

Contesting Issues in Conferring the Rank of Senior Advocate of Nigeria.

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INTRODUCTION

The new Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria¹ (herein SAN), hopes to bring about a major modification that should help in enhancing a positive perception by the public towards SAN and also securing the best holders for the rank. The growing cynicism about the honour of SAN is due largely because of the process and procedure for the conferment of the honour under the old criteria.² This cynicism is partly due to the process of appointing them, which is seen as skewed, leaving out those who ought to be rewarded, while rewarding those who ought not. The perception, that one must be 'connected' before one could be appointed a Senior Advocate, has fuelled the scepticism.

An eminent Jurist puts the problem in these words;

The criteria for elevation of members of the profession to the rank of senior advocates have been subject matter of discussion and criticism in recent times. The criticism is that there has been a systematic and progressive lowering of standards of those so elevated and more rigid application of the criteria was required....That there has been unpopular appointments of recent, can be explained by the existence of similar unpopular appointments. This is the personal factor in appointments essentially based on the subjective factor in the exercise of discretion.³

¹ Government Legal Notice Vol. 94 No. 36 of 29th January, 2007.

² Guidelines for Conferment of the Rank of Senior Advocate of Nigeria 13th August, 2004.

³ Karibi-Whyte, A.G., 'The Future of the Legal Profession in Nigeria', in Peters, S.C., [ed.] *Selected Essays of Honourable Justice A.G. Karibi-Whyte on Jurisprudence* (Abuja: Centre for Publications, 2003) P. 296 at 326.

Even a President of the Nigerian Bar Association had expressed dissatisfaction with the old procedure for the award, for not giving the association the opportunity 'to be actively involved in the selection of persons to be conferred with the rank of Senior Advocates of Nigeria ... [and] the criteria upon which such legal practitioners will be selected.'⁴ Some allegation of scandals by Silks (as they are often referred to, because of the silk robes they wear)⁵, have worsened matters and increased this public cynicism.

Buttressing this view, a commentator noted;

It is now the case that the powerful in society use certain members of the legal profession to intimidate and browbeat their unwary citizens into submission. It is not uncommon to hear a very powerful crook threaten to deal with you or take you to a particular judge or call a SAN for you. The mention of a SAN tells you that the game is up.⁶

These emerging problems respecting SAN have made the issue of the criteria and process for their appointment an imperative for a study like the present. To redress some of these problems, the new guidelines for the conferment of the rank of SAN, were issued and gazetted in January 2007 (herein the 'guidelines').⁷ What do these guidelines portend for the process of appointing SAN and what are

⁴ Address Delivered at the Special Session of the Supreme Court held on 25th September, 2000, for the swearing-in of New Senior Advocates of Nigeria, In Abuja Nigeria.

⁵ A past President of the Nigerian Bar Association, Mr. O.C.J. Okocha (SAN) had noted that '...several cases of professional misconduct are presently being investigated ...it is rather sad to note that some members of the Inner Bar are involved in some of the said cases'. See Address, Ibid. In 2002, two Senior Advocates were reported to be involved in a graft scandal to influence the Nigerian Independent Electoral Commission (INEC) to secure a multi million naira brief. Even though the incident against the silks raised a lot of dust in the country and particularly among legal practitioners, the 'case' against the silks is yet unproven, neither have they been found guilty. Similarly, another Senior Advocate is standing trial for offences bothering on corrupt practices.

⁶ Kukah, M.H., 'Legal Profession in Nigeria: Views from Outside the Profession' in Mamman, T., et al [eds.] *Nigerian Law School-Four Decades of Service to the Legal Profession* (Nigeria: Council of Legal Profession, 2003) P. 117, at 121.

⁷ Government Notice No. 38 of 29th January, 2007

some issues in them? Are there new mechanisms in the guidelines to ensure that the best in the legal profession are conferred with the ranks? Would the guidelines enhance the public perception of the process of conferring the rank? These are some issues treated in this paper. First we look at the history and philosophy behind the rank of SAN.

HISTORY AND PHILOSOPHY OF THE RANK OF SAN

The rank of SAN is an offshoot of the rank of Queen's Counsel or King's Counsel in the United Kingdom (as the situation on the crown dictates). In the United Kingdom, Queen's Counsel (herein Q.C.), has existed for a period of about 400 years, with Sir Francis Bacon as the first Q.C., who saw his appointment as merely honorary, since the appointment was not applied for.⁸ The initial conception was that the Q.C. should assist and be advocates of the Crown. A Q.C. was to be consulted in capital cases and 'cases of state.' He was the Queen's 'counsellor at law' with 'precedence and audience in our courts or elsewhere'.⁹ Cases that were complex as well as novel thus demanded the eminent wisdom and input of the prominent members of the legal profession to resolve and mostly without any fee.

With time however, this conception was modified. But that did not affect the view that those who hold this rank must be eminent members of the legal profession and be ready whenever called upon to render services for the common good. With the expansion of the British Empire to other parts of the world like Canada, Asia and Africa, lawyers practicing in these jurisdictions could be appointed as Q.C. Thus where Q.C. exists, it reflects a legacy of English colonial rule. In Nigeria, the Queen's Counsel Act of 1958 created the Order of Queens Counsel, just as in England. The rank of Q.C. was created and conferred on deserving members of the Profession.¹⁰

⁸ Sourced at <http://www.duhaime.org/Legal/Q/QueenCounsel.aspx>. Source on July 3, 2008

⁹ Ibid.

¹⁰ Karibi-Whyte, Op. Cit., P. 312.

The Order was however abolished by the Queen's Counsel Act No. 12 of 1964, and in 1975, 'a new Order to replace the Queen's Counsel was created and designated Senior Advocates of Nigeria (herein SAN).'¹¹ Suffice to state here that the phrase 'senior' appearing in the rank raises the question of hierarchy in the legal profession. If some are 'senior', then it implies that non-holders of the rank must be 'juniors'-not necessarily juniors at year of call, but 'junior advocates'. If distinction is the consideration for the rank, shouldn't we style it 'Distinguished Advocate of Nigeria' (DAN), or such other appellations that do not entail those others are mere, ordinary, or junior lawyers? The phrase 'Advocate' also gives primacy to the advocacy skills, above other skills-a point we shall return to later.

Unlike other jurisdictions with similar honours, in Nigeria the rank of SAN has been conferred on an insignificant number of persons in the legal profession in proportion to the number of persons enrolled in the Supreme Court as Legal Practitioners. Since the inception of the rank,¹² less than 300 (three hundred) lawyers have been conferred with the rank as against approximately 70,000 (seventy thousand) lawyers enrolled in the Supreme Court. The number conferred is less than .5% (point five percent) of the total number of lawyers. Worse still is the number of academics that have been conferred with the rank where in any given year not more than two academics out of a total of at least fifteen are conferred with the rank.¹³

¹¹ Ibid. Presumably, the abolition of the Queen's Counsel Act may be attributed to the fact of the constitutional change in the Nigerian Federation in 1963, which turned the Federation into a Republic with a President, rather than having the Queen of England as its head, which was the case between 1960-1963.

¹² In 1863 when English law was formally introduced into the Colony of Lagos. See Obilade, A. O. *The Nigerian Legal System* (London Sweet Maxwell 1979), p. 4. Note however that in Nigeria, the Queen's Counsel Act of 1958 created the Order of Queens Counsel, just as in England.

¹³ Rule 1 (9) of the new guidelines, while limiting the number to 15 legal practitioners for now, admits of the possibility of increasing the number of awardees of the rank by granting the LPPC the power to do so.

SOME PROBLEMS WITH THE OLD GUIDELINES

The Legal Practitioners Privileges Committee (herein LPPC) created by the Legal Practitioners Act,¹⁴ is vested with the powers to confer the rank of SAN to deserving members of the legal profession. The rank was conceived as conferrable only on a person who 'has been qualified to practice as a legal practitioner in Nigeria for not less than ten years and has achieved distinction in the legal profession in such manner as the Committee may from time to time determine.'¹⁵ (*Words in Italics are for emphasis only*).

The name of the awarding committee, particularly the employment of the phrase, 'Privileges' some create problems. First it suggests that the rank is simply a privilege and as such, a legal practitioner does not merit or deserve the rank. Secondly, the element of discretion is suggested, which is supported by the wordings 'in such manner as the committee may from time to time determine'. These two observations seem to have beclouded the core issue of 'distinction in the legal profession', which is the essence of the rank. Determining a person who is 'not less than ten years' does not present much difficulty, as is the question of what constitutes 'distinction in the legal profession'. The issue is compounded because 'distinction' is not defined by the Legal Practitioners Act, but seems to be a matter to be determined by the LPPC.

However before the new guidelines came into force, 'distinction in the legal profession' seems to be determined by the attainment of certain feats in the legal profession.¹⁶ The question here was

¹⁴ Section 5 of the Legal Practitioners Act Cap. Laws of the Federation of Nigeria, 2004. The Committee is composed of the following, Chief Justice of Nigeria (chairman), Attorney General of the Federation, one Justice of the Supreme Court, President of the court of Appeal, Five Chief Judges of the State High Courts, the Chief Judge of the Federal High Court, and five legal practitioners who are Senior Advocates of Nigeria.

¹⁵ Ibid.

¹⁶ These include : 1. particulars of at least six cases at the Supreme Court in which he has appeared, within the last three years preceding the date of

whether the evidence to be furnished i.e. the listed requirements was what amounted to 'distinction'?

It seems that these were the factors that helped the LPPC arrive at a decision that a legal practitioner has achieved 'distinction in the legal profession' in addition to the 'contested cases' he has handled. All that mattered was that the cases were contested, and nothing mattered with the contest, or what the contest was all about. In any case, advocacy was emphasized above other skills, even though a

application to be made a Senior Advocate; or 2. particulars of at least two contested cases in the Supreme Court and at least four contested cases in the Court of Appeal in all of which the applicant has appeared within the three years preceding the date of his application; or 3. particulars of at least one contested case in the Supreme Court and at least four contested cases in the Court of Appeal and at least six contested cases in the High Courts in all of which the applicant has appeared, within the three years preceding the date of his application. 4. The rank is to be conferrable on the following: (a) all former Queen's Counsel who apply; (b) the Attorney General of the Federation, if prior to his appointment, he had not been conferred with the rank; (c) academics who have distinguished themselves through teaching or published works that have substantially contributed to law and jurisprudence; (d) partners in chambers who severally meet all the criteria, excludes Associates and salaried legal practitioners in chambers. 5. Applicants for the rank must also be persons of good character and good reputation, honesty, integrity, ability and sound knowledge of the law, respect for the code of conduct and etiquette at the Bar, loyalty to the profession, and have a high standing within the profession. 6. Applicants for the rank of Senior Advocate should also have the following- (a). a good law office with a good library; (b). at least two junior lawyers and other staff in his office. Opara, C., 'An Appraisal of the Controlling Bodies in the Legal Profession in Nigeria,' in Nwosu, K.N., *Legal Practice Skills & Ethics in Nigeria* (Lagos: DCON consulting, 2004) P. 163. The process of appointment under the old rules and guidelines may also be summarized thus- (a) a legal practitioner must apply by filling the prescribed form for the application and paying the required fee. It is at this point that he supplies the evidence to satisfy the criteria for appointment; b). he must also be recommended by the Chief Judge of the State where he practices and also by Justices of the Court of Appeal within the jurisdiction in which he practices; c). the Nigerian Bar Association also makes recommendations on such member d). the Privileges Committee then meets annually to consider the application and then publishes the names of successful applicants, which in most cases are not more than fifteen of the total number of applicants. Appointment is therefore made only once in a year.

legal practitioner may be good in advocacy, without necessarily being good in other skills of legal practice (lets say solicitor's accounting or legal research or legal drafting). Perhaps more was required of these factors. Some lawyers for example, have made their marks and achieved distinction in the legal profession, not necessarily through advocacy in the courts, but other forms of legal engagements.¹⁷

All former Q.C. were automatic awardees of the rank if they applied. The same automatic 'promotion' existed for any serving Attorney General of the Federation who was not conferred with the rank before his appointment. It did not matter if these last two officials met the conditions for the award. The new guideline has removed this automatic conferment that was simply hinged on appointment to an office, which in some instances is merely political (Attorney General), or by virtue of foreign criteria (Q.C.) which may contrast with the local criteria for conferring SAN.

The privileges of a SAN were also emphasized above the corresponding responsibilities;¹⁸ indeed the public has not appreciated the resultant duties conferred on holders of the rank.¹⁹

¹⁷ A past president of the Nigerian Bar Association had given examples of such in these words- 'the efforts of such crusaders like Chief Gani Fawehinmi, SAN, Olisa Agbakoba, SAN ...led to the due registration of more political parties and to the opening up of the democratic space in Nigeria...'See Okocha, O.C.J., 'The Role of Lawyers in an Enduring Democracy', in Akinseye-George, Y., & Gbadamosi G., [eds.] *The Pursuit of Justice & Development* (Lagos: Diamond Publications Ltd. 2004)

¹⁸ See Section 5 (7) Legal Notice No. 40 1979.

¹⁹ The restrictions however are not cutting. They merely appear to add to the prestige of the silk. A Senior Advocate of Nigeria shall not appear as counsel in a civil case before any superior court of record except with a junior, or with another Senior Advocate of Nigeria except where he is appearing in the judge's chambers or any where other than in open court and where he is appearing in a criminal matter. A Senior Advocate of Nigeria may appear for or issue originating process in court only in such matters as he can appear in. He can only draft instruments which the prescribed fee is not below a certain amount except when done

Aside from the privileges of donning the silk gown, a SAN has the exclusive right and privilege to sit at the inner Bar or where there is no such facility, the front row of the seats available for legal practitioners. A SAN also has the right to mention any motion in which he is appearing or any case or matter on the cause list for mention out of turn. The perception by the public is that if a SAN can mention his case anytime he wants, has an exclusive seat in the bar, and is adorned with a silk robe, then he must be a 'big man', a sort of a 'chief' of lawyers, which in due course confers enormous advantages on him because of 'fat' and rewarding briefs.

In addition, there has been the perception that the process for conferment of the rank has been less than fully transparent. It is believed in many quarters that one needs some 'connection' in order to be awarded the rank and not just distinction in advocacy. This suspicion is further fuelled by the fact that biological children and relatives of 'big men' in the legal profession have been awardees of the rank, that these were not just coincidences, even when in many respects, the children have fulfilled the criteria for the award of the rank.²⁰ These are some problems it was hoped the new guidelines would address. Has it been done so? Are the new guidelines simply a recycling of old wines in new bottles? In what ways are they different and what innovations do they contain?

ISSUES IN THE NEW GUIDELINES

The new guidelines is divided into two parts-Parts I and Part II. Part I explains the principles and also the methods/procedure for conferring the rank of SAN; while Part II deals with the criteria for the appointment. The criteria for appointment are further subdivided into 'eligibility criteria' and 'competency criteria'. No

gratuitously or connected with parliament. The fee is not below #400.00. (Four Hundred Naira). This amount was substantial in 1979 when these Rules were drafted. This indeed is due for an amendment.

²⁰ Some notable examples are late Chief FRA Williams SAN and his two sons; Mr F. O. Akinrele SAN and his son Demola Akinrele SAN; Late Kehinde Sofola SAN and his son Kayode Sofola SAN; Late Hon. Justice Mbanefo and his son Sir Louis Mbanefo SAN; Hon Justice Atake and his son Eyimofe Atake SAN; Hon. Justice Belgore and his son Dele Belgore SAN; and Hon Justice Babalakin and his son Wale Babalakin SAN.

reasons are advanced for this dichotomy which appears awkward in its flow, with many of the items discussed in the principles being repeated in the eligibility and competency criteria. We intend to treat the commentary and any criticism of the guidelines taking this sequence, principles; eligibility; competency; and procedure/method.

PRINCIPLES

Unlike the old process, the new guidelines unequivocally states as a fundamental principle that the rank of SAN is a 'privilege' and awarded as 'a mark of excellence to members of the legal profession who are in full time practice, have distinguished themselves as advocates and have made significant contribution to the development of the legal profession in Nigeria'.²¹ It addition, the rank is 'an independent indication of excellence in the legal profession'- 'the public identification of advocates whose standing and achievement would justify an expectation on the part of clients, the judiciary and public' that the holders of the rank can provide 'outstanding services as advocates and advisers in the overall best interest of good administration of justice'.²²

The element of discretion in the former guidelines by the view on 'privilege' seems to have been reduced in the new guidelines by the use of phrases such as 'mark of excellence' and 'indication of excellence'. Thus 'excellence' must justify the award of the rank and not just that it is a privilege to be awarded to persons who do not deserve the award. Yet, it is still a privilege in the sense that there is no justifiable right upon which an action can be hinged if an application to be awarded the rank is refused.

Again, the guidelines states in unprecedented terms that 'all applicants will be treated equally and the award will be based on merit'. Explaining this further, the guidelines state that applicants will be considered without regard to 'ethnic origin, pedigree,

²¹ Rule 1.

²² Rule 2 (1)

gender, physical disability, marital status, age, religious belief, political views or affiliations'.²³ By emphasizing merit, the guidelines attempt to down-play these listed subjectivities. But how true is this when regard is paid to the fact that the guidelines say further that 'every effort shall be made to ensure that appointment in every year reflect a national character by achieving as much geographical spread and gender representation as is possible'?²⁴

These declarations of principles are commendable for setting out the philosophy and base for the award of rank of the SAN; and also to assuage some past misgivings, mistakes and misperceptions of the awards. In some terms however, the declarations maintain the traditional base of the award such as 'distinction' (by employing 'distinguish') in the legal profession. To emphasize this intent, the new guidelines added such expressions as 'contribution to the development of the legal profession', even though nothing is listed as amounting to that contribution.

The underlying reason for 'geographical spread' may be due to perception or misperception that the rank has been mostly awarded to persons from some particular parts of the country, to the loss of others. Despite this novelty however, balancing 'geographical spread' with 'merit' (as demonstrated by the phenomenon of 'federal character')²⁵ is not an easy task to achieve in Nigeria. The

²³ Rule 2 (2)

²⁴ Rule 1 (3)

²⁵ The 'Federal Character' principle is an affirmative action mechanism entrenched in the Nigerian Constitution which provides for the representation of diverse ethnic and national representation in institutions of governments of Nigeria. Section 13 (3) of the Constitution of the Federal Republic of Nigeria provides that the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies. Sub section 4 of the Constitution also makes similar provisions for the States. It says that the composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the

guidelines make very bold proclamations at ensuring gender balance in the rank. The male gender has dominated the rank over the years thus the need for 'gender representation'. In fact, out of the 176 awardees of the rank by the year 2001, only 3 were female.²⁶ This gender misbalance has been blamed as peculiar to the Nigerian Bar, a commentator wonder that;

...is the saying NO WOMAN AT THE BAR, tradition or is it Law? ... It probably means to convey the same sentiments that ensure a level of equality. But is it conceivable that we can say there are NO MEN AT BAR? ... Do we take it therefore that when men wear the Silk, they wear it on behalf of women since there are no women at the Bar? Or else, how many women are Senior Advocates of Nigeria?²⁷

It is hoped that the principle of 'gender representation' even if it faces the risk of being subjective, will assuage views such as expressed above. While the need to ensure balance of the genders is commendable, there is a danger that excessive emphasis on 'gender representation' may conflict with the subjectivity of 'gender' in rule 1 (2) which is discouraged under the new guideline. The new guidelines restrict the holders of the rank of SAN to those in 'full time legal practice'.²⁸ This point is further emphasized to the effect that the rank shall continue to be awarded primarily to 'legal practitioners who have distinguished themselves as advocates'.²⁹ The

Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation. Even though a Federal Character Commission has been set up by the Constitution, enforcing the constitutional provisions for diverse and national representation in institutions of government has been very difficult to achieve.

²⁶ These were Mrs. Folake Solanke (1981); Mrs. P. C. Ajayi-Obe (1989); and Mrs. Olufunke A. Adekoya (2001).

²⁷ Kukah, 'Legal Profession in Nigeria: Views from Outside the Profession' Op. Cit, at 127 & 128.

²⁸ Rule 1 part I of the guidelines

²⁹ Rule 2 (5) part I of the guidelines

question arises as to which legal practitioner is in 'full time legal practice', a phrase that is not defined. Does 'full time legal practice' apply only to lawyers working in and are partners or principals in law offices as the guidelines seem to suggest? Note that it is 'full time legal practice' and not 'full time private legal practice'. In such a case, it could be argued that lawyers in ministries of justices at both the State ministries and Federal ministries, who advocate before the courts may rightly claim to be in 'full time legal practice.'

This argument may also apply to lawyers in corporate practice (since they are similarly in legal practice), even though it may be debatable if they are advocates; except where the literal meaning of advocates, which implies also promoter, supporter, activist, campaigner, sponsor or any word that stands as a synonym to the word 'opponent' is admitted. 'Full time legal practice' does not seem to apply to law lecturers, since lecturing or teaching and research is not 'practice' of the law. If the emphasis is on achievement of 'mark of excellence' in the legal profession and also 'significant contribution to the development of the legal profession in Nigeria', shouldn't the distinction between those in 'full time legal practice' and those who are not (whatever that means) be less emphasized?

The only class that has been made an exception to advocacy and 'full time legal practice' are academics; yet such academic must distinguish himself with substantial contribution to the practice of law through teaching and research and publication (*emphasis added*) that have become major source of reference by legal practitioners, judges, law teachers and law students. It is needless to restrict the beneficiaries of law academics to these last four, since other non-law students, and non-law teachers make reference and use of publications by law academics. In other words, the teaching, research, and publications of law academics must contribute to the practice of law. Those who practice law must find the teaching, research and publication of law academics most helpful. We shall return to this point later.³⁰

³⁰ Supra.

ELIGIBILITY CRITERIA

To be eligible for appointment as a Senior Advocate of Nigeria, applicants must be legal practitioners 'in active current legal practice' of 'at least ten years immediately preceding the date of their application.'³¹ While 'active current legal practice' in the eligibility criteria appears different from 'full time legal practice' in the principles (since one may be active and still be part-time), because of 'current' and 'active', the emphasis is on applicants with existing, present, contemporary and dynamic practice, and not persons whose legal practice has become dormant. But 'current and active' here has not solved the problem of whether the practice must be private or not, which we highlighted earlier.³²

The fact though that the LPPC may consult the Chief Judge of a State or a local branch of the Nigerian Bar Association where an applicant has his main law office,³³ (*emphasis added*) is suggestive and compelling to say that the rank is awarded to legal practitioners in full time, current and active private legal practice. These applicants must be partners or sole practitioners in a law office.³⁴

The eligibility criteria emphasizes the character of applicants for SAN, perhaps to cure criticisms that have followed some awardees of the rank in the past, whose character and integrity have been questionable. In addition, it has a deterrent effect on legal practitioners who will make sure that they follow the 'right path' throughout the course of legal practice if they ever hope to become SAN. Things that are considered 'bad behaviour' are listed. Accordingly, an applicant must not have any of the following dispositions:

³¹ Rule 2 (1) of Part II of the guidelines

³² *Infra*

³³ Rule 2 (i & ii) part II of the guidelines

³⁴ Associates and juniors on paid salary are excluded. Rule 2 (2), part II of the guidelines.

- i. bad behaviour (in or out of court), examples of which are bad temperament or propensity to insult or assault people or cause them harm or put them in state of fear of bodily harm;
- ii. indulgence in drug or substance abuse or alcoholic addiction;
- iii. moral depravity or other socially unacceptable behaviour;
- iv. abuse of trust like embezzlement or mismanagement of Clients funds;
- v. blatant self-sought praise or sponsored advertisement, songs by musicians or other form of media (print or electronic);³⁵

Unlike the acts constituting 'bad behaviour', there is no acts listed and tagged 'good behaviour' and this is perhaps because of the assumption that 'good behaviour' are acts that are in contradistinction to 'bad behaviour'. The essence of satisfying the eligibility criteria of good behaviour as a condition for award of SAN is very commendable. It ensures that the holders of the rank are not just excellent and successful advocates, but are persons with good and commendable conduct that are worthy to be noted. Bad behaviour is not only limited to acts that are criminal or illegal, but those that may be personal, immoral, and unsociable, without necessarily being public and unlawful.

Awardees of the rank must not just be publicly, but also privately clean, 'from inside out'. Of course some of the acts constituting bad behaviour (such as embezzlement, assault, drug and substance abuse) are obviously criminal and illegal and there is little debate on the need to have them listed. While the former procedure assumes that a SAN is a person of good behaviour and character, the new guideline makes no such assumption but explicitly sets out clearly standards and 'crimes' for judgment and disqualification.

There are obviously some concerns with some of these acts that constitute 'bad behaviour'. Examples are 'moral depravity' and 'socially unacceptable behaviour'; what may be immoral to a person may not be so for another. How do we define what is 'socially unacceptable' since societal norms vary from one community to

³⁵ Rule 2 (3) (i-vi) part II of the guidelines

another? Deciding these 'crimes' may pose some problems to the LPPC. There is need for some determining parameter by way of illustrations of what 'moral depravity' or 'socially unacceptable behaviour' amount to or are capable of amounting to.

COMPETENCE CRITERIA

After satisfying the eligibility criteria, an applicant for the rank of SAN would be suitable for appointment where he is successfully evaluated for what the guidelines describe as 'professional competence' against certain set standards. The first issue under 'professional competence' is similar to the bad behaviour in the eligibility criteria discussed above, which is 'high professional integrity';³⁶ this is explained to mean being 'honest and straightforward in all his professional dealings...good character and reputation...candid with clients and professional colleagues and must demonstrate high level of understanding of cultural and social diversities of the Nigerian society'.³⁷

In addition, the applicant must observe the code of conduct and etiquette at the bar. How some of these traits may be discovered (apart from the reference reports) may be difficult. How can it be proved that a candidate has a high understanding of cultural and social diversities of the Nigerian society? Is it because of his affiliations or his performance at an interview called for this purpose (the last being the most likely)? The plausible reason for this (which has little to do with excellence at the bar) is intended at engendering some level of broad and national outlook, rather than parochial patriotism by holders of the rank of SAN.

In assessing 'professional competence', the LPPC takes note of the following things-

1. List or citation of 10 contested cases of substance, complexity or particular difficulty or sensitivity handled by the candidate as lead counsel, not simply assisting counsel

³⁶ Rule 3 (1) part II of the guidelines

³⁷ Ibid

(*emphasis added*).³⁸ The criteria for determining substance, complexity, difficulty and sensitivity of a case are also set out.³⁹

2. List of 10 judges of superior courts or arbitrators before whom the candidate has appeared in contested cases who could make a confidential reference on the competence of the candidate.⁴⁰
3. List of 6 practitioners whom the candidate has led or against whom he has appeared in contested cases who can attest to the candidate's 'professional competence, abilities and integrity'.⁴¹

A candidate is also required to demonstrate as part of his competence that he has made 'tangible contribution to the development of the law through case law or publications in recognized scholarly journals or scholarly publication at National or International conferences'. In addition, he should demonstrate clear qualities of leadership and loyalty to the Nigerian Bar by the consistent payment of practicing fees for 10 years preceding his application,⁴² and also provision of *pro bono* legal services to indigent clients.⁴³ Finally, evidence of a good, up to date, and well organized chamber with a standard law library is reckoned with for professional competence.⁴⁴

³⁸ Rule 2 (a) part II of the guidelines

³⁹ These include any two or more of whether the case involves - significant legal or public interest; novel point of law; is groundbreaking or landmark decision; substantial amount of money; or one frequently cited in the law reports. See Rule 3 (2) (c) of part II of the guidelines

⁴⁰ Rule 3 (2) (b) of part II of the guidelines

⁴¹ Rule 3 (2) (c) of part II of the guidelines

⁴² All legal practitioners in Nigeria are required by law to pay annual practicing fees, the amount being dependent on the particular year of call to the Nigerian Bar; section 8 of the Legal Practitioners Act, Cap. 207 Laws of the Federation of Nigeria, 1990

⁴³ Rule 3 (3-5) part II of the guidelines. *Pro bono* legal services are services usually rendered free by lawyers without any reward. The beneficiaries of such services are usually the indigent in the society.

⁴⁴ Rule 3 (5) part II of the guidelines. A standard chambers and law library is one with the following: standard textbooks, sets of statutes, law reports, numbers of junior legal practitioners and support staff, and equipments such as computers, fax machines, cabinets, fire proof cabinets, fire extinguishing equipment, etc.

Law academics have been imputed with 'professional competence' for the award of the rank of SAN, but only in 'exceptional circumstances'.⁴⁵ While 'exceptional circumstances' for award to academics may be viewed as discriminatory against this class, this is explained by the guideline itself which says that the award is primarily to academics.⁴⁶ Historically, few academics were awarded the rank (if ever) in any given year.⁴⁷ The guidelines simply validate this historical practice. To be so competent for the award, an academic is not expected to meet the 'requirement of being an advocate', but only expected to distinguish himself or herself as an academic by making 'substantial contribution to legal scholarship and jurisprudence through teaching and research or through published works which are a constant source of reference by legal practitioners, judges, law teachers and law students'.⁴⁸

There are differences in the phraseologies in the principles of the award in respect of academics and the competency criteria for academics. For example, the principles talks about an academic making substantial contribution to the 'practice of law', while the competency criteria talks about contribution to 'scholarship and jurisprudence'. Again under the principles, it seems the 'teaching and research and publication' must all be present because of the use of the conjunctive 'and' appearing after each verb; while under the competency criteria it is either 'teaching and research or published works'. Thus, there is a choice between teaching/research and published works. All must not be present. This raises a point: where there is a conflict between the declarations in the principles and the requirements under the eligibility and competence criteria, which prevails? We suggest that that latter would, since the principles are

⁴⁵ Rule 4 (1) part II of the guidelines

⁴⁶ Rule 2 (5) part I of the guidelines

⁴⁷ For example, for the year 2000 award, 11 of the awardees were from private legal practice, while 1 was from the academics. The best the academics ever got was in the year 2002, when 3 academics were awarded the rank out of a total number of 12 awardees.

⁴⁸ Ibid.

only in the nature of ideals to follow (some sort of preamble to the guideline), while the eligibility and competence criteria are the 'must follow'.

METHOD AND PROCEDURES

The procedure for award of SAN takes the following processes - the application; first filter by the secretariat; actions after the filter; second filter by the LPPC; chamber inspection; interview; and final review of the full panel.⁴⁹ We now deal with these steps in some detail.

1. The Application: a call for application would be made by the LPPC not later than 31st January of every year.⁵⁰ Interested persons could then apply in the prescribed form and pay a non-refundable fee of N200, 000.00 (two hundred thousand naira only). The requirement that legal practitioners must apply for the rank contrasts with its original conception of honouring members of the legal profession where it was 'given without being asked' or sought for by legal practitioners who had distinguished themselves by way of contribution to the legal profession and offer of free legal services in 'matters of state'.

The added requirement of the non-refundable fee makes the process more onerous for persons who have excelled as advocates, but who may not have that much to pay. Additionally, if the award of the rank of SAN is a privilege and is made in recognition of excellence of members of the legal profession, why should it be made to be self financing by the applicant? The non-refundable application fee of N200, 000 (Two hundred thousand Naira) to be paid by the applicants is not only unnecessary but is also assessed as being rather exorbitant, more so that legal practitioners in Nigeria pay the annual practicing fee to finance activities of the Nigerian Bar.⁵¹ Additionally, caution must be taken to avoid measuring the

⁴⁹ These steps are well explained in the operative parts of the guidelines and also succinctly stated in the marginal notes of the guidelines.

⁵⁰ Rule 3 (1) part I of the guidelines. This call may be made in through the media.

⁵¹ Op. cit. item 3 (2) of the new Guidelines. In the UK, the application fee is £25000.00 plus VAT and a further fee of £3,000.00 plus VAT is payable on appointment. This fee is over and above the fee necessary to cover the cost of letters, patent and appointment ceremony). See

suitability of a candidate by the extent of his wealth albeit a successful lawyer who aspires to be a SAN should have a respectable practice with reasonable financial evidence.⁵²

Further, unlike the practice in certain jurisdictions⁵³ where either letters are sent to members of the provincial Bar to seek nominations and applications for Q.C. or where a selection committee is set up to suggest potential Q.C.,⁵⁴ in Nigeria, any interested legal practitioner has direct access to apply for such conferment. Should interested persons apply for such conferment? If indeed it is recognition of distinction, shouldn't this distinction be glaring for all to see and the conferment should ordinarily be a consequence of this distinctiveness?

2. The applications are then 'filtered' by the Secretariat of the LPPC.⁵⁵ Where applications 'on their face do not meet the stipulated conditions or where the candidates plainly do not meet the criteria for eligibility and competence' such applications are treated as unsuccessful.⁵⁶ This premature stage of terminating applications has its merits and demerits, its potential and dangers. If indeed an application on its face, plainly, does not meet the criteria, there is no reason to waste time and energy in processing such application. An example of situations where applications on their face do not meet the criteria include, for example, where the applicant is less than 10 years post call, where the prescribed fee has not been paid, where the required number of cases have not been contested and

⁵² <http://www.qcapplications.org.uk/introduction> Application and Selection for Queens Counsel 30th Nov., 2007.

⁵³ Chinwo, C. A. J. 'Taking Silk in Nigeria: A Proactive Approach for Conferment' Sound Counsel Vol. 2 No. 3 ISSN 1597-5444 p. 7

⁵⁴ This is the practice in Canada. See 'The Appointment of Queen's Counsel- A Consultation Paper' down loaded from the internet.

⁵⁵ In reality, no such secretariat is established by law, it being set up in the Supreme Court simply for convenience of administration only.

⁵⁶ Rule 3 (3) (ii & iii) of the guidelines

submitted. Even though candidates that have been filtered out at this stage have the right to be notified,⁵⁷ there is need to entrench supervisory mechanisms to ensure that mistakes are not made.

3. The list of applicants that have not been 'filtered out' by the secretariat of the LPPC would then be forwarded to the Nigerian Bar Association, all Chief Judges of States, all Justices of the Supreme Court and the Court of Appeal to make a confidential report on the integrity of the applicant and any area of integrity that is of concern to them. An applicant has a right to explain such identified areas of concern of his integrity. However, where the issue of integrity 'is of significant weight' the LPPC may treat the application as unsuccessful and notify the applicant accordingly.⁵⁸ "The list of cases, judges, and practitioners which accompany the application, is to ensure that some of them are selected to make a written confidential reference on an applicant."⁵⁹

4. The second filter by the LPPC evaluates the competence and grades candidates based on the following weighted criteria-integrity (30%), knowledge of the law (40%), contribution to the development of the law (10%), leadership qualities in the profession (10%), strength and quality of references received on candidate (10%).⁶⁰ The LPPC then makes a short list of candidates 'in such manner that not more than 3 times the number allowed for appointment for each year make the short list' to go to the next stage of selection.⁶¹

5. The next stage is the physical inspection of chambers of applicants in the final short list to 'evaluate the level and quality of the facilities provided in the chambers'.⁶² What determines the 'level and quality of facilities' are the size and quality of library, the quality of office space and other facilities, number of junior counsel or partners, number and quality of staff.⁶³ It seems that any guideline

⁵⁷ Rule 3 (3) (iv) part I of the guidelines

⁵⁸ Rule 3 (4) part I of the guidelines

⁵⁹ Rules 5 & 6, part I of the guidelines

⁶⁰ Rule 3 (8) (i) part I of the guidelines

⁶¹ Rule 3 (8) (ii) part I of the guidelines

⁶² Rule 9 (i) part I of the guidelines

⁶³ Ibid.

for evaluating library and chambers shall include the standard text books, sets of statutes, law reports, number of junior legal practitioners and support staff.⁶⁴

The importance of this chamber inspection is that where the quality of the candidate's chambers is below the required standard, the candidate shall automatically be dropped from the short list and that ends his application, at least for that year.⁶⁵ It is accordingly imperative that applicants should have standard chambers and library before embarking on the process of applying for the rank, otherwise, all they have laboured for would be terminated at the law office inspection stage. However there is need for the LPPC to ensure that the facilities in the chambers are those that exist both at the time of application and at the time of inspection, and not rather facilities that do not exist at the time of application but are only found at the period of inspection. This will ensure that there is no 'window dressing' at the time of inspection.

The requirements for well-equipped Chambers and Chambers inspection raise the issue of exclusion of Counsel practicing in the offices of the Attorneys General of the Federation and States in the entire eligibility and competence criteria for the appointment of SAN; they are not academics but are in full time active legal practice, both as advocates and solicitors working in the Chambers of the Attorneys General. Whose Chambers would now be inspected, that of the Attorney General or that of the State Counsel (the latter being inconceivable by the guidelines)? Or will the Chambers of the Attorneys General be attributed and regarded as that of the State Counsel? The implication of this is that this class of Counsel has been indirectly sidelined as possibilities for the award of the rank of SAN.

6. The sixth stage is the interview where the LPPC is broken into 3 sub-committees and each applicant is interviewed by each of these

⁶⁴ Rule 3 (5) par II of the guidelines

⁶⁵ Rule 3 (9) (ii) of the guidelines

sub-committees. Candidates appearing for interview before the sub-committees are to be selected randomly so that the sub-committees would have no prior notice of which candidate would be appearing before them.⁶⁶ At the interview, the candidates are to be weighted using the following criteria for evaluation-integrity (25%), knowledge of the law (25%) leadership quality (10%), contribution to the development of the law (10%), leadership qualities in the legal profession (10%), strength and quality of reference received (10%) and quality of law office/library (10%).⁶⁷

The difference between the weighted percentages under the second filter stage and the interview stage is that in the former integrity has 30%, while knowledge of the law has 40%. In the latter, both integrity and knowledge of the law have been down-weighted to 25% each. In addition there is a new weight of 10% for 'leadership quality' apart from the 10% weight for 'leadership qualities in the profession'. This appears to be unnecessary duplication, since hardly any distinction could be made between them. Or does 'leadership qualities in the profession' mean positions and offices held in the Nigerian Bar Association or offices held in the profession? Aren't these the positions where 'leadership quality' would be demonstrated, or should leadership quality extend to political electoral or appointive offices, which have little relevance to the ranking of SAN? The 10% weight for 'leadership quality' should be removed and added to more pressing weights such as integrity or knowledge of the law.

7. A final sitting of the full panel of the LPPC would be held to review the report of each subcommittee, collectively moderate the scores taking into account gender representation and geographical spread.⁶⁸ The names on the final list of successful candidates awarded at the interview stage, and also review borderline cases. The full panel then draws up a final list of successful candidates taking into account gender representation and geographical spread.⁶⁸ The names on the final list are subsequently awarded the rank of SAN at an annual ceremony summoned for that purpose at the Supreme Court of Nigeria.

⁶⁶ Rule 3 (10) (iii) of the guidelines

⁶⁷ Rule 3 (10) (i & ii) of the guidelines

⁶⁸ Rule 3 (10) (v) part II of the guidelines

FEEDBACK AND COMPLAINTS

In seeking to buttress the integrity of the exercise, a novel feedback stipulation was made. Here, an unsuccessful candidate may request and obtain a written feedback on why his application was unsuccessful. The feedback may also point out areas the candidate will be required to improve his/her competence.⁶⁹ The feedback comment will be designed to help the candidate clearly identify areas of weakness or where a candidate needs to provide more evidence of competence or improve his/her standards.⁷⁰

Similar to the feedback is the complaints procedure which provides avenues for candidates to lodge protest where they perceive that they had been treated unfairly. The procedure allows complaints to be treated promptly and feedback given to the candidate.⁷¹ The guidelines in providing for the complaints procedure on the selection process or other aspect of the award, states that any complaint would be determined by an independent committee appointed by the Chief Justice of Nigeria.⁷²

A critical point to note on the guidelines is the outcome of a successful complaint of a candidate who was wrongly turned down. The guidelines provide that the successful outcome of a complaint will not be an automatic award of the rank but the LPPC will be allowed to take remedial action to avert future occurrence. The LPPC may on a case by case basis determine what other measures will be taken in respect of a complaint that had been successfully lodged in relation to future consideration of the candidate whose complaint had been upheld.⁷³

⁶⁹ Rule 3 (11) (i & ii) part I of the guidelines

⁷⁰ Rule 3 (11) (iii) part I of the guidelines

⁷¹ Rule 3 (12) (ii) part I of the guidelines

⁷² Rule 3 (12) (i) part I of the guidelines

⁷³ Ibid

While the opportunity given for a fair consideration of such complaint is commendable, the remedy prescribed may not be adequate. If the error that warranted the complaint in the first place resulted from the Secretariat of the LPPC with no fault of the candidate, then it is not fair if a retrospective action cannot be taken to remedy the candidate's application. Where such favourable outcome (that the candidate ought to have been conferred with the rank) is made to take effect retrospectively, it will certainly proffer a more justifiable solution than for a successful outcome of the complaint to be kept in abeyance in relation to future consideration. However the limits of this novel feedback and complaints procedure, it is still praised for being a more open and transparent mechanism in the process for award of SAN.

CONCLUSION

The paper has pointed out the original conception and philosophy of the rank of SAN and also some of the weaknesses in the old process for awarding the rank. The paper also commended the many positive clauses in the guidelines which aim at a more transparent process for award of the rank, like confidentiality of the process⁷⁴ and placing it fully in the hands of the LPPC to prevent extraneous influences, considerations, or 'connections'.⁷⁵ The guidelines are thus a vast improvement over the former criteria. More commendable is the criterion that applicants should demonstrate evidence of engagement in pro bono services to litigants. In line with this, where an advocate appears in a case as *amicus curiae*,⁷⁶ to help a court resolve a complex and intricate point of law, regard should be paid to that as a weight for awarding the rank of SAN.

⁷⁴ The guidelines say that any information provided by applicants, views and opinions given or expressed to the committee by all persons consulted shall be treated in confidence.

⁷⁵ Ibid, Item 3 (1), (3) – (11) (i). 'Connections' is a Nigerian cliché to describe a situation where a person has contact, knows or has some relationship with highly-placed members of the society who can influence favours, opportunities, and positions to that person's advantage.

⁷⁶ *Amicus curiae* (friend of the court) happens where a judge or justices of a court call upon a lawyer to assist the court with his opinion on a particular matter which is often, though not always novel, intricate and complex to resolve. The service is usually gratuitous, and no fee is paid.

Despite these improvements, the guidelines are still bedeviled by some of the weaknesses of the past which we have pointed out. The public should be involved in the 'independent indication of excellence in the legal profession'. To achieve this, the LPPC should be reconstituted to involve members of the public in the process of the award, which is the current practice in other jurisdictions.⁷⁷ In addition, references should not only be required from colleagues and judges/arbitrators alone, but also from previous clients describing their confidence in an advocate who handled their matter.

In the final analysis, no guideline for the award of any rank, more so that of SAN is ever permanent or immutable. While the new guideline is commended for seeking to 'right the wrongs' of the former process, the problems pointed out in the guideline and others that may emerge as a result of its implementation will have to and need to be addressed to smoothen the coarse edges in the process for the award of the rank of SAN. A periodic review of the guideline is recommended to meet up with changing realities that will ensure the emergence of the best candidates as awardees for the rank of SAN.

⁷⁷ In England for example, an independent selection panel is constituted made up of retired justices, senior barristers and solicitors and lay (not legally qualified persons). In fact the panel is chaired by a lay member. This ensures that the selection panel is 'independent, will act in the service of the public interest...and command respect'. For this and other process and guidance for the selection of Q.C. see <http://www.qcapplication.org.uk/process>. Sourced on May 22, 2008.