as judges must be done independently of gender, ethnic or social origin, philosophical and political opinion or religious beliefs. In furtherance of this, article 4-1 requires that the recruitment or selection must be based only on objective criteria which may ensure professional skills; it must be done by the body described in article 2-3.

Article 5-1 of the Universal Charter of the Judge provides that the selection of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Article 5-2 reinforces the objective criteria by providing that, when the promotion of a judge is not based on seniority, it must be exclusively based on qualifications and merit verified in the performance of judicial duties through objective and [sic] contradictory assessments.

Additionally, article 5-2 requires that decisions on promotions must be pronounced in the framework of transparent procedures provided for by the law and when decisions are taken by the body referred to in article 2-3, the judge whose application for promotion has been rejected should be allowed to challenge the decision.

4.2.3 International Bar Association Minimum Standards of Judicial Independence, 1982

International standards on the selection and appointment of judges are furthermore outlined in the International Bar Association Minimum Standards of Judicial Independence.⁵³ The terms and nature of judicial appointments are set out in part C of the International Bar Association Minimum Standards. Generally, judicial appointments should be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.⁵⁴ Furthermore, judges should not be appointed for probationary

52 International Association of Judges. The Universal Charter of the Judges, Adopted by the IAJ Central Council in Taiwan on November 17th, 1999, Updated in Santiago de Chile on November 14th, 2017. Available at: https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf

53 IBA Minimum Standards of Judicial Independence, 1982. Available at <https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29> (accessed on 6 June 2022).

54 Ibid., para. 22.

periods except for legal systems in which appointments of judges do not depend on practical experience in the profession as a condition of the appointment.⁵⁵ Part-time judges should be appointed only with proper safeguards⁵⁶ and the selection of judges shall be based on merit.⁵⁷ Lastly, the appointment of judges is mentioned in the IBA Minimum Standards of Judicial Independence in relation to the executive. Paragraph 3 requires that participation in judicial appointment by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of the judiciary and the legal profession form a majority. Appointments by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments operate satisfactorily.

4.3 Standards developed for the African region

4.3.1 African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003

A first document that sets out standards on the selection and appointment of judges for the African region is the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 2003.⁵⁸ The document identifies values such as integrity, professional qualification and learning as guarantees of independence for judicial institutions, judges and judicial processes against unwarranted interferences by the executive branch. Principle A (4) (i) provides that the sole criteria for appointment to judicial office shall be the suitability of a candidate for such office based on integrity, appropriate training or learning ability. Moreover, principle A (4) (j) reflects issues of non-discrimination except in cases where States prescribe a minimum age or experience for candidates or require that only nationals of the State concerned shall be eligible for appointment to judicial office.

4.3.2 Lilongwe Principles and Guidelines on the Selection and Appointment of Judges, 2018

The Lilongwe Principles and Guidelines on the Selection and Appointment of Judges,⁵⁹ formally adopted at the Southern African Chief Justices' Forum Conference in 2018, are recommended to be applied to all forms of judicial appointments, whether or not such appointments are short term, acting or contractual. The principles embody the underlying values of transparency, independence and impartiality, and advocate minimum standards, merit, diversity and the involvement of stakeholders (principles i–xv). They recommend that transparency should permeate all levels of the selection and appointment process through the following, among others:

- i. sourcing of candidates in accordance with a consistent and transparent process which may include applications, nominations, proposals, direct searches or invitations to express interest;

55 Ibid., para. 23 lit. a.

56 Ibid., para. 25.

57 Ibid., para. 26.

58 Available at: https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf.

59 Available at: <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf>.

- ii. the public should be made aware of the persons and bodies involved in the various stages of the process, candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the suitability of the candidates to be appointed;
- iii. vacancies should be widely advertised with reasonable time provided for candidates to be nominated, recommended, or to apply and the procedure should pay due regard to achieving the substantive objects and purposes of the selection and appointment rather than pay heed to administrative and procedural technicalities;
- iv. interview processes should be equal, fair, rigorous and respectful, the tone of the interview should not be confrontational and interview questions should not seek to serve an alternative agenda or take candidates by surprise;
- v. the criteria for the appointment, shortlisting, selection and decision-making process should be predetermined and publicly available and not be amended during the selection process;
- vi. the judicial Bench should reflect the diversity of society in all respects and selection and appointment authorities may actively prioritize the recruitment of appointable candidates who enhance the diversity of the Bench;
- vii. subject to national laws, all records generated by the process should be documented and kept by the selection and appointment body and be available to interested parties; and
- viii. the nomination of persons, appointment and assumption of office by a judge should be publicized to ensure the integrity of the process.

4.4 Standards developed for Commonwealth countries

For the Commonwealth countries, the so-called Latimer House Principles on the Three Branches of Government,⁶⁰ approved by the Heads of Government of the Commonwealth in 2003 provides another reference document on the selection and appointment of judges. Principle IV (a) of the Commonwealth (Latimer House) Principles provides that judicial appointments should be made based on 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.”

4.5 European standards, in particular by the Council of Europe

At European level, further guidance on the selection and appointment of judges has been developed, in particular within the framework of the Council of Europe.

4.5.1 Recommendations of the Committee of Ministers of the Council of Europe

In 1994, the Committee of Ministers of the Council of Europe made specific recommendations to Member States on measures to ensure the independence and efficiency of the judicial system. The first principle stated that considerations for merit should be balanced with evaluations, integrity, skills and efficiency and the appointing body or authority should, as much as possible, be independent of the Government or public administration (recommendation No. R (94) 12). In 1998, the Council of Europe adopted the European Charter on the statute for judges, which prescribes a procedure for the selection and appointment of judges that

60 Available at: <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf>.

includes an independent commission that can recruit judges who have the requisite capacity and can freely and impartially appreciate all judicial decisions, situations, and apply the law in the spirit of preserving the dignity of persons. Recommendation No. 2010 (12) on Judges independence, efficiency and responsibilities emphasises independence, efficiency and responsibilities and recommends the following standards:

- i. Decisions concerning the selection and career of judges should be based on an objective criterion pre-established by law or by the competent authorities. Such decisions should be based on merit having regard to the qualifications, skills and capacity required to adjudicate cases (paragraph 44).
- ii. The authority making decisions on the selection and career of judges should be independent of the executive and legislative powers and, to guarantee its independence, at least half of the members of the authority should be judges chosen by their peers (paragraph 46).
- iii. Where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in chapter IV) should be authorized to make recommendations or express opinions, which the relevant appointing authorities follows in practice (paragraph 47).
- iv. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for their decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

4.5.2 Opinions of the Consultative Council of European Judges

Further guidance on the selection of judges was developed by the Consultative Council of European Judges (CCJE), which stated that the independence of judges has merit beyond itself because it serves the interest of the state of the law and those who seek justice (CCJE opinion No. 1 of 2001).⁶¹ As such, the criteria for the selection of judges set out by CCJE include merit and performance without any political considerations. CCJE opinion No. 10 of 2007 further outlines total transparency of the conditions of selection by the dissemination of the criteria for appointment and promotion, a selection based on the merits of the candidates, appreciated by their qualifications, competence, integrity, independence, impartiality and efficiency, opening the procedures for an appointment for a large area of candidates, who are representative for the community.⁶²

4.5.3 Opinions of the Venice Commission

The European Commission for Democracy through Law (Venice Commission), another advisory body to the Council of Europe, has also issued several guidelines on the selection process of judges. The three basic principles outlined are: independence from external influences, especially political interference; recognition of diversity and balance; and effective functioning of courts through a carefully designed system that anticipates vacancies and delays in appointments.⁶³ These are aimed at ensuring that the judiciary is credible and perceived to be dedicated to the interest of the people rather than certain narrow sectional interests. In addition, the Venice Commission endorsed the mixed system of selection/appointment of judges where all the arms of government (legislature, executive and judiciary) play a role. This is favoured over the two

61 Recommendation No. R (94) 12, paras. 17, 18, 37 and 50.

62 Ibid., paras. 48–51.

63 European Commission for Democracy through Law, *The Composition of Constitutional Courts*, Science and technique of democracy, No. 20 (December 1997). Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e).

other systems, namely the direct appointment and elective systems, because it strengthens public trust in the judicial system.⁶⁴

Other suggestions of the Venice Commission on the selection and appointment process include inclusivity,⁶⁵ diversity (such as in legal background and age)⁶⁶ and a legal process involving the courts to address violations of laid-down procedure for appointment of judges.⁶⁷

4.6 Models of selection and appointment of judges

There are several models of selection and appointment of judges and they vary according to a given country's legal system. Despite the variations, two basic models are widely accepted: the civil service model and the professional model.⁶⁸ Thus, legal scholars make a distinction between "career judges" (civil service model) and "recognition judges" (professional model). The former is prevalent in Europe while the latter is most commonly associated with the United States and other common law jurisdictions.⁶⁹

4.6.1 Professional model

In the professional model, judges are recruited from among experienced legal professionals, which sometimes involves public competition. Key features of a recognized judiciary include: i) selection of judges from practising legal experts; ii) no clear provisions for promotion of judges; and iii) no attachment of tenure to a specific court. The appointive mechanism involves actors from other branches of government and hence may be open to political influence.

The process usually involves political actors and professional judicial bodies who drive the process of selection and appointment, particularly in the case of judges of the higher courts. A distinguishing feature of this model is that judges are generally appointed or elected from among practising lawyers. As such, the appointment of judges in this model is tied to vacancies in specific courts (trial, appellate or supreme courts). The system does not provide formal opportunities for career advancement and hence judges are unable to formally apply for promotion to higher courts. Judges of lower courts are not competitively assessed to fill vacancies in higher courts and the only means through which they can ascend is an entirely different and new procedure.⁷⁰

The professional model, where political actors and judicial bodies participate in the process of the selection of judges, has been further divided into representative or cooperative models. The representative model is the process in which the selecting and appointing authorities (political institutions and judicial bodies) are assigned a certain percentage of the court, as in Italy, for example. In other variants of the cooperative model, emphasis is placed on securing the broad-based support of institutional or political actors or cooperation between two or more institutions before the appointment of judges, as in Armenia, for example.

64 CDL-AD (2009) 014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 13.

65 CDL-AD (2004) 043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paras. 18–19.

66 CDL-AD (2006) 006 Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the constitutional court of Romania, para. 17.

67 Ibid.

68 Cardona-Peretó, Francisco and Gyulumyan, Alvina, *Kazakhstan: Comparative Note on International Standards for Selection, Competencies and Skills for Judges in Administrative Justice* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2020).

69 Georgakopoulos, Nicholas, "Discretion in the career and recognition judiciary", *The University of Chicago Law School Roundtable*, vol. 7, No.1, art. 8 (2000).

70 UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (Vienna, 2011).

4.6.2 Civil service model

Under the civil service model, also called the bureaucratic model, the focus is on recruiting young university graduates through a competitive public process. Essential features of a career judiciary include: i) the appointment of judges to junior positions in trial courts or as assistants to senior judges; ii) judges may be promoted to senior positions and may rise through the ranks to the Supreme Court; iii) tenure is attached to the entire career and not necessarily to a particular position; and iv) there are restrictions on transfers to courts of equal seniority.⁷¹ The appointment mechanism in this system seeks to insulate career judges from political influence.

Originating in France and widely adhered to in continental Europe, the civil service model has its philosophical underpinnings in Montesquieu's doctrine of the separation of powers. Under this model, judges are considered as civil servants with a specific legal status and junior judges are appointed into entry-level positions in the administrative jurisdiction. Variants of this model are found in several countries in Western Europe, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Spain and Sweden.

Another variation of the civil service model is the merit-based recruitment system, which is common in the Nordic countries of Europe. The three main elements that characterize this model are: i) the use of a merit-based system to assess the knowledge and qualifications of candidates in the legal field; ii) the model provides for life tenure for successful candidates who have undergone training and the period of probation; and iii) in this system, promotion through the ranks of the judicial hierarchy is based on seniority and professional merits that include the record of performance in some national systems.

One of the challenges associated with the merit-based recruitment system relates to the design and conduct of appraisal of the performance of individual judges. Where this is not done properly, it can undermine the independence of judges. However, this challenge can be remedied through the provision of lateral entry points for experienced lawyers as practised in the civil service model. In both the professional and civil service models, candidates may be required to have a clean criminal record in addition to prior professional experience. Examples of this can be found in countries such as France, Finland and the Netherlands. Whichever track is adopted, suffice to say that these classifications are general as there are differences in the way the civil service and professional models are implemented depending on institutional settings.⁷²

In the models for the selection and appointment of judges outlined above, the emphasis is on ensuring the internal and external independence of judges and the judiciary itself. Such independence is essential for the proper functioning of the political system. Citizens rely on judges to deliver justice in a manner that is impartial, unbiased and transparent. For this reason, the selection and appointment process should be perceived to be independent and those appointed are required to be accountable to the people for all their actions and decisions. In relation to the judicial appointment process, Fiss⁷³ observes that most modern constitutions are designed to protect against undue interference from the executive.

71 Garoupa, Nuno and Ginsburg, Tom, "Guarding the guardians: judicial councils and judicial independence", *The American Journal of Comparative Law*, vol. 57, No. 1 (2009), pp. 103–134.

72 Ibid.

73 Fiss, Owen M., "Perspective: the limits of judicial independence", *University of Miami Inter-American Law Review*, vol. 25, No. 1 (1993), pp. 57–76.

Box 2: Key features of the judicial recruitment processes in some European countries

Citizenship – a national or citizen (although in Portugal, citizens of some Portuguese-speaking countries are also allowed to participate in the recruitment processes).

Age requirement (in some countries, a minimum age of 30 or 35 years is required).

A law degree or equivalent (in Türkiye, for example, a diploma in political science is considered equivalent), although in the case of administrative judges, other diplomas are also admitted in some countries.

In some countries, professional experience in law-related matters is a requisite to be eligible to sit for a selection examination. In Belgium, for example, 10 years of experience are required for candidates from the public sector and 12 years for those from the private sector. In Spain, 10 years of experience are required for entering the *cuarto turno*, whereby one in four vacancies are reserved for professionals with more than 10 years of experience.⁷

Source: Cardona-Peretó, Francisco and Gyulumyan, Alvina, Kazakhstan: Comparative Note on International Standards for Selection, Competencies and Skills for Judges in Administrative Justice (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2020).

4.6.3 Use of models in selected African countries

An overview of the mechanisms for the appointment of judges in five African countries, namely Benin, Botswana, Cameroon, Kenya and South Africa, shows that⁷⁴ one of the most important factors in judicial appointments in those countries is qualification. Whereas the common law approach is to appoint judges from legal practice (the professional model), the civil law approach is to appoint judges who are career judges that have undergone formal training (the civil service model). The Constitutions of Kenya and Botswana specify the academic legal qualification and practice experience of prospective judges, while that of South Africa states that persons to be appointed should be “appropriately qualified” and “fit and proper”.⁷⁵

The role of judicial appointment bodies in the five African countries also shows specific constitutional provisions that are aimed at ensuring the independence of the selection and appointment process, as well as minimizing external control and influence. Unlike the High Judicial Council in Benin and Cameroon, the Constitution of Botswana stipulates that the Judicial Service Commission should not be subject to the control of any person or authority, while the Constitution of Kenya provides for competitiveness, transparency and gender equality. A similar provision is section 174 of the Constitution of the Republic of South Africa, 1996, which charges the Judicial Service Commission JSC to act without favour or prejudice. The composition of judicial appointment bodies and those who preside over them varies (the chief justice or the president, as in francophone Africa). There are also differences in their powers, with some only able to make recommendations while others (francophone Africa) only offer advice to assist the president.

74 Fombad, Charles Manga, “A comparative overview of recent trends in judicial appointments: selected cases from Africa”, *Canadian Journal of African Studies/Revue Canadienne des études Africaines*, vol. 5, No. 1 (2021), pp. 161–82.

75 Constitution of the Republic of South Africa, 2010, sect. 174(1).

Manga Fombad⁷⁶ states that the appointment system in francophone countries in Africa is more career driven than in anglophone countries, where the process is competitive and evidence based. He also states that the appointment system in anglophone countries is implemented by reference to an explicit selection criterion.

Additionally, Manga Fombad⁷⁷ provides a further comparative overview of the development of the legislature in Africa and assesses the process for the selection and appointment of judges in the dominant legal traditions, namely common law in anglophone Africa and civil law in francophone, hispanophone and lusophone Africa. He argues that the appointment system in anglophone and francophone legal jurisdictions has been entrenched across many African countries since the wave of constitutional reforms that started in the 1990s. According to him, the judiciary in those countries has suffered from a severe lack of independence in the last three decades, largely due to long periods of military rule and dictatorship, which have resulted in the erosion of public trust in the judiciaries of most of the countries.

4.7 Overview of judicial selection and appointment practices in five selected countries

In this section, five countries have been selected for in-depth consideration. The models of the United Kingdom, India, Kenya and the United States are studied because they share a history of the common law legal tradition with Nigeria, while Germany is included as a contrast because of the unique features of the continental or civil law legal tradition in that country.

4.7.1 United Kingdom

In the United Kingdom, the legal framework on the selection and appointment of judges is provided by the Constitutional Reform Act 2005 and the Judicial Appointment Regulations 2013. The Constitutional Reform Act prescribes comprehensive procedures for the selection and appointment of judges and clearly defines the role of the Lord Chancellor. In part 3 sections 25 to 31 and schedule 8, the Act regulates the process of appointment of presidents and justices of the Supreme Court of the United Kingdom and other courts. The requirements for appointment under the Constitutional Reform Act 2005 are as follows.

Applicants must have held high judicial office for at least two years, the high judicial offices include High Court judges of England and Wales, and Northern Ireland; Court of Appeal judges of England and Wales, and Northern Ireland; and judges of the Court of Session. Alternatively, applicants must satisfy the judicial-appointment eligibility condition on a 15-year basis or have been a qualifying practitioner for at least 15 years.

A person satisfies the judicial-appointment eligibility condition on a 15-year basis if he or she has been a solicitor of the Senior Courts of England and Wales, or a barrister in England and Wales, for at least 15 years and has been gaining experience in law during the post-qualification period.⁷⁸ A person is a qualifying practitioner if he or she is an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justice, or he or she is a member of the Bar of Northern Ireland or a solicitor of the Court Judicature of Northern Ireland.

76 Fombad (2021), pp.161-82. *Op Cit. Fn. 74*

77 *Ibid.*

78 The Constitutional Reform Act 2005, sect. 52 (2-5).

Judges in the United Kingdom are appointed through an open process of recommendation to the Queen on the advice of the Prime Minister, who receives the nominations from the Lord Chancellor (changed to Secretary of State for Justice in the Constitutional Reform Act 2005) upon recommendations of the Judicial Appointments Commission. As a result of the enactment of the Constitutional Reform Act 2005, including the establishment of the Supreme Court, the selection of justices of the Supreme Court is made by the Selection Commission made up of the President and Deputy President of the Supreme Court. The Constitutional Reform Act also created the post of Judicial Appointment and Conduct Ombudsman, who is responsible for handling complaints about judicial appointments and is empowered to take actions or to resolve complaints arising from the selection and appointments of judges.⁷⁹ The Selection Commission usually proposes only one name to the Secretary of State for Justice, who may accept or reject the name.⁸⁰

To enable an increase in the number of ethnic minorities in the pool of candidates for selection for judicial office, including their elevation to the apex courts, the Judicial Appointments Commission applies the statutory consultation process alongside evidence of merit and good character, including checks with external bodies as best practices.⁸¹ The statutory consultation process is a legal requirement that involves the engagement of a person or persons known as the consultor(s), who must have held the same judicial office as the candidates are being selected for or possess other relevant experience.⁸² The statutory consultees are expected to provide feedback or responses on whether or not the candidate meets the requirements of competence, character and qualifications of the office to which she or he seeks to be appointed. The feedback and responses must be objective and based only on verifiable evidence founded on guidance provided by the Judicial Appointments Commission.

The Judicial Appointments Commission is made up of 15 commissioners, and with the exception of the six judicial members who are selected by the judge's council, the chair and 11 other members are recruited through an open and competitive process. The chair and members hold office for a renewable tenure of four years. Members of the Commission are made up of persons from a wide range of professional backgrounds, that is two professional members each of whom must not hold the same qualification as the other, five lay members, and a non-legally qualified judicial member. This is to ensure that the Commission has more breadth of knowledge, expertise and independence.⁸³ The Judicial Appointments Commission is to consult a statutory consultee before making a recommendation for appointment unless the chair, the Lord Chancellor or Senior President of Tribunals agrees in advance to waive that requirement.⁸⁴

4.7.2 Germany

In Germany, judges hold judicial office throughout their working life. Judges are either employed by the Federal Government or by one of the States (*Bundesländer*). The appointment of judges in Germany has three main features: career appointments through special committees for the selection of judges; appointment by the executive; and appointment by parliament.⁸⁵ The Federal legislature enacted the *Deutsches Richtergesetz*

79 Ibid., sect. 23 (2), (5) and (6)). The current Nigerian approach whereby a judicial career to the Supreme Court begins at the High Court Bench is akin to the English process prior to the Constitutional Reform Act of 2005 when the starting route of appointments to the House of Lords was through the High Court Bench.

80 The Constitutional Reform Act 2005, sects. 27, 30, 31, 67, 70, 76, 79, 83, 84, 85, 88, 92 and 93.

81 Ibid., sect. 63.

82 Ibid., as amended by the Crime and Courts Act 2013, sect. 20).

83 Brewer, Karen, Dingemans, James and Slinn, Peter, "Judicial appointments commissions: a model clause for constitutions" (May 2013). Available at <https://www.icj.org/wp-content/uploads/2018/01/Judicial-Appointments-Commissions-CLA-CLEA-CMJA-Report.pdf> (accessed on 8 June 2022).

84 Regulation 30

85 Heinz, Volker G., "The appointment of judges in Germany", *Berliner Anwaltsblatt* (April 1999), pp. 178–83.

(German Judiciary Act), 1962 (last amended 2021), which deals in part with the general rules applicable to both federal and regional judges. Other applicable legislation is the *Richterwahlgesetz* (German Selection of Judges Act), 1950 (last amended 2015), which regulates the appointment of federal judges. Appointments by the executive are made by the Minister of Justice, who selects and appoints the judges of the lower federal courts such as the Federal Military Court, the Federal Disciplinary Court and the Restitution Court. Judges of the Constitutional Court are directly elected by parliament, hence each of the two parliamentary houses elects its quota of four judges through a special selection committee (*Wahlausschuss*), which is itself elected by the Federal Parliament through proportional representation.

When a vacancy arises in a promotion grade, the post is advertised and suitably qualified judges may apply. In many States, the recommendation for such appointments is made by a *Richterwahlausschuss* (judicial selection committee). This committee is typically composed of 11–15 members drawn from the *Land Parliament* and judiciary, but the appointment is made by the Minister of Justice of the State. Before the decision of the judicial selection committee or the Minister of Justice is made, an opinion on the suitability of candidates is delivered by the *Präsidentialrat*, a representative organ of the local judges. This opinion is typically based on an assessment of a trial period in which the candidate has sat in the court to which he or she seeks promotion. Judges of the Constitutional Court are appointed by the parliament as each house of the legislature appoints an equal number of members to the Constitutional Court. The principle of supermajority requiring a two third vote has frequently been applied and has led to a form of reciprocity that has led to each of the two largest parties having an equal number of permanent seats on the Constitutional Court. The process of nomination, selection and appointment is formally completed with the handing over of a sealed deed of appointment to the appointee of the President of the Federal Government.

4.7.3 India

The selection, appointment and promotion of judges in India is governed by three legal frameworks, namely the Constitution of India, 1950, the Judges (Inquiry) Act, 1968 and the National Judicial Appointments Commission Act, 2014. The Constitution of India provides for the appointment of judges to be made by the President of India upon consultation with the judges of the Supreme Court and the National Judicial Appointments Commission Act, as the President may deem necessary for the purpose.⁸⁶

To complement the constitutional provisions, the National Judicial Appointments Commission was established by the Indian National Judicial Appointment Commission Act, 2014, section 5(1). The Commission is mandated to make recommendations to the President of India in matters of filling existing vacancies in the Supreme Court and the High Court.⁸⁷ Whenever the office of the Chief Justice is vacant, or when the Chief Justice is unable to perform the functions of his office because of absence or otherwise, the President shall appoint one of the other judges of the court to perform those functions.⁸⁸

In deciding to fill an existing vacancy in respect of the position of the Chief Justice, the Commission is under obligation to recommend the most senior judge of the Supreme Court, especially when it finds that the judge recommended is fit to occupy the position. To qualify for appointment as a judge of the High Court, the applicant must be a citizen of India and must have held judicial office or must have been an advocate of the High Court or of two or more such courts within India for at least 10 years. Where the appointment is to be

86 National Judicial Appointments Commission Act, 2014, sect. 124(1).

87 Ibid., sect. 124(B).

88 Ibid., sect. 126.

made in respect of vacancies in the State High Court, the Commission will act in consultation with the Chief Justice of the High Court concerned.⁸⁹

It is worthy of note that National Judicial Appointments Commission Act permits the blocking of the recommendation of a candidate where objections are raised to that effect by at least two members of the Commission.⁹⁰ The key consideration in the selection or appointment of judges in India, especially of the Chief Justice, is the choice of the most senior judge from among the serving judges of the particular Bench, that is the Supreme Court or the High Court, as the case may be.

4.7.4 Kenya

The Constitution of Kenya, 2010 provides many innovative practices and standards, including the involvement of both judges and the public in the selection and appointment of judges. The President of the Court of Appeal is, for example, appointed after he or she is elected by the Judges of the Court of Appeal,⁹¹ and serves a non-renewable term of five years.

In line with the provisions of section 118(1) and (2) of the Constitution of Kenya, the Kenyan Parliament shall conduct its activities transparently and, as such, its sittings and those of any of its committees shall be open to the public, which includes public participation in the legislative business. This provision allows citizens to submit petitions, queries and opinions concerning nominations for judicial appointments made and submitted by the President of the Republic of Kenya to the Parliament through the Parliamentary Vetting Committee of the Parliament.⁹² Moreover, the vetting process and the hearing of petitions or queries against appointments of persons to the judicial office are publicly broadcast.

The Constitution of Kenya requires that vacancies be advertised by the Kenyan Judicial Service Commission. This gives eligible candidates, including sitting judges, lawyers and others from the Commonwealth, the opportunity to submit their applications. The Commission, upon making a shortlist from the applications received, conducts public interviews of the shortlisted candidates.⁹³ Section 166(1)(a) of the Constitution of Kenya provides for the President to appoint the Chief Justice and Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission and with the approval of the national legislature. The appointment of other judges is made by the President in line with the recommendations made by the Judicial Service Commission without approval by the legislature.

Selections for appointment to all judges in Kenya are to be made from among persons who hold a law degree from a recognized university, or who possess other equivalent qualifications from a common law jurisdiction (who are advocates of the High Court of Kenya).⁹⁴ Section 166 of the Constitution of Kenya provides further requirements that such a person shall possess the experience required under clauses (3) to (6) of section 166, as may be applicable whether or not the experience was gained in Kenya or another Commonwealth jurisdiction, and shall be a person of high moral character, integrity and impartiality.⁹⁵ Where the selection

89 Ibid., 2014, sect. 6.

90 Ibid., sects. 5(2) and 6(6).

91 The Constitution of Kenya, 2010, sect. 164(2).

92 Ibid., sect. (1) and (2).

93 Dingake, Oagile Bethuel Key and others, "Appointment of judges and the threat to judicial independence: case studies from Botswana, Swaziland, South Africa, and Kenya", *Southern Illinois University Law Journal*, vol. 44 (2019), pp. 407–432.

94 Nompumelelo, Sibalukhulu, "The judicial appointment process in Kenya and its implications for judicial independence", Submitted in partial fulfilment of the requirements for the degree MPhil (Multidisciplinary Human Rights), Faculty of Law of the University of Pretoria, July 2012.

95 The Constitution of Kenya, sect.166(2)(a-c).

for a judicial appointment is in respect of appointment to the offices of the Chief Justice or a Justice of the Supreme Court of Kenya, the person considered must have at least 15 years' experience as a judge of a superior court or, alternatively, at least 15 years' experience as a distinguished academic, legal practitioner or have other such experience in a relevant legal field, or have held the relevant qualifications for an aggregate period of 15 years.⁹⁶ Similar requirements are applied in cases of selection for appointment to the Court of Appeal and the High Court, with the exception that the years of experience required for appointment to the Court of Appeal and the High Court respectively is 10 years.⁹⁷

4.7.5 United States

Apart from the Supreme Court of the United States, which is the only court created by the Constitution of the United States of America, the Constitution empowers Congress to establish Federal Courts with jurisdiction to hear cases involving the Constitution and federal laws.⁹⁸ The Constitution and Statutes of each State also establish State Courts to hear cases that raise issues of State laws (for instance, article IV.s.1, 2 of the Constitution of the State of Ohio, 1851). The judiciary in the United States is therefore made up of the Federal Courts system and the State Courts system. Also, within both the Federal Court and State Court systems, their jurisdictions are divided into original or trial courts and appellate courts, hence the existence of the Circuit, District and Superior Courts, that is the Court of Appeals and the Supreme Court.

It is pertinent to note that in several States, there are different methods or procedures for selecting judges at different levels of courts. In some States, judges of the trial courts are elected by ballot, while those in the appellate court system are appointed. The rationale for States that select judges through some form of electoral process has been that the election of judges, like the election of other public officials, will necessarily make them independent and more responsive to ordinary people rather than to the wealthy and politically influential. Studies on the system have indicated, however, that the contrary is the case as the practice effectively weakens judicial powers and progressively increases the executive and legislative control of the process.⁹⁹

The constitution and laws of each State determine the qualifications that aspirants to a judicial office, whether appellate or trial court, must possess. For instance, article II section 2 clause 2 of the Constitution of the United States provides the procedure and criteria for which a justice will be appointed in the "appointment clause." It provides that the President of the United States "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court". Political consideration also plays a significant role in such appointments. Arguably, the President may be inclined to nominate candidates who share similar political or ideological leanings.

On whether or not only lawyers may be appointed as Justices of the Supreme Court, Gerhardt¹⁰⁰ opines that the constitution seems to be silent on this. According to him: "while the Constitution does not indicate that a President must nominate a candidate who is a lawyer to the Supreme Court Bench, it does not preclude the President from nominating non-lawyers to hold key Justice Department positions or Federal Judgeship, the delegates to the Constitutional Convention and ratifiers (sic!) did occasionally express their expectations that the President would nominate qualified people to Federal Judgeships and other important government

96 Ibid., sect.166(3).

97 Ibid., sect.166(4).

98 The Judiciary Act of 1789, art. III sect.1. Constitution and s.11.

99 Fitzpatrick, Brian T, "The politics of merit selection", *Missouri Law Review* (2009), p. 675.

100 Gerhardt, Michael J, *The Federal Appointment Process* (Durham, NC, Duke University Press, 2003).

offices, but those comments were expressions of hope and concern about the consequences of and the need to devise a check against a President's failure to nominate qualified people particularly in the absence of any constitutionally required minimal criteria for certain positions".

The Senate also plays significant roles in appointments and the role of the Senate in the appointment process is borne out of reference to the words "advice" and "consent". There are divergent views on the exact role of both the President and Congress in the appointing process for judges of the Supreme Court. Referring to the role of the Senate, Farling¹⁰¹ asserts that the framers of the Constitution of the United States of America contemplated an "advisory" or "recommending" role for the Senate before the President selected a nominee and thereafter a confirming role. Gerhardt¹⁰² further argues that "the Constitution does not mandate any formal pre-nomination role for the Senate to consult with the President, nor does it impose an obligation on the President to consult with the Senate before nominating people to confirmable posts. The Constitution does however make it clear that the President or his nominees may have to pay the price if he ignores the Senate advice".

Other scholars such as Harris¹⁰³ have extended the argument further by insisting that the "advice" and "consent" role of the Senate is merely that of determining whether or not to approve the nomination as soon as the President's choice has been made. Watson and Stookey¹⁰⁴ discuss the common practice by which the President consults with party leaders, both of the judicial nominee's home constituencies and the Judiciary Committee, before choosing a candidate in order to avoid confrontations and disagreements that may arise from the suitability or otherwise of the candidate.

Over the years, the Senate has developed procedures for evaluating a candidate nominated by the President, part of which is live publicity in the form of televised coverage of the hearings. Nominees are issued extensive personal data questionnaires to seek information about the nominees past legal experience, financial holdings and publications. The candidate's responses to the questionnaire form part of public commentaries in the media. Since vacancies take a long time to arise, whenever there is a vacancy in the office of the Chief Justice, the President may exercise his discretion by choosing or nominating a sitting associate justice for the position, or nominate an individual who is currently serving as a justice on the court to fill the vacancy.

Article II, section 2, clause 3 of the Constitution of the United States empowers the President "to fill all vacancies that may happen during the recess of the Senate by granting Commission, which shall expire at the end of their next session".¹⁰⁵ The objective of this provision is to avoid long periods of existing vacancies that arise at a time that the Senate would have been in recess and will be unavailable to confirm a President's nominee. However, in a bid to restrict the use by the President of the "recess appointment" vehicle in making appointments, the Senate passed resolution 324 of 29 August 1960 to make such appointments only in cases of preventing or ending a breakdown in the administration of the Court's business.¹⁰⁶ As soon as a nomination is submitted by the President to the Senate, but before the Committee begins hearings on the nomination, the American Bar Association Standing Committee on the Federal Judiciary carries out its evaluation of the nominee. The evaluation focuses on the candidate's character, integrity and qualities, such as knowledge,

101 Farling, J, "The senate and federal judge: the intention of the founding fathers", *Capitol Studies*, 66 (1974).

102 Gerhardt, Michael J., *The Federal Appointment Process* (Durham, NC, Duke University Press, 2003).

103 Harris, Joseph P, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (Berkeley, California, University of California Press, 1953).

104 Watson, George L. and Stookey, John Alan, *Shaping America: The Politics of Supreme Court Appointments* (New York, HarperCollins College Publishers, 1995).

105 Hogue, Henry B., "The law: recess appointments to article III courts", *Presidential Studies Quarterly*, vol. 34, No. 3 (2004), pp. 656-673.

106 Abraham, Henry J., *Justices, Presidents and Senators: A History of the United States Supreme Court from Washington to Clinton* (Lanham, Maryland, Rowman & Littlefield Publishers, 1999).

writing skills, legal experience and judicial temperament and commitment to the rule of law, and rates the candidate as either not qualified, qualified or well qualified.¹⁰⁷

A key lesson to be learnt from the United States is that the process of selection and appointment of judges, especially Justices of the Supreme Court, generates public attention and interest about who is appointed. This encourages education of the public and awareness of the process and reinforces the values of checks and balances, press freedom and effective functioning of the rule of law. Above all, it offers assurances that the persons to be appointed as judges have the competence, independence, temperament and impartiality to decide cases and that, once appointed, they will not decide cases based on corruption, economic or politically exerted pressure.

4.8 Conclusion

The discussion of the relevant international and regional standards on the selection, appointment and promotion of judges and the overview of the models of selection and appointment of judges in Germany, Kenya, India, the United Kingdom and the United States identify common features that best secure the independence of the judiciary and promote transparency, merit, diversity and involvement of stakeholders. For instance, Judicial Appointments Commissions (similar to SJSC, FJSC and NJC in Nigeria) feature prominently as recommending institutions in the process of selection and appointment of judges in India, Kenya and the United Kingdom.

Additionally, the criteria and standards for the appointment of judges in Kenya cover a wide range of issues, such as the involvement of judges of the courts to which appointments are to be made, the involvement of the public in the appointment process, the direct appointment of legal practitioners from the Bar to the Supreme Court, while in India they allow for the appointment of part-time judges to cope with the increasing workload of the courts. Moreover, the advertisement of vacancies and handling of complaints arising from selection and appointments, both in Kenya and the United Kingdom, as well as the merit of consultation with other judges and the opposition in India, allow for valuable input into the potential suitability of candidates for judicial appointments. Another good practice observed is that of subjecting the appointment process to the scrutiny of an independent institution such as the Judicial Appointment Commission, whose duty is to audit the selection process and also adjudicate complaints received about the appointment process.

Despite the lack of uniformity across the countries studied, some principles are common and lend themselves as good practices. While the basic requirements are often specified in constitutions or other laws, most jurisdictions have several sources that deal with the methods of selection, appointment and promotion of judges. In most cases, the responsibility of selecting and appointing judges is either placed on a single public institution or a combination of arms or branches of government.¹⁰⁸

107 Epstein, Richard A., "The independence of judges: the uses and limitations of public choice", *BYU Law Review*, vol. 1990, No. 3 (1990), pp. 827–855.

108 Smith, Tefft and others, "Selecting the very best: the selection of high-level judges in the United States, Europe and Asia", research by Kirkland & Ellis LLP. Available at https://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf (accessed on 10 June 2022).

5

Towards an improved model for selection and appointment of judges: provisional recommendations

The in-depth interviews conducted with purposefully selected respondents and the review of the literature on the process of selection and appointment of judges in Nigeria (as presented in section 3 of the present study) generated several recommendations on measures that can be implemented to strengthen the selection and appointment process of judges in Nigeria.

5.1 General recommendations on the selection and appointment of judges in Nigeria

- i. Courts should reflect the societal diversity with regard to professional background, gender, youth and people with disabilities. As far as practicable, appointments should be aimed at achieving gender balance in the courts for which the vacancy was announced.¹⁰⁹
- ii. Requirements for ethnic diversity should be respected in line with the “federal character” provisions of the Constitution, although not at the expense of merit. Where the processes are objectively applied, excellent candidates can be attracted from all parts of the country in a manner that is merit-based and transparent.
- iii. Specific slots should be reserved for outstanding and well qualified members of the private Bar and academia in order to progressively improve the diversity of the professional, ideological and philosophical backgrounds of both the Supreme Court and the Court of Appeal justices.¹¹⁰ The appointment of serving judges from across all courts should also be promoted.
- iv. Safeguards should be put in place to ensure that NJC undertakes its constitutional role without undue pressure from any quarter.
- v. Consider creating a professionalized cadre of court administrators .
- vi. Consider regulating the process of selection and appointment of judges by an act of the National Assembly.¹¹¹
- vii. Consider introducing regular compliance audits to ensure adherence to rules and procedures for the selection and appointment of judges.

109 Principle IV(a) of the Commonwealth (Latimer House) Principles. *Op Cit. Fn.* 59

110 Venice Commission. *Op Cit. Fn.* 65

111 In the United Kingdom, the legal framework on the selection and appointment of judges, including comprehensive procedures, is provided by the Constitutional Reform Act, 2005. The selection and appointment of judges in Germany and India are also regulated by legislation. See Chapter 4.7.

5.2 Identification and publication of vacancies (notice of vacancies, expression of interest, etc.)

- i. All judicial vacancies should be published, including in the media, on court notice boards and websites and other relevant websites, and circulated among relevant stakeholders, such as NBA, relevant civil society organizations and other professional bodies.¹¹²
- ii. Advertised judicial vacancies should be specific and call for candidates with relevant experience and competence in subject matters in which the courts declaring vacancies have jurisdiction.
- iii. Nominations by heads of courts and serving or retired judges should be addressed to the entity that announced the vacancy.

5.3 Eligibility

- i. Vacancies should reflect all the relevant qualifications for the appointment, including the independence, temperament and integrity of candidates, a law degree, in-depth knowledge of the law and proven excellence in legal analysis, a history of sound judicial decisions, where applicable, and excellent oral and written communication skills. Other qualifications should include creativity and collaborative skills, demonstrated commitment to the institutional independence of the judiciary, demonstrated commitment to the protection of human rights and democratic values, and an ability to understand social and legal consequences of judicial decisions.¹¹³
- ii. Seniority should not be the principal criteria in the selection and appointment to judicial offices such as CJN, PCA, Chief Judge, PNIC, Grand Kadi and PCCA. Consideration should also be given to experience, judicial excellence, past performance, managerial competencies and psychometric parameters.
- iii. Appointments to the appellate courts should not only be via the high courts. Appointing authorities must ensure that non-serving judges are equally considered.¹¹⁴ The Supreme Court being a court of policy and philosophy should be open to receiving all appropriate appointees, including Chief Judges, members of the Bar as well as academia.
- iv. Consider having heads of courts elected by their peers¹¹⁵
- v. All constitutionally qualified applicants should be included in the provisional shortlist, which should be accessible to all members of JSC in accordance with the exclusion criteria contained in rule 3 (7) of the Extant Revised NJC Guidelines.
- vi. The involvement of NBA in the selection process should be strengthened, including by making the provisional shortlist available to NBA for comment. Any observations shared by NBA should be addressed with appropriate explanations by the selecting entity.
- vii. Consider introducing the requirement that for the selection process to proceed the provisional shortlist must include applicants from the Bar, Bench and academia.

112 See the Lilongwe Principles and Guidelines on the Selection and Appointment of Judges, 2018, as discussed in chapter 4.3.2 (i) and (iii).

113 An unpublished poll conducted by NBA on 25 January 2022 ranks the criteria in the appointment of judges in the following order: character and reputation (56 per cent), knowledge of the law (21 per cent) and experience of the practice and procedure of the courts as a legal practitioner (21 per cent). Regarding the determining factors to be considered in the elevation of a judge to a higher court, respondents to the NBA poll identify the following: quality of judgments delivered (65 per cent); character and reputation (17 per cent); number of times adverse comments were made by the appellate courts concerning a candidate's judgement (9 per cent) and quality of judgements delivered (2 per cent).

114 In Kenya, a person with at least 15 years' experience as a distinguished academic or legal practitioner is eligible for appointment to the offices of Chief Judge or Justice of the Supreme Court of Kenya. 10 years of such experience is required for appointment to the Court of Appeal and High Court in Kenya (see chapter 4.7.1). Similar provisions are provided by the Constitution of Botswana (see chapter 4.6.3).

115 See the Constitution of Kenya, 2010, sect. 164(2)

5.4 Evaluation of candidates

- i. The procedures and standards for evaluating applications should be predefined and made public.
- ii. Written examinations should be made compulsory for all eligible candidates.¹¹⁶ Written examinations should be carefully tailored to the specific needs of courts and the quality of judges that are needed. Guidelines should be developed on the development, conduct and evaluation of such examinations. For appointments to the Court of Appeal and Supreme Court, candidates may be exempt from written exams but requested to provide written samples of their work, including judicial decisions, academically published articles or books, or lawyers' briefs of argument.
- iii. Candidates who pass the written examinations should be invited to participate in an oral interview.
- iv. Candidates who emerge successful from written examinations and oral interviews should be included in the final shortlist which should be at least double the number of judges to be appointed.
- v. Establish standard operating procedures for the vetting of candidates and a standard format for the reports to be provided by the Department of State Services (DSS) and law enforcement agencies.

5.5 Shortlisting (candidates who have met the criteria)

- i. The final shortlist should ideally include applicants from the Bar, Bench and academia, and be reflective of the diversity in society. Where the shortlist does not reflect these categories, reasons must be given.
- ii. The final shortlist should be made public in order to provide an opportunity for members of the public to raise any concerns.¹¹⁷
- iii. Concerns, objections and petitions raised by the public against any candidate should be included in the documentation available to selecting and appointing entities.
- iv. The process of consideration and confirmation of nominees by the legislator should be made more robust and consistent and include live coverage.¹¹⁸
- v. A judicial appointment complaints ombudsman function, which is responsible for handling and resolving complaints about judicial appointments, should be created.¹¹⁹

5.6 Composition of the entities involved in the selection and appointment of judges

- i. The composition and dual membership of selecting and appointing institutions should be reviewed in order to reduce potential conflict of interest and promote transparency.¹²⁰
- ii. The roles and responsibilities of NJC and JSCs with regard to the selection of judges should be clarified and the establishment of a self-standing entity exclusively responsible for the appointment of judges should be considered.
- iii. The functions of CJN should be restricted to heading either FJSC or NJC to reduce the risks of actual or perceived conflicts of interest. Moreover, it may be worthwhile considering to limit the powers of CJN in terms of the number of NJC members appointed by him or her.

116 This position is further substantiated by the NBA poll conducted in 2022 in that 82 per cent of respondents agree that applicants seeking to be appointed judges should be made to sit for proficiency tests in order to ascertain their knowledge of the law and the practice and procedures of the courts.

117 See the Constitution of Kenya, 2010, sect. 164 (1) and (2) discussed in chapter 4.7.4

118 In the United States of America, the evaluation of a candidate by the Senate includes televised live coverage. See chapter 4.7.5, p49

119 See the Constitutional Reform Act of the United Kingdom, 2005, sect. 23 (2), (5), and (6) discussed in chapter 4.7.1.

120 See the Recommendations of the Committee of Ministers of the Council of Europe, discussed in chapter 4.5.1 (iv).

- iv. The diversity, including gender diversity, of the membership of JSCs and NJC should be strengthened by, for example, reducing the number of members from the judiciary, increasing the number of members who are not serving or former justices, involving the executive and/or the legislature in the nomination of the non-judicial members of NJC and considering representatives of stakeholder institutions, such as the Judiciary Staff Union of Nigeria, the law school, the Nigeria Women Judges Association etc. Moreover, professionals with human resources management expertise should also be included among the serving members of the NJC and the JSCs.¹²¹

¹²¹ See the Recommendations of the Committee of Ministers of the Council of Europe discussed in chapter 4.5.1(iv). Similarly, the United Kingdom's Judicial Appointments Commission is made up of 15 commissioners from a wide range of professional backgrounds (see chapter 4.7.1).

Annexes

Annex 1: Interview guide

S/N	Question	Probe questions
Recruitment and selection		
1.	Have you been involved in the selection, appointment and promotion of judges in Nigeria?	<ul style="list-style-type: none"> • Did you participate as a candidate, member of a selection panel or in any other capacity? • How would you describe this experience? • Would you describe the process as transparent, fair and effective in identifying the best candidate? • If not, why not...etc.)
2.	Is the procedure for the selection of judges in Nigeria producing the best possible candidates? If not? Why not?	<ul style="list-style-type: none"> • Is it open and transparent? • Is it competitive (written exams, etc.)? • Is there a seniority list that is kept updated? • Are there criteria to determine whether an advertisement will be issued? • Can the process be manipulated? (if yes, how?)
3.	How robust is the vetting process of future/prospective judges?	<ul style="list-style-type: none"> • Are criminal investigations/clearance undertaken? • Judges with disciplinary records? • Full investigation into the conduct of candidates prior to their appointment, to ensure their integrity and to fight corruption? • Who undertakes criminal investigation/clearance? • Who determines the parameters of the process?
4.	What are the major inadequacies of the present system for selecting judges?	
5.	Are the procedures and criteria for selection fair, transparent and objective?	<ul style="list-style-type: none"> • Are they based on merit, competence, ability, appropriate training and qualifications in law, integrity and propriety? • Can candidates from outside the judiciary participate/ apply?
6.	How adequate are the laid-down procedures for the interview process?	<ul style="list-style-type: none"> • What questions are asked and is there a record of the questions and/or answers? • Are the same questions asked to all candidates? • Who determines the questions that are asked? • Are there third party or psychometric testing/content parameters? • Is the restriction of the recruitment process (especially in the superior courts) to the judiciary an advantage or a disadvantage to judicial independence and effective justice delivery?

S/N	Question	Probe questions
7.	How are applications evaluated?	<ul style="list-style-type: none"> • Are there parameters for evaluation – intellectual, professional, etc.? • What happens if there are differences in evaluation between the members? • Is there a casting vote? • Is there a record of voting? • Is there a written policy for appraisal? • Should public hearings be held with the candidates to assess their qualifications? • Are reasons provided to unsuccessful applicants? • Are there complaint/communication feedback mechanisms for unsuccessful applicants?
8.	How can the recruitment and selection process be strengthened?	<ul style="list-style-type: none"> • What procedures or standards can guarantee transparency, competitiveness and merit in the process?
Appointment		
9.	How efficient is the appointment process?	<ul style="list-style-type: none"> • Transparency • Do the frameworks, standards and procedures contain objective criteria for appointment? • What is the level of engagement of stakeholders? • Role of the various bodies (commissions, NJC, etc.?)
10.	Constitution of NJC: is there a need for other categories of persons on NJC?	<ul style="list-style-type: none"> • Should there be a representative of civil society? • Should there be a human resource specialist? • Should sitting judges be appointed?
11.	Is the office of the Chief Justice able to manage the work of NJC in addition to other functions?	<ul style="list-style-type: none"> • Should someone else head NJC? • Should an additional administrative office be created?
12.	Is there a need to change the appointment mechanism for members of NJC? If YES, why? If NO, why?	<ul style="list-style-type: none"> • Recommendations
13.	Should there be oversight of the appointment process by the legislature?	<ul style="list-style-type: none"> • What should the parameters of this be? • Should some other body have oversight? • Should there be some accountability for persons who are aggrieved by the appointment process?
14.	Are there requirements in respect of diversity? If YES, what are they? Are they sufficient?	<ul style="list-style-type: none"> • Gender? • Ethnicity? • Religion? • Others?

S/N	Question	Probe questions
15.	What new or different criteria for appointment would you recommend?	<ul style="list-style-type: none"> • Service as a temporary judge or recorder to permit feedback on performance? • Specialization in particular fields in respect of perceived needs of the Bench?
16.	What other recommendations can you make on how to reform and strengthen the process for the appointment of judges?	<ul style="list-style-type: none"> • Other frameworks? • Promotion of judges with active cases?
17.	Should the selection, appointment and elevation processes be regulated by law?	<ul style="list-style-type: none"> • Act of the National Assembly

Annex 2: Data coding and analysis matrix

S/N	Codes	Frequency	Themes/Categories	Concepts
1.	<ul style="list-style-type: none"> • Recommenders • Members or officials of JSC • Chairmen, secretaries, etc. 	12x 8x 10x	Knowledge of the process	-
2.	<ul style="list-style-type: none"> • Existing structures are strong enough for purpose • No provisions for human resources specialists and representatives of CSOs • JSC (federal and state), NJC overloaded with judges and positions • No room for diversity of opinions • Erosion of legitimacy of NJC & other bodies • Dual membership of bodies & institutions responsible for recommending and assessing submissions • Heavy workload of the Chief Justice (head of NJC) • NJC largely unaccountable – absence of strong oversight • Too much actual and discretionary power in CJN as the sole appointing authority 	13x 28x 12x 9x 11x 18x 9x 16x 20x	Membership of the appointing institutions	Judicial legitimacy & Judicial independence
3.	<ul style="list-style-type: none"> • Well laid guidelines and procedures • Non-adherence to constitutional provisions & guidelines • Selection appears good on paper and based on objective criteria even if not well developed and laid out • No written policy for appraisal and public hearings • Non-consultation with stakeholders outside the judiciary • Positions at the Supreme Court, the Court of Appeal and for heads of courts not advertised • Constitutional inconsistency for judicial positions 	30x 24x 11x 17x 13x 27x 21x	Compliance with constitutional provisions and guidelines	Judicial legitimacy
4.	<ul style="list-style-type: none"> • Whole process is not as transparent as desired • Easily manipulated to satisfy various interest groups • Process is dominated by chief judges and other heads of courts rather than JSC • Processes are not transparent, which weakens its legitimacy • Lack of equal opportunities for all candidates to attend interviews 	32x 27x 25x 10x 16x	Transparency	Judicial legitimacy

S/N	Codes	Frequency	Themes/Categories	Concepts
	<ul style="list-style-type: none"> • Poor record keeping/management and documentation • No feedback mechanisms for unsuccessful candidates • Method for evaluation of applicants not transparent • Limited engagement of CSOs • Outcomes for every step of the process not made public 	<p>26x</p> <p>13x</p> <p>30x</p> <p>24x</p> <p>18x</p>		
5.	<ul style="list-style-type: none"> • Political, religious and emotional bias • Document tampering when submitted to the Commission • Alleged corruption and bribery by candidates seeking judicial positions • Various stages of the process (setting of questions, marking of answer scripts and preparing the names of shortlisted candidates) subject to abuse • Nepotism • Appointment of people of questionable moral character • Frivolous petition writing • Cronyism, tribalism & ethnicity • Critical of federal character & quotas 	<p>27x</p> <p>6x</p> <p>23x</p> <p>19x</p> <p>28x</p> <p>13x</p> <p>7x</p> <p>17x</p> <p>6x</p> <p>8x</p>	Corruption, ethno-religious sentiments and discrimination	Judicial legitimacy
6.	<ul style="list-style-type: none"> • Influence of interests of powerful interest groups and "major" stakeholders • System does not always produce the best possible candidates, mediocrity • Process not competitive – in many cases no compulsory written or oral exams • Selection process favours "anointed" or "favoured" candidates/ Process sometimes manipulated to produce pre-determined outcomes • Seniority as a principal factor • The practice of expression of interest creates room for lobbying and other sharp practices • Quota system and its deficits • Where exams are conducted, it does not guarantee that the best candidates will be selected • Not favourably disposed to exams • Appointments restricted to the judiciary • Interviews only at the level of NJC • No standardized system for developing questions or content for interviews 	<p>30x</p> <p>30x</p> <p>30x</p> <p>15x</p> <p>10x</p> <p>12x</p> <p>20x</p> <p>12x</p> <p>6x</p> <p>3x</p> <p>6x</p> <p>14x</p>	Non-merit-based system	Judicial legitimacy & Judicial independence

S/N	Codes	Frequency	Themes/Categories	Concepts
	<ul style="list-style-type: none"> No clear third-party or psychometric testing No clearly established parameters for evaluation and the process largely relies on ratings by heads of courts/High Court Judges Some shortlisted candidates lack basic legal knowledge Not favourably disposed to exams or prefer for it to be restricted to High Court level 	23x 21x 9x 3x		
7.	<ul style="list-style-type: none"> Lack of adequate knowledge of candidates by the recommending body The Constitution specifies uniform qualifications – years of experience & quality of legal experience for some positions Non-specification of additional requirements by Constitution & guideline 	8x 14x 16x	Non-specification of the quality of legal practice and skills	Judicial legitimacy & Judicial independence
8.	<ul style="list-style-type: none"> Heavy reliance on information contained in curriculum vitae. No actual in-depth verification No independent basis for assessing claims by candidates Superficial criminal investigation by security bodies Non-adherence to recommendations of screening agencies Limited consideration of service records (disciplinary records, etc.) 	7x 9x 13x 12x 13x	Poor vetting of candidates	Judicial legitimacy & Judicial independence
9.	<ul style="list-style-type: none"> Political interference especially from the executive arm (governors) & heads of courts Political settlement and favouritism Governors dictate and control the process because they control funding Judges being dictated to by political office holders 	29x 26x 17x 8x	Political interference	Judicial legitimacy & Judicial independence
10.	<ul style="list-style-type: none"> Current level of legislative engagement as sufficient (confirmation) Greater involvement could undermine independence of the judiciary Appoint an ombuds to be headed by a retired Supreme Court Justice or Chief Justice Legislative confirmation to be extended to other judicial positions A legislation provides the legal framework for the selection and appointment process 	12x 22x 10x 15x 13x	Limited scope of legislative scrutiny	Judicial legitimacy & Judicial independence

S/N	Codes	Frequency	Themes/Categories	Concepts
	<ul style="list-style-type: none"> Strengthen existing constitutional provisions Process of constitutional alteration is cumbersome 	11x 20x		
11.	<ul style="list-style-type: none"> Some level of involvement of women in the process Not sufficient inclusion of women No specific provisions on gender Introduction of gender quotas 	16x 4x 17x 4x	Limited inclusiveness and diversity	Judicial legitimacy
12.	<ul style="list-style-type: none"> Harassment of candidates, blackmail/threats to life, use of security to intimidate Appointments/elevation to Supreme Court limited to Appeal Court Judges 	6x 5x	Others	Judicial legitimacy

