

Choosing Lesotho's judges on merit should be only the start of judicial reforms

By [Hoolo 'Nyane](#)

12 May 2021

Lesotho's Judicial Service Commission (JSC) has started a process to recruit seven judges of the High Court through a merit-based process. In February 2021, the commission issued a [public advertisement](#) announcing the vacancies and spelling out the competencies required. The vacancies follow a slew of deaths and retirements of judges.



The move towards an open process for appointing judges is unprecedented in Lesotho. shutterstock

The High Court is the second highest court in [Lesotho](#); after the Court of Appeal. But, the High Court is more important as it is the highest court with unlimited original jurisdiction to hear and determine any civil or criminal proceedings, and the power to review the decisions or proceedings of any subordinate court or tribunal. Since 2000, the court sits as a constitutional court when it decides on [constitutional matters](#).

The [Constitution](#) provides that the High Court shall comprise the Chief Justice and any number of judges as the Act of parliament may determine. Judges are appointed by the king on the advice of the JSC, which is a constitutional structure responsible for the appointment, conduct and removal of judicial officers.

The advertisement was intended to culminate in public interviews of shortlisted candidates in May. But the process has been suspended due to [lack of funding](#).

Nevertheless, the move to appoint judges through an open process based on merit is unprecedented in Lesotho, a small nation that is completely landlocked by South Africa, and thus laudable. So far, the appointment of judges has been an obscure and oftentimes clandestine affair between the commission and government. This has produced incompetent judges and claims that the judiciary is beholden to the executive.

Welcome as it is, the move towards an open process is only a small step in reforming the country's judiciary. The appointment of judicial officers in Lesotho is beset with much deeper systemic problems that need urgent attention.

The practice so far

In the past, the public used to simply see a person being announced as a judge of the High Court by the JSC. The usual practice has been to appoint a person as an acting judge, which would ordinarily attract little public scrutiny, and later confirm the person as a permanent judge.

This deplorable practice is arguably a factor, among others, contributing to the current [state of incompetence](#) in the High Court. The Court of Appeal often [decries](#) the quality of the [judgements](#) of the High Court judges.

Until now, the JSC and government have tended to promote either magistrates or registrars of the High Court to the bench. The registrar is the chief accounting officer for the judiciary. Even this practice was not based on any objective criteria.

Sometimes, very junior magistrates would be appointed over more senior and competent ones. That practice excluded other areas of the legal profession, such as private legal practitioners (lawyers) and legal academics.

Perhaps the new approach to recruiting judges is inspired by the practice [in South Africa](#), and the fact that Lesotho is in the process of constitutional reforms.

Hopefully, the drive for meritocracy in the High Court will be applied across all facets of the judiciary to make it genuinely meritorious.

The bigger problem

While the new move is welcome, a lot still remains to be done to enhance merit in the appointment of [judges of the superior courts](#) in Lesotho.

The problem is that meritocracy is currently not a constitutional requirement. The Constitution is still cast in the [colonial mould](#) whereby the executive dominates the appointment of judges. That needs to change.

The problem is more acute when it comes to the appointment of judicial leaders – the chief justice and the president of the Court of Appeal. They are appointed through a purely political process.

The Constitution provides that the king appoints them on the advice of the prime minister. There is no constitutional requirement for competition or scrutiny. Consequently, successive PMs have treated it as an executive prerogative and exploited this deficiency to their political advantage. Hence the judiciary has been [enmeshed in politics](#). The high turnover in the offices of president of the Court of Appeal and that of chief justice in recent times is testament to the manner in which the judiciary is entangled in politics.

When it comes to the appointment of other High Court judges, other than the chief justice, it is slightly better. That's because the Constitution created the JSC as an interlocutor. But the Commission is weirdly constituted.

In terms of section 132(1) of the [Constitution](#), the Commission consists of four members: the chief justice as chairperson, the attorney general, chairman of the public service commission and a judge or former judge chosen by the King, on the advice of the chief justice.

The commission's composition is skewed in favour of the executive as all its members are direct or indirect appointees of the executive. This is not surprising as the entire relationship between the three arms of government - parliament, the executive and the judiciary - in Lesotho turns on the strong executive that overshadows the other two branches. This is a profoundly ingrained constitutional problem.

Move towards meritocracy

The new move towards openness comes after a previous process to appoint High Court judges was invalidated by the Constitutional Division of the High Court [in December 2020](#).

It found the process to have been clandestine and irregular. The former acting chief justice and former attorney general had secretly constituted themselves into a JSC, and appointed their preferred five candidates to the bench.

The registrar, who was allegedly [on the list of candidates](#), then wrote to King Letsie III to advise him to appoint those candidates. The registrar is the secretary to the commission.

The king [declined to appoint the judges](#), citing irregularity in the appointment process. The then minister of justice, [Ngosa Mahao](#), also openly opposed the appointment as [irregular](#). The Constitutional Division of the High Court [confirmed this view](#).

What needs to happen

There is, therefore, a need for a more comprehensive judicial reforms in Lesotho. Fortunately, the country is in a somewhat sluggish [constitutional reform programme](#) which includes, among others, the reforms of the judiciary.

It is vital that the reforms recast the relationship between the executive and judicial branches of government to reduce the executive's excessive powers over the judiciary, including the appointment of judges.

The JSC, as the buffer between the two branches, will also have to change. Its composition, processes of appointment and powers over the judicial officers will have to change significantly. Its membership will have to be more diverse and reduce executive dominance.

Its mandate will then have to be expanded to include the appointment, discipline and removal of all judicial officers - including the chief justice and the president of the Court of Appeal.

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