

**The Zimbabwean Model for Judicial Appointments as
it relates to the public town hall style**

PRESENTATION BY

**The Honourable Mr Justice L. Malaba,
Chief Justice of the Republic of Zimbabwe**

AT

**The Global Judicial Integrity Network Preparatory
Meeting**

Swakopmund, Namibia

ON

16 October 2017

Introduction

The enactment of a new Constitution in Zimbabwe in 2013¹ brought with it many changes. Like many other facets of life, the administration of justice also underwent fundamental changes. Some of the changes were anticipated, whilst others were a complete departure from past positions and procedures.

One area which marked a complete departure from past positions and procedures related to the appointment of Judges. The 2013 Constitution ushered a paradigm shift in the method used for appointment of Judges.

For purposes of contextualizing this paper, it may be important to give a brief outline of the procedure used in the appointment of Judges in terms of the repealed constitutional dispensation.

Then, Judges were appointed in terms of **section 84** of the repealed Constitution.² The Judicial Service Commission played a very minimal or peripheral role in the entire process.

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

The names of the prospective candidates “tapped on the shoulder” by the Executive were then submitted to the Judicial Service Commission for its views on whether or not the proposed

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

² The Constitution was repealed by Constitution of Zimbabwe Amendment (No. 20) Act, 2013. Section 84 of the old Constitution provided as follows:

84 Appointment of Judges

- (1) The Chief Justice, Deputy Chief Justice, Judge President and other Judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission.
[Subsection substituted by section 12 of Act No. 23 of 1987 (Amendment No. 7) and amended by section 20 of Act No. 11 of 2007 (Amendment No. 18)]
- (2) If the appointment of a Chief Justice, Deputy Chief Justice, Judge President or a Judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1), the President shall cause the Senate to be informed as soon as is practicable.
[Subsection substituted by section 12 of Act No. 23 of 1987 (Amendment No. 7) and amended by section 13 of Act No. 31 of 1989 (Amendment No. 9), section 23 of Act No. 5 of 2005 (Amendment No. 17) and section 20 of Act No. 11 of 2007 (Amendment No. 18)]
- (3) The appointment of a Judge in terms of this section, whether made before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 4) Act, 1984, may be made for a fixed period and any Judge so appointed may, notwithstanding that the period of his appointment has expired, sit as a Judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced or heard by him while he was in office.
[Subsection inserted by section 2 of Act No. 4 of 1984 (Amendment No. 4)]

candidates were qualified for appointment. The law then required the appointing authority to merely consult the Judicial Service Commission. The President was not bound by the opinion of the Judicial Service Commission. Although in reality and in recorded history the President never appointed a person that the Judicial Service Commission had recommended against, the legal position and the governing framework did not preclude that possibility. It would have been perfectly proper and constitutional for the President then to ignore the advice of the Judicial Service Commission and appoint as Judge a candidate against the advice of the Judicial Service Commission.

This procedure, largely adopted from the practice in England and Wales and in most common law jurisdictions, was in use in pre- and post- independent Zimbabwe and resulted in the appointment of many good Judges whose reputation and independence was beyond doubt until the political fortunes of the country started to decline and, with it, the perception of its judiciary. In post-colonial Zimbabwe, especially until the promulgation of the new Constitution, this method of selecting and appointing Judges, which had resulted in the appointment of many good Judges in the past, was viewed as inappropriate and therefore unacceptable. It created the perception that Judges could be appointed not on merit but for other considerations, mainly political and sympathy for the government of the day. In an effort to deal with this perception, the framers of the new Constitution provided for a more transparent system in the selection and appointment of Judges.

The new Constitution, in section 180,³ has very elaborate provisions for the appointment of Judges.

Also to be noted in the provision is the broader and more pronounced role of the Judicial Service Commission in the whole process. Unlike in the past when the process was initiated

³ The section provides as follows:

180 Appointment of Judges

- (1) The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other Judges are appointed by the President in accordance with this section.
- (2) Whenever it is necessary to appoint a Judge, the Judicial Service Commission must—
 - (a) advertise the position;
 - (b) invite the President and the public to make nominations;
 - (c) conduct public interviews of prospective candidates;
 - (d) prepare a list of three qualified persons as nominees for the office; and
 - (e) submit the list to the President;whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.
- (3) If the President considers that none of the persons on the list submitted to him or her in terms of subsection (2)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.
- (4) The President must cause notice of every appointment under this section to be published in the *Gazette*.

and thereby dominated by the executive, the new process is initiated, controlled and directed by the Judicial Service Commission until it comes up with a list of possible appointees.

In precise language that admits of no ambiguity, the Constitution provides for the following -

- The declaration of vacancies in all courts by the Judicial Service Commission. In declaring these vacancies, the Judicial Service Commission receives advice from the Chief Justice on the number of vacancies that would have arisen in each court;
- The advertisement of the vacancy. In practice this advertisement is widely circulated in the local print and electronic media. It outlines the Court for which the vacancy has arisen, the number of vacancies available and the requisite qualifications for persons to be appointed to that court;
- The advertisement also calls upon members of the public intending to nominate candidates to obtain forms at designated offices. To ensure that interested people from the whole country can access nomination forms, these are made available at more than ten Magistrates' Provincial Court centres throughout the country and are also downloadable from the Judicial Service Commission website;
- The holding of interviews of the prospective candidates in public; and
- The preparation of a list of qualifying candidates and submission of same to the President.

The selection and appointment procedure of Judges in Zimbabwe has all the hallmarks of the public town hall style of proceedings and therein lies its strength and also its major weakness. It is an attempt at opening up to public scrutiny the process of selecting Judges, but this same apparent strength has been viewed as a governance weakness in that it takes away from the Head of State the power to have a bigger say in the appointment of key office holders in the judiciary such as the Chief Justice. This has resulted in the first amendment to the Constitution to restore the power of the President to appoint the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court outside the public town hall style. The Chief Justice, his or her Deputy and the Judge President will once again be tapped on the shoulder, as was the practice before the adoption of the new Constitution.

The Public Town Hall Style of Judicial Appointments

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

fostering democracy and public participation. It of necessity compels the governing authority to take on board the concerns of and inputs from the public.

The hallmarks of the style include the debate or discussion of public issues not only in public but with the active participation of the public. Therefore, one can say the style has the following essential elements -

The issue at hand must be a public issue;

The issue is discussed in public; and

The public participates in the discussion.

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

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

The following are the steps that are taken by the Judicial Service Commission in selecting and recommending candidates for appointment.

STEP 1

Declaration of a vacancy

The Chief Justice, as head of the judiciary, advises the Judicial Service Commission during a meeting of the Judicial Service Commission of a vacancy or vacancies in any court. In practice, the Chief Justice would have in turn taken advice or would have discussed the issue with the appropriate head of the court to which the vacancy relates. This is a matter purely in the hands of the judiciary as headed by the Chief Justice and the Executive has no role to play in this regard.

Step 2

Advertisement of the vacancy

The Constitution mandates that the vacancy be advertised. This is the first of many transparent steps that the Constitution demands in the process. In practice, the vacancy is advertised in all local newspapers and is posted on the website of the Judicial Service Commission.

The advert calls for members of the public to nominate persons suitable for appointment to the advertised posts. Forms for such nominations are made readily available countrywide and are found in all the provinces of the country.

The Constitution also provides that the President may nominate suitable candidates for consideration and in some instances the President has done so.

Step 3

Master-listing of candidates for appointment to position of Judge

- After receiving nominations and CVs, the Judicial Service Commission produces a master-list of all the candidates nominated.
- This is for purposes of transparency and providing a summary of the profile of each candidate in terms of -
 - name of candidate;
 - gender;
 - date of birth/age;
 - citizenship; and
 - qualifications as provided by the Constitution.
- This information is available to the public and invariably, gets published in the local press, igniting and at times fuelling public comments on the prospective candidates.

STEP 4

Shortlisting of Candidates

- In this process Judicial Service Commission is guided strictly by the criteria given in the Constitution relating to qualifications.
- Every nominee who meets the constitutionally provided requirements and is thereby not disqualified for appointment is entitled to be interviewed in public.
- Examples of disqualified candidates would include those who have not attained the requisite age for appointment or those who do not possess the requisite academic qualifications but are nevertheless nominated and accept the nomination.
- The practical effect of this is that if, for instance, there are a hundred nominees who qualify in terms of the constitutional requirements for one post, they all have to be interviewed. In one set of interviews for Judges of the High Court the Judicial Service Commission interviewed 46 candidates.

- Innovative ways of detecting, prior to the interviews in public, possibly suitable candidates have been employed in the past. These include requesting the prospective candidates to write a judgment on a given set of facts, prior to the interview.

STEP 5

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

- Each shortlisted candidate completes a specially designed questionnaire which is returnable to the Judicial Service Commission within a specified period and prior to the interviews. This form provides useful and critical information about the candidate that does not ordinarily appear on a C V such as -
 - Health issues;
 - Indiscretions which may cause embarrassment to the nominee or to the judiciary after appointment;
 - Number of partly heard matters (if the candidate is a serving Judge seeking appointment to a higher court);
 - Number of reserved judgments (if the candidate is a serving Judge seeking appointment to a higher court);
 - Contributions made to the development of the law, etcetera.

The duly completed questionnaire will also be part of the package that will be given to the Judicial Service Commissioners in preparation for interviews and some of the questions that will be put to the nominee during the public interview arise from the information disclosed in the questionnaire.

STEP 6

Identification of a suitable venue for interviews

- The Judicial Service Commission identifies a suitable venue for the interviews. The venue must be big enough to accommodate a sizeable number of members of the public to fulfil the dictates of the Constitution, which provides that the interview must be in public. Whilst televising the interview is not mandatory, because of the interest that the selection and appointment of Judges generate, the public broadcaster has invariably done so.

STEP 7

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

- In keeping with the public nature of the interviews, the Judicial Service Commission releases a press statement informing all media houses and members of the public about the dates, times and venue of the interviews, as well as the names of the shortlisted candidates to be interviewed. The Judicial Service Commission does not invite members of the public to submit any comments that they may have on the nominees but, once the names of the prospective candidates have been publicised, comments from members of the public may be received, sometimes alleging acts of misconduct or unethical behaviour on the part of some of the candidates.

STEP 8

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

The Constitution provides that for a person to be appointed as Judge, they must be a fit and proper person to hold that office. Whilst there is no one definition of what attributes make one a fit and proper person to hold the position of Judge, the Judicial Service Commissioners have always sought the views of the Law Society and the side bar, where appropriate, on the professional conduct of all nominees. Such inquiries have in past instances elicited information relating to complaints made against the nominee and his or her standing with the professional body.

Any adverse comments received about a nominee from the Law Society or from the public are referred to the nominee before the interview, for his or her comment. Questions may be put to the nominee on the issue during the interview in public.

STEP 9

Conduct of the interviews in public

On the date of the interview -

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

- A set of standard questions is put to each and every candidate. Each of the Judicial Service Commissioners is then given an opportunity to put questions to the candidate. The questions must, as far as is practicable, be uniform.
- Any adverse comments received from members of the public or other professional bodies and organisations are publicly revealed to enable the affected candidate to comment on them. The practice is that the candidate will have been advised of this in advance to allow him/her to prepare a response to them if any.
- Each Judicial Service Commissioner scores each candidate independently on a score sheet which is pre-agreed to by the Judicial Service Commission.

Lessons from the town hall style

Since 2013 the Judicial Service Commission has conducted seven different sets of interviews using the new system.⁴ These included one for the post of Chief Justice, two for Supreme Court Judges, two for High Court Judges, one for appointment of Judges to the SADCAT and one for the position of Prosecutor-General, which in terms of the law is filled in the same way as that of a Supreme Court Judge. From these we drew a number of lessons -

- The process recognises that the selection and appointment of Judges is indeed a public issue that must not be only done publicly but must involve public participation.
- The whole process after the declaration of vacancies by the Judicial Service Commission is done openly with publication of the number of vacancies and the candidates nominated for the positions.
- The process puts the public at the centre of the stage in as far as nominating candidates is concerned. The invitation is to members of the public, without qualification or reservation, to nominate whomsoever they believe is suitable for appointment as a Judge. Whilst the assumption upon which the provision is made is that the nomination by the public shall emanate on the basis of “public” satisfaction with the qualifications and propriety of the candidates, in practice the candidates have in some instances arranged to be nominated by distributing nomination forms to their clients, friends and relatives. In some instances though, the nomination has been properly initiated by the public on the basis of a track record of performance by the proposed candidate.
- Whilst there is no specific provision calling for the public to file objections to any proposed nomination, there is equally no provision that bars the filing of such

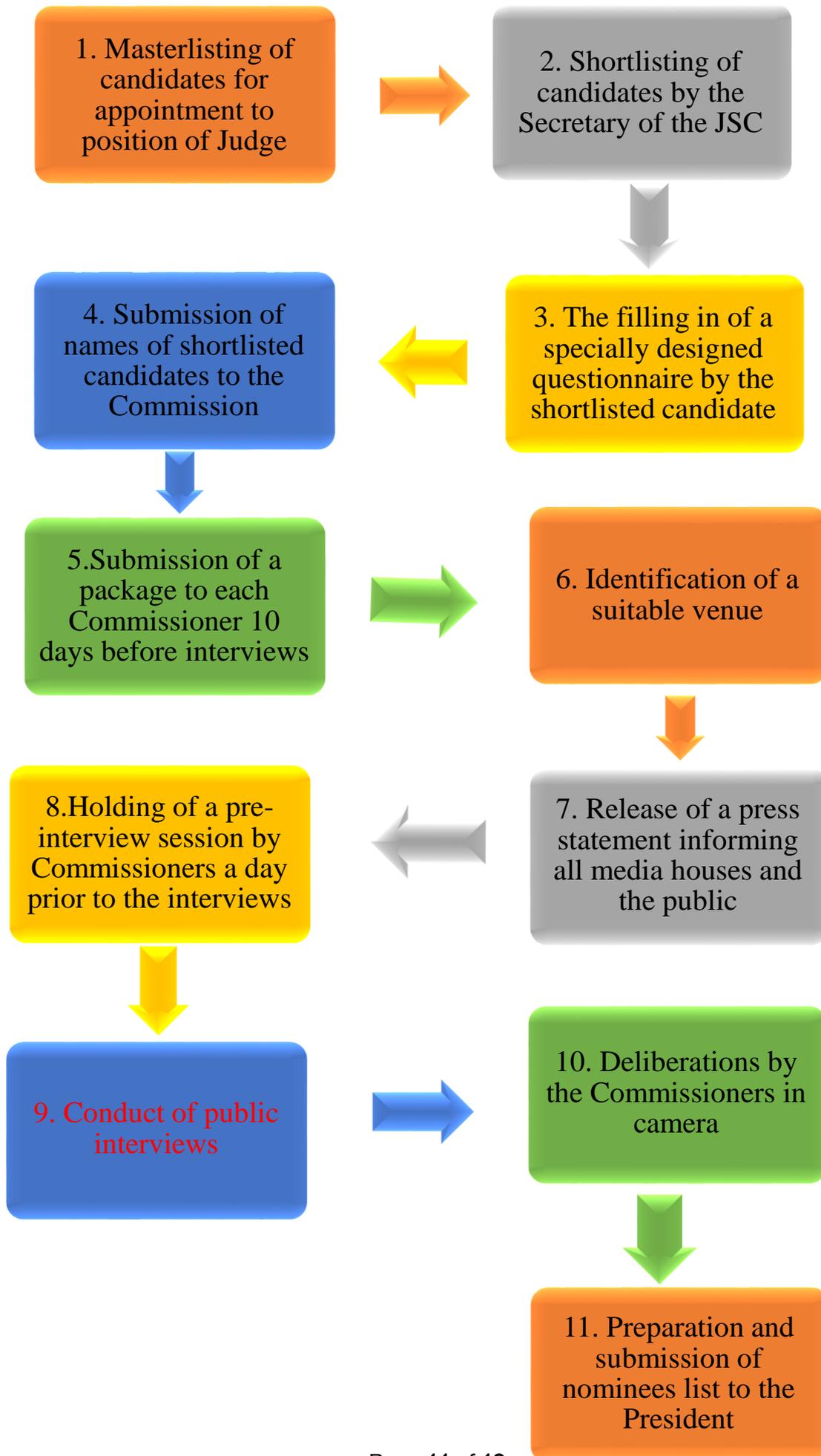
⁴ 15 July 2014 for the Supreme Court, 28 October 2014 for the High Court, 15 January 2016 for the SADC Administrative Tribunal, 29 September 2016 for the Supreme Court, 24-28 October 2016 for the High Court, 12 December 2016 for the Chief Justice.

objections, and in some instances the public have indeed filed objections against the nomination of certain candidates.

- The holding of the interview in public also indirectly involves the participation of the public in the process. The performance of the candidates at the interview is invariably a subject of public debate after the interviews and, whilst the Judicial Service Commission is not influenced by public sentiments, the comments of the public especially in the media after the event have been largely reflective of the decisions of the Judicial Service Commission.
- There is a downside though to the holding of interviews in public, as some questions put to the nominees in public may have the effect of denting their standing without redress. For instance, allegations of improper behaviour, if not handled properly may leave the public with the perception that the candidate is not a fit and proper person, yet these remain as mere allegations, for the Judicial Service Commission cannot make a definitive finding either way in the process of the interview.
- The process as laid out in the Constitution has no mechanism of filtering out chancers who accept nomination when it is clear that they are not suitable for appointment. Due to the imperatives of the Constitution all such candidates have to be interviewed in public and this can be burdensome on the Judicial Service Commission in terms of both man-hours and funding the exercise.
- The process can be difficult to manage in a manner that is fair to all candidates where you have many candidates. In one set of the interviews the Judicial Service Commission had to interview 46 candidates for 6 posts over a period of one week. The length of the period over which the interview was held had the effect of distorting the attempts of the Judicial Service Commission to be uniform and to treat candidates fairly and uniformly. For instance, the standard questions posed to one group could not be asked the next day because they were already in the public domain. The Judicial Service Commission had to adopt and use different tests on each day but for candidates who were vying for the same post.
- In another set of interviews, the process had to go on until the early hours of the next day. The candidate interviewed last could have easily been disadvantaged by the long period spent waiting his/her turn.

Summary

In summary and in pictorial form, the process for the appointment of all Judges except the Chief Justice, the Deputy Chief Justice and the Judge President is as follows -



Conclusion

The Zimbabwean model of selecting and appointing Judges is a welcome development in our jurisdiction. It represents an effort to deal with a matter that is clearly of public interest in a transparent manner. It marks the beginning in the jurisdiction to entrench not only transparency but public participation in the process. It is not a panacea to the issues dogging the selection and appointment of fit and proper persons to the position of Judge, but it goes a long way in responding to some of the issues that were dogging the selection and appointment process in Zimbabwe. The strength of the model lies in limiting the power of the Executive but therein also lies its major weakness, which makes it unattractive to those who still believe that the Executive must control the selection and appointment of Judges.