

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

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INTRODUCTION

Rivers State of Nigeria was effectively without an incumbent Chief Judge from 20th August, 2013 (when the immediate past Chief Judge of the State, Hon. Justice Iche N. Ndu, retired from service) up until the 31st day of May, 2015. The current Acting Chief Judge of Rivers State, Hon. Daisy W. Okocha, Ag. C.J., was sworn into office on 1st day of June, 2015 by the incumbent Governor of Rivers State, Chief Nyesom E. Wike. At the centre of the crisis was the insistence by the former Governor of Rivers State, Rt. Hon. Chibuike Amaechi that he had the prerogative to reject the recommendation of the National Judicial Council (hereinafter referred to simply as “the NJC”) that Hon. Justice Daisy W. Okocha of the High Court of Rivers State should be appointed to the office of Chief Judge of Rivers State. According to the former Governor of Rivers State, the favourable recommendation of Hon. Justice Daisy Okocha by the NJC for appointment to the office of Chief Judge of Rivers State was merely directory since the Constitution of the Federal Republic of Nigeria 1999 (as amended) vests the actual power of appointment of the State Chief Judge in the Governor.

Following the judgment delivered by Hon. Justice Lambo Akanbi, J., of the Federal High Court Port Harcourt in *Governor of Rivers State & ors v. National Judicial Council & anor.*,¹ which set aside the recommendation of the NJC to the former Governor of Rivers State to appoint Hon. Justice Daisy Okocha to the office of Chief Judge of Rivers State, the former Governor of Rivers State in purported exercise of his power under s.271(1) of the Constitution of the Federal Republic of Nigeria 1999(as amended),² appointed and swore in Hon. Justice P. N. C. Agumagu, former President, Rivers State Customary Court of Appeal, to the office of Chief Judge of Rivers State on 18th March, 2014 without the recommendation of the NJC. In appointing and swearing in Hon. Justice P. N. C. Agumagu, as Chief Judge of Rivers State, the Governor purportedly acted on the advice of the Rivers State Judicial Service Commission to the NJC which preferred Hon. Justice P. N. C. Agumagu, to Hon. Justice Daisy Okocha for appointment to the office of Chief Judge of Rivers State.

Quite expectedly, the NJC not only refused to recognize the appointment of Hon. Justice P.N.C. Agumagu as Chief Judge of Rivers State but also suspended him from performing the functions of his office as a judicial officer for accepting his purported appointment as Chief Judge of Rivers State without the prior recommendation of the NJC. As Ahuraka Isah, Media Aide to the former Chief Justice of Nigeria stated it, the suspension of Hon. Justice P. N. C. Agumagu was intended to preserve the authority of the National Judicial Council and “arrest or prevent judicial anarchy.”³

On 3rd day of June, 2014 the NJC appointed Hon. Justice Daisy Okocha, J., as the “Administrative Judge” of the High Court of Rivers State with a mandate to assign cases to all the Judges of the High Court of Rivers State and to perform other related administrative functions necessary to prevent the complete collapse of the operation of the judiciary in the State.⁴ However, the Rivers State Government quickly reacted to the said appointment by issuing a circular directing all staff of the Rivers State Judiciary to refrain from taking any instructions from or dealing with Hon. Justice Daisy Okocha, J., in her capacity as the Administrative Judge of the High Court of Rivers State. The directive was coupled with a clear threat that any staff found guilty of its violation would be dismissed from the service of the Rivers State Judiciary.⁵

In the confusions that followed these conflicting actions by the NJC and the Government of Rivers State, members of the Judiciary Staff Union of Nigeria (JUSUN) Rivers State Branch declared an indefinite strike action on 9th June, 2014 thus completely grinding the administration of justice throughout Rivers State and depriving litigants of access to the court of justice.

¹ (Unreported), Suit No. FHC/PH/CS/421/2013 delivered on 18th day of March, 2013.

² Cap C23, LFN 2004 (hereinafter ‘the 1999 Constitution’).

³ Lanre Adewole and Dapo Falade, “Agumagu: Politics, law and survival as Rivers CJ appointment crisis drags on” *Tribune* (Ibadan, 6th April, 2014)<<http://www.tribune.com.ng/special-report/item/2763-agumagu-politics-law-and-survival-as-rivers-cj-appointment-crisis-drags-on/>>accessed 03/12/2014.

⁴ Tobi Soniyi, “Why Justice Okocha Was Appointed Acting Rivers CJ” *ThisDay Live* (04 June, 2014)> <http://www.ThisdayLive.com/articles/why-justice-okocha-was-appointed-acting-rivers-cj/180167/>> accessed 03/12/2014

⁵ Innocent Anaba & Jimitola Onoyume, “Reactions trail NJC directive on assigning cases in Rivers courts” *Vanguard* (05 June, 2014)< <http://www.vanguardngr.com/2014/06/reactions-trail-njc-directive-assigning-cases-rivers-courts/>> accessed 03/12/2014.

The new Chief Justice of Nigeria, Hon. Justice Mahmud Mohammed, in his first official reaction to the crisis in Rivers State Judiciary had blamed the former Governor of Rivers State, Chibuike Amaechi, for circumventing seniority in the appointment of a new Chief Judge for the State.¹ The Amaechi administration in Rivers State on its part, had always blamed the NJC for undue interference in what was supposedly the internal affair of the State.² The needless crisis and the complete disruption of the administration of justice in Rivers State which was unprecedented in history continued until the Hon. Justice Daisy Okocha was appointed and sworn in as the Acting Chief Judge of Rivers State on 1st day of June, 2015 by Governor Wike.

Against the foregoing factual background, this paper seeks to examine the relevant provisions of the 1999 Constitution (as amended) on the power of appointment of the Chief Judge of a State with a view to determining the constitutionality or otherwise of the actions taken so far by the NJC and the former Governor of Rivers State. It is argued that the politicization of the appointment of the Chief Judge of Rivers State by the former Governor of Rivers State, Rt. Hon. Chibuike Rotimi Amaechi was directly responsible for the crisis. Arguably, the former Governor was able to cripple the entire Rivers State Judiciary for almost two years because of a patent defect in the Constitution of the Federal Republic of Nigeria, 1999 which does not specifically prescribe that the most senior Judge of the High Court of the State shall be appointed as the substantive Chief Judge of the State. This gap in the 1999 Constitution was simply exploited by the administration of Governor Amaechi for obvious political reasons to the irreversible detriment of the people of Rivers State who look up to the courts for justice. The paper argues that in order to depoliticize the appointment of the Chief Judge of the State of the federation, a constitutional amendment should be introduced to prescribe that the most senior Judge of the High Court of the State should be appointed to the office of Chief Judge of the State. The proposal will de-emphasize political considerations and ensure predictability in the process of appointment of a Chief Judge of the State of the Federation of Nigeria.

This paper is divided into five sections. The introductory section provides a sketch of the factual background to the crisis in the Rivers State Judiciary and its adverse impacts on the administration of justice in the State. The second section addresses the issue of qualification for appointment to the office of Chief Judge of a State of the Federation of Nigeria under the 1999 Constitution (as amended). In more specific terms, this section will attempt to answer the question whether Hon. Justice P.N.C. Agumagu, P., who at all material times was the President of the Rivers State Customary Court of Appeal, was qualified to be appointed by the former Governor of Rivers State to the office of Chief Judge of Rivers State. The procedure laid down in the 1999 Constitution (as amended) for the appointment of the Chief Judge of a State of the federation is examined in section three whilst section four proffers solutions to stem such crisis in future. The concluding remarks are contained in section five.

WHO IS QUALIFIED TO BE APPOINTED TO THE OFFICE OF CHIEF JUDGE OF A STATE UNDER THE 1999 CONSTITUTION?

The answer to the above crucial question can be found in sections 270 and 271(1), (3) and (4) of the 1999 Constitution (as amended). Section 270(1) of the 1999 Constitution (as amended) establishes the High Court for each State of the Federation. Section 270(2) of the 1999 Constitution (as amended) provides that the High Court of a State shall consist of –

- (a) a Chief Judge of the State; and
- (b) such number of Judges of the High Court as may be prescribed by a law of the House of Assembly of the State.

Section 271(1) of the same Constitution provides that the appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the *recommendation* of the National Judicial Council subject to the confirmation of the appointment by the House of Assembly of the State.

It is clear from a literal interpretation of the above provisions that a person shall not be appointed to the office of Chief Judge of a State unless he is first and foremost, a Judge of the High Court of the State. And to be a Judge of the High Court of a State, a person shall be qualified to practice as a legal practitioner in Nigeria and shall have been so qualified for a period of not less than ten years.³ Put differently, the Chief Judge of a State can only be appointed from among the Judges of the High Court of the State. This position is supported by the provision of s. 271(4) of the 1999 Constitution (as amended) which provides that:

If the office of Chief Judge of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed those functions the Governor of

¹ Ade Adesomoju, "CJN decries closure of Rivers courts" Punch (Lagos, 08 December, 2014)<<http://www.punchng.com/news/cjn-decries-continued-closure-of-rivers-courts/>> accessed 08 December, 2014.

² Kelvin Ebiri, "Rivers blames NJC members for crisis in judiciary" The Guardian (Lagos, 27 August, 2014)<<http://www.nguardiannews.com/news/national-news-176716-rivers-blames-njc-members-for-crisis-in-judiciary/>>accessed 03 December, 2014.

³ See s.271(3) of the 1999 Constitution

the state shall appoint the most senior Judge of the High court to perform those functions.

It is submitted that since only the most senior Judge of the High Court of a State is qualified to be appointed to the office of Chief Judge of the State in an acting capacity, it follows logically that a person who is not the most senior Judge of the High Court of a State cannot be appointed to the office of Chief Judge of that State in a substantive capacity. It will be ridiculous and absurd to assume that the constitution intends to allow a person who is not qualified to be appointed to the office of Chief Judge of a State in an acting capacity to hold that same office in a substantive capacity. If the most senior Judge of the High Court of a State is the only person qualified to be appointed by the Governor as Acting Chief Judge of the State, it is very arguable that the constitution cannot intend that the person to be appointed to the office of Chief Judge of the State in substantive capacity should be anything less. Put differently, it cannot be the intention of the Framers of the 1999 Constitution to make appointment of the Acting Chief Judge of a State more important than the appointment of the substantive Chief Judge of the State.

Clearly, to argue otherwise is not only to impute absurdity to the legislature but also to charge it with deliberately seeking to subvert the time-honoured tradition of orderly succession on the High Court Bench based on seniority and integrity. There is indeed a presumption that the legislature is a perfect law-making institution and therefore, cannot ordinarily, intend an absurdity. In other words, in interpreting the provisions of a statute or constitution, a court of law is bound to proceed on the presumption that the legislature is an ideal person that does not make mistakes or intend an absurdity.¹ Accordingly, constitutional language is to be given a reasonable construction and absurd consequences are to be avoided.²

Therefore, it is submitted that a person who is not the most senior Judge of the High Court of a State cannot be appointed to the office of Chief Judge of that State either in an acting or substantive capacity. This is the only meaning that is consistent with a purposive interpretation of s. 271(1) and (4) of the 1999 Constitution (as amended).

The above conclusion leads us to the question whether the President of the Customary Court of Appeal of a State (or a Judge of that Court) can be considered as a Judge of the High Court of a State for the purpose of appointment to the office of Chief Judge of the State? The Customary Court of Appeal of a State is created by s.280(1) of the 1999 Constitution (as amended) which provides that there shall be for any State that requires it a Customary Court of Appeal for that State. Sub-section (2) of s.280 provides that the Customary Court of Appeal of a State shall consist of-

- (a) a President of the Customary Court of Appeal of the State; and
- (b) such number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.

The appointment of a person to the office of President of a Customary Court of Appeal or to the office of a Judge of that court shall be made by the Governor of the State on the recommendation of the National Judicial Council except that in the case of the President, such appointment shall require the confirmation of the House of Assembly of the State.³

In terms of qualification, s.281(3) of the 1999 Constitution provides that apart from such other qualification as may be prescribed by a law of the House of Assembly of the State, a person shall not be qualified to hold the office of President or of a Judge of a Customary Court of Appeal of a State unless –

- (a) he is a legal practitioner in Nigeria and he has been so qualified for a period of not less than ten years and in the opinion of the National Judicial Council he has considerable knowledge of and experience in the practice of customary law; or
- (b) in the opinion of the National Judicial Council he has considerable knowledge of and experience in the practice of customary law.

It is indisputable from the above provisions that the qualification for appointment to the office of President or Judge of the Customary Court of Appeal is different from that of Judges of the High Court of a State as prescribed under s. 271(3) of the 1999 Constitution to the extent that Judges of the High Court of a State are not required to have any knowledge of and experience in the practice of customary law. It is also clear from the use of the word “or” which separates s.281 (3) (a) and (b) of the 1999 Constitution that a person who is not a legal practitioner in Nigeria but who in the opinion of the National Judicial Council has considerable knowledge of and experience in the practice of customary law may be appointed as a Judge of the Customary Court of Appeal.⁴ Furthermore, it is clear from a combined reading of s. 272(1) and s. 282(1) of the 1999 Constitution

¹ *Alhaji v. Egbe* [1986]1 NWLR (Pt.16) 361 @ 370 paras C-D.

² See *Ishola v. Ajiboye* [1994]6 NWLR (Pt.352) 506 @ 539.

³ See s. 281 (1) and (2) of the 1999 Constitution (as amended); see also the Rivers State Customary Court of Appeal Law, Cap. 41, Laws of Rivers State of Nigeria, 1999.

⁴ The “word” is always interpreted disjunctively, see *Arubo v. Aiyeleru* [1993]3 NWLR (Pt.280)126, 141, *Military Gov. Lagos v. Adeyiga* [2012]5 NWLR (Pt.1293) 291 @ 318.

that the jurisdiction of the High Court of a State and that of the Customary Court of Appeal are not co-ordinate or identical because whilst the State High Court is a court of unlimited jurisdiction, the Customary Court of Appeal is a court of limited jurisdiction vested with power to hear appeals in civil proceedings involving questions of customary law only.¹

The conclusion to be drawn from the foregoing is that the High Court of a State and the Customary Court of Appeal of a State are completely distinct courts with different jurisdiction and membership. In *Ado v. Dije*², the main issue raised for determination by the Court of Appeal was whether Hon. Justice S.N. Wali, a Khadi (Judge) of the Sharia Court of Appeal, Kano was competent to sit as one of the Judges of the Kano State High Court while hearing appeals from the Area Court in the exercise of its appellate jurisdiction. The Court of Appeal in a unanimous judgment answered the above question in the negative and nullified the judgment delivered by the High Court of Kano State. The Court of Appeal held that the Kano State House of Assembly had no power to modify or alter the constitution or composition of members of any of the courts established under the 1979 Constitution and that such power lied only with the National Assembly within the ambit of the provisions relating to constitutional amendment. Coker, J.C.A. (as he then was) who read the leading Judgment of the court stated at page 267 of the law reports as follows:

The 1979 Constitution of Nigeria prescribes in sections 234 and 235 for the establishment of the High Court of a state and the mode of appointment of its Judges and of their qualification. Similarly sections 240 and 241 of the same Constitution provides for the establishment and jurisdiction of a Sharia Court of Appeal of a state and the qualification for appointment of its members. The two courts are separate and distinct, with different jurisdiction and membership. A judge of the one is different from that of the other and its membership cannot be interchanged. It is only the constitution of the country which established both courts and prescribed the qualification of their members and jurisdiction, that could make a judge of one court sit in another but regrettably no such provision exist in the present Constitution.³

Although the above decision of the Court of Appeal was based on the provisions of the repealed 1979 Constitution, it is submitted that the decision applies with equal force to the 1999 Constitution (as amended) because sections 270, 271, 280 and 282 of the 1999 Constitution prescribing the constitution, membership and jurisdiction of the State High Court and Sharia Court of Appeal of a State respectively are *in pari materia* with sections 234, 235, 240 and 241 of the repealed Constitution of the Federal Republic of Nigeria 1979. Therefore, the *ratio decidendi* of the decision in *Ado v. Dije*⁴ constitutes binding precedent for the determination of a similar question under the 1999 Constitution.⁵

Thus, even if the Rivers State Customary Court of Appeal Law provides that the President of the Customary Court of Appeal shall continue to be a Judge of the High Court of Rivers State from where he was appointed to the Customary Court of Appeal bench, such provision will clearly be unconstitutional because the House of Assembly has no power to re-define the constitution or membership of the High Court of Rivers State as already prescribed under the 1999 Constitution (as amended). Karibi-Whyte J.CA (as he then was) put the matter beyond any dispute when he stated in his concurring judgment in *Ado's case* that since the "Constitution has provided for the constitution of the High Court in its original and appellate jurisdiction, it is not open to the state legislature to make any further provision in respect of the same subject matter."⁶

It is further submitted that a Judge of the High Court of a State cannot be "seconded" to the Customary Court of Appeal of that State because the two courts are distinct and separate. However, where a State High Court Judge accepts his appointment to the Customary Court of Appeal of the State, he will cease to be a Judge of the State High Court at least from the day he takes the judicial oath prescribed in the Seventh Schedule to the 1999 Constitution (as amended).

The distinctiveness and separateness of the High Court of a State and the Customary Court of Appeal of the State have also been pronounced upon in the judgment of the Benue High Court delivered by Tur, J., in *Chieshe v. The Customary Court of Appeal, Benue State*.⁷ The court considered the question whether the High Court of Benue State and the Customary Court of Appeal of Benue State were courts of co-ordinate jurisdiction under the

¹ S. 282(1) of the 1999 Constitution; s. 2 (1) of the Rivers State Customary Court of Appeal Law, Cap. 41, Laws of Rivers State of Nigeria 1999; *Okhae v. Governor, Bendel State* [1990] 4 N. W. L. R. (Pt. 144) 327, 376; See *Chieshe v The Customary Court of Appeal Benue State* [2000]7 NCLR (Pt.1) 171 @ 180; *Golok v. Diyalpwan* [1990] 3 N. W. L. R. (PT. 139) 411 @ 418; *C. C. A, Edo State v. Aguele* [2006] 12 NWLR (PT. 995) 545, 564-5.

² [1984]5 NCLR 260 @ 267.

³ *Ado's case* (n14) 267; The Supreme Court delivered a similar decision in *Olawoyin v. Police* [1961] ANLR 213 @ 225-226

⁴ *Ado's case* (n14).

⁵ See *Nwobodo v. Onoh* [1984]1 SCNLR 1 @ 25; *Okon v. State* (1988)2 SC (Pt.1) 140 @ 155-156.

⁶ *Ado's case* (n14) 280.

⁷ (2000)7 NCLR (pt.1) 171 @ 186-7

Constitution of the Federal Republic of Nigeria 1979. The court examined the ranking of the superior courts of records as listed under s.6 (5) of the 1979 Constitution and concluded that the High Court of a State was not of the same rank with the Customary Court of Appeal of a State. At pages 186-187 of the Law Reports Tur, J. stated thus:

Thus the Supreme Court is the apex court of the land. Among the superior courts in Nigeria the Customary Court of Appeal is listed last. The framers of the Constitution knew why it was so listed...The highest genus among the superior courts of record in Nigeria is the Supreme Court and the lowest is the Customary Court of Appeal. At the state level the highest is the High Court and the lowest is still the Customary Court of Appeal.

Continuing, His Lordship concluded at p. 187 of the Law Reports thus:

From the above analysis it can be seen that the High Court is not of equal rank, order or degree with the Customary Court of Appeal in a State. Not being empowered to deal with customary law questions on appeal the High Court does not possess coordinate or concurrent jurisdiction with the Customary Court of Appeal. Even the manner the two courts are listed in the Constitution of the Federal Republic of Nigeria 1979 (and 1999) shows that the High Court comes before the Customary Court of Appeal. The Customary Court of Appeal cannot take precedence over the High Court either in its original or appellate jurisdiction. That was never contemplated by the framers of the constitution. That is why the issues that the High Court can adjudicate upon are quite separate and distinct.

The above was the settled position of the law when the former Governor of Rivers State, Rt. Hon. Chibuike Rotimi Amaechi purportedly appointed Hon. Justice P. N. C. Agumagu as the Acting Chief Judge of Rivers State notwithstanding the fact that Hon. Justice P. N. C. Agumagu was at the material time the President of the Rivers State Customary Court of Appeal. The constitutionality of the said appointment was later challenged in *Goodhead & ors v. The Hon. Attorney-General of Rivers State*, a suit filed at the Federal High Court, Port Harcourt Judicial Division.¹ The plaintiffs in this suit challenged the constitutionality of the appointment of Hon. Justice P.N.C. Agumagu, P., as the Acting Chief Judge of Rivers State by the Governor of Rivers State on the ground that since Hon. Justice P.N.C. Agumagu, P., was the President of the Rivers State Customary Court of Appeal at all times material to the said purported appointment, he was not qualified to be so appointed. The Court, coram Lambo Akanbi, J., posed the following question at page 10 of the judgment:

Now the question is – who is my Noble Lord, the Hon. Justice P.N.C. Agumagu and where does he belong? Is he a Judge of the High Court of the State appointed pursuant to the provision of s.270(1) of the Constitution or a Judge of Customary Court of Appeal under section 280(1) of the Constitution?

After referring to the unchallenged evidence before the court that the Hon. Justice P.N.C. Agumagu was a Judge and indeed the President of the Rivers State Customary Court of Appeal and that his appointment to that office had neither been challenged nor nullified, the court held that the Constitution of the Federal Republic of Nigeria, 1999 has clearly demarcated the boundaries of the High Court of Rivers State and the Customary Court of Appeal of Rivers State and that the duty and function of one cannot be assumed by the other. At page 12 of the judgment, the learned trial Judge proceeded to answer the sole question he posed earlier as follows:

Thus the inevitable conclusion I have reached is that His Lordship, the Hon. Justice P.N.C. Agumagu is not qualified as a State High Court Judge hence he's not suitable and/or qualified to be appointed as Acting Chief Judge of the High Court of Rivers State.

We have argued earlier that the Framers of the 1999 Constitution (as amended) could not have intended that a person who is disqualified from being appointed to the office of Chief Judge of a State in acting capacity should at the same time be qualified to be appointed to that same office in a substantive capacity. Based on this premise, it is submitted that this judgment effectively disqualified Hon. Justice P.N.C. Agumagu, from being appointed to the office of Chief Judge of Rivers State on the ground that he was not a Judge of the High Court of Rivers State. The argument that Hon. Justice P.N.C. Agumagu was the most senior Judge in the Rivers State Judiciary or High Court of Rivers State is simply misconceived because as shown earlier, he was not a Judge of the High Court of Rivers State at the time of his purported appointment. Rather, he was, at all time material to his purported appointment as Chief Judge of Rivers State, the President of the Rivers State Customary Court of Appeal which is a distinct and separate court from the High Court of Rivers State. It is therefore presumptive to rely on his purported seniority as the basis of his appointment to the office of Chief Judge of Rivers State.

¹ (Unreported) Suit No. FHC/PH/CS/358/2013 delivered on 19/02/2013

The position this paper has taken on the ineligibility of Hon. Justice P. N. C. Agumagu, P., to be appointed to the office of Chief Judge of Rivers State is contrary to the decision delivered by the Hon. Justice Lambo Akanbi J., of the Federal High Court, Port Harcourt Judicial Division in *Governor of Rivers State & ors v. National Judicial Council & anor.*,¹ where His Lordship held that there is no requirement under s. 271(1) of the 1999 Constitution (as amended) that only a serving Judge of the High Court of a State or the most senior Judge of the State High Court is eligible to be recommended by the National Judicial Council to the Governor of a State for appointment to the office of Chief Judge of a State. According to the learned trial Judge:

The provision of paragraph 21 of the 3rd Schedule to the Constitution does not empower the NJC to make its choice of nominee for the office of the Chief Judge of a State based on seniority of Judges of the High Court of Rivers State.²

On the specific question whether the Rivers State Judicial Service Commission was bound to nominate only Judges of the High Court of Rivers State to the National Judicial Council for recommendation to the Governor for appointment to the office of Chief Judge of Rivers State, the trial Judge held at page 59 of the judgment that the Constitution does not curtail or limit the power of the State Judicial Service Commission:

To choose only candidates from Rivers State High Court when performing its constitutional function in advising the 1st defendant on a suitable candidate. I find and hold that such suitable person of whom the 2nd plaintiff is to advise the 1st defendant must be persons who are suitable in the sense of being acceptable, accordant, adapted, agreeable, congruous, appropriate, becoming, conformable, consonant, eligible, fitting and proper for the purpose of the appointment as the Chief Judge of Rivers State and the candidate can come from a place other than the Rivers State High Court. This is my respectful view and I so hold.

Based on the above interpretation, the learned trial Judge concluded that Justice P.N.C. Agumagu, President of the Rivers State Customary Court of Appeal was qualified to be recommended by the National Judicial Council to the Governor of Rivers State for appointment to the office of Chief Judge of Rivers State. The learned trial Judge stated his conclusion at page 67 of his judgment:

Thus I agree with the submission of learned senior counsel for the plaintiffs that aside the foregoing requirement of qualification of a potential candidate as a legal practitioner with ten years post-call experience, there is no other requirement contained in the Constitution for a person vying to occupy the office of Chief Judge of a State. To this end, therefore, it is also not a requirement of the Constitution that the next most senior Judge of a High Court of a State must be the nominee recommended for appointment as the Chief Judge of a State neither, in my respectful view, is it the constitutional position that being the President of the Customary Court of Appeal of a State disqualifies such a person from recommendation for appointment into the office of Chief Judge of a State. Indeed, much as it is desirable, a nominee for appointment to the office of Chief Judge of a State need not be a Judge. All that the Constitution requires is that such nominee should be a legal practitioner in Nigeria and has so qualified for at least ten years.

It is submitted with greatest respect to the learned trial Judge that the interpretation he placed on relevant provisions of the 1999 Constitution (as amended) runs contrary to the principles and rules of constitutional interpretation which have been enunciated by the Supreme Court in several of its decisions some of which were cited by the learned trial Judge. In *Nafiu Rabiu v. State*,³ Hon. Sir Udo Udoma, J.S.C., emphasized that our written constitution is a sacred and organic instrument designed to serve not only the present generation, but also several generations yet unborn. Therefore, its interpretation by the courts calls for the exercise of a special jurisdiction and the courts must bear constantly in mind that the constitution is a “mechanism under which laws are to be made” and should not be equated with an ordinary Act of the National Assembly “which declares what the law is to be.”⁴

According to Sir Udo Udoma, J.S.C., the approach of the courts to the construction of the constitution should be “one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*.”⁵ Accordingly, it is not the duty of any “court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”⁶

¹ *Governor of Rivers State* (n1).

² *Governor of Rivers State* (n1) 62.

³ (1981)2 NCLR 293 @ 326-327.

⁴ *Rabiu's Case* (n23) 327 citing *The Bank of New South Wales v. The Commonwealth* (1947-1948) 76 CLR 1 @ 332.

⁵ This maxim means that “It is better for a thing to have effect than to be made void.”

⁶ *Rabiu's Case* (n23) 326

The above broad principles of constitutional interpretation have been restated by the Supreme Court in several decisions. In *Kalu v. Odili*,¹ it was held by the Supreme Court that given the status of the constitution as the supreme law of the land, an extra duty is imposed on the court in the exercise of its interpretative jurisdiction of ensuring that the words of the constitution are construed with liberalism and that a wider meaning of the words used in the constitution should be preferred to a narrower meaning in order to bring out their true intention. Thus, the 1999 Constitution is to be read together as a whole, carefully not disdainfully, so as to give every section its true meaning.²

These broad principles of constitutional interpretation were restated by Obaseki J.S.C., in *Attorney-General of Bendel State v. Attorney-General, Federation*,³ as twelve (12) guidelines to be observed in the interpretation of the constitution including other statutes:

- (1) Effect should be given to every word used in the Constitution.
- (2) A construction nullifying a specific clause in the Constitution will not be given unless absolutely required by the context.
- (3) A constitutional power cannot be used by way of condition to attain an unconstitutional result.
- (4) The language of the Constitution where clear and unambiguous must be given its plain evident meaning.
- (5) The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be severed from the rest of the Constitution.
- (6) While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed, can yield new and further import of its meaning.
- (7) A constitutional provision should not be construed so as to defeat its evident meaning
- (8) Under a constitution conferring specific powers, a particular power must be granted before it can be exercised.
- (9) Delegation by the National Assembly of its essential legislative functions is precluded by the Constitution.
- (10) Words are the common signs that mankind make use of to declare their intention one to another and when the words of a man express his intention plainly and distinctly and perfectly, there is no need to have recourse to any other means of interpretation.
- (11) The principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used measure the purpose and scope of its provisions.
- (12) Words of the constitution are therefore not to be read with stultifying narrowness.

In *Ishola v Ajiboye*,⁴ Ogundare, J.S.C., after adopting the 12 guidelines outlined above added 4 additional guidelines thus:

- (1) Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided.
- (2) Constitutional provisions dealing with the same subject are to be construed together.
- (3) Seemingly conflicting parts are to be harmonized if possible, so that effect can be given to all parts of the Constitution.
- (4) The position of an article or clause in a Constitution influences its construction.

These sixteen guidelines to be observed in the interpretation of our constitution were adopted by Mahmud Mohammed JSC (as he then was) in *Elelu-Habeeb v A.G. Federation*,⁵ in construing the provisions of the 1999 Constitution relating to the power of the National Judicial Council to participate in the process of removal of a Chief Judge of a State.

It is submitted that in accordance with the foregoing guidelines, s.271(1) of the 1999 Constitution dealing with the appointment of a person to the office of Chief Judge of a State in substantive capacity ought to be construed together with s.271(4) of the same Constitution dealing with appointment of a person as Acting Chief Judge of a State. The two sub-sections cannot be construed in isolation one from the other because they deal with the same office of Chief Judge of a State and both also appear in the same s. 271 of the Constitution. Construing s.271(1) and s.271(4) together implies that if there is any seeming conflict between the two sub-sections, the sub-sections are to be harmonized so that effect can be given to all parts of the Constitution.

¹ [1992]5 NWLR (PT.240) 130 @ 175-176.

² See also *A-G. Federation v. A-G. Abia State* [2001]11 NWLR (pt.725) 689 @ 736.

³ [1982]3 NCLR 1 @ 77-78

⁴ [1994]6 NWLR (Pt.352) 506 @ 559.

⁵ [2012] 13 N. W. L. R. (Pt. 1318) 423

Another reason for construing the two sub-sections together is to avoid a situation whereby the meaning to be placed on one subsection when construed independently or in isolation of the other results in absurdity in relation to the other subsection. This purposive and community reading of relevant provisions of the 1999 Constitution in order to ascertain the intention of the framers of the constitution was adopted by the Supreme Court in *Elelu-Habeeb v. A.G, Federation* in that although the case dealt specifically with the question whether the Governor of Kwara State could remove the State Chief Judge without the recommendation of the NJC, the Supreme Court considered not only the constitutional provisions dealing with the removal of a State Chief Judge but also those governing the appointment of Chief Judges and Judges of the State High Courts in order to ascertain the special role which the 1999 Constitution has assigned to the NJC in the entire process of appointment and removal of Chief Judges and Judges of State High Courts.¹

The case of *Okhae v. The Governor of Bendel State*² also demonstrates the application of the principle that all relevant constitutional provisions should be read together in order to ascertain the intention of the Framers of the Constitution. In this case, one of the issues for determination before the Court of Appeal was whether in view of s. 248 of the Constitution of the Federal Republic of Nigeria 1979, the Customary Court of Appeal of Bendel State could be properly constituted by a single Judge sitting to exercise appellate and supervisory jurisdiction in criminal causes and matters pursuant to the provisions of the Customary Court of Appeal Edict of Bendel State (No.16) of 1984. To be sure, s. 248 of the 1979 Constitution provided that “For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law a Customary Court of Appeal of a State shall be duly constituted if it consists of such number of Judges as may be prescribed by Law for a sitting of the court.” It was held by the Court of Appeal that although s. 248 of the 1979 Constitution was silent on the quorum of the Customary Court of Appeal of a State, the quorum of the court cannot be different from those of other appellate courts established under the Constitution which are properly constituted when sitting with more than a single Judge. Ogundare, J. C. A., (as he then was) who read the leading judgment of the court declared at page 366 of the Law Reports as follows:

As I have pointed out earlier in this judgment, a provision in a constitution cannot be read in isolation where such provision is qualified by some other considerations. . . . It is clear from sections 214, 226 and 243 that the Constitution intends that the superior appellate courts of record established by it be multi-member courts. Is it intended by enacting section 248 that the situation be different in the case of the Customary Court of Appeal? I cannot read such an intention in the Constitution.

In his own concurring judgment Ejiwunmi, J. C. A., (as he then was) dealt with this rule of construction of constitutional provisions at great length when he declared at page 382 of the Law Reports thus:

In my view, if the provisions of section 248 are considered in the light of the above principles, the first result of the exercise is that it is not permissible to consider its provisions in the abstract. It has to be considered as part of the entire scheme of the Constitution for the creation of appellate court for the hearing and determination of appeals from lower courts. It is clear that all appellate courts thereby created by the Constitution are fully constituted when sitting with more than a single Judge. The Customary Court of Appeal of a State should therefore not be an exception to the general scheme in the constitution wherein other appellate courts are duly constituted when sitting with more than a single Judge. True enough with regard to the Sharia Court of Appeal specific provisions were made in section 243 that the court is duly constituted if it consists of at least 2 Kadis of that court. In my view, the absence of similar provisions in section 248 ought not to be interpreted to mean that a single Judge could duly constitute a Customary Court of Appeal of a State. . . . To do so would in my view, mean the reading of the section with stultifying narrowness. The result would then be an alteration or departure from the purposes and object of the Constitution.

The learned trial Judge, with due respect, ignored the above cherished approach to the interpretation of the constitution when he opted to construe s. 271(1) of the 1999 Constitution in isolation and without reference to s.271 (4) of the same Constitution in spite of the fact that both sub-sections deal with the same subject-matter – office of Chief Judge of a State. This error on the part of the trial court is apparent from the observations of His Lordship contained at page 66 of the judgment that “We are in this case concerned with the appointment of a substantive Chief Judge of Rivers State and not the Acting Chief Judge.” And at page 67, the learned trial Judge further observed that, “it is noteworthy that under the Constitution different rules govern the appointment of a substantive Chief Judge and an Acting Chief Judge of a State. As the issue before me is not the appointment of

¹ *Elelu-Habeeb* (n31) 491.

² *Okhae's case* (n13) 382.

an Acting Chief Judge, I shall say no more in that regard but shall confine myself to the appointment of a substantive Chief Judge for Rivers State.”

While it is conceded that the subject-matter of the suit was the substantive office of Chief Judge of Rivers State the point being made is that sub-sections (1) and (4) of s.271 of the 1999 Constitution ought to have been construed together by the learned trial Judge in order to ascertain the true intention of the Framers of the Constitution. As the Supreme Court held in *Wilson v. A.-G., Bendel State*,¹ the provisions of a Statute including the constitution must be construed conjunctively and not disjunctively. This is the general rule of construction referred to as *construction ex visceribus actus* (meaning construction within the four corners of the Act). It is submitted that a combined reading of the s.271 (1) and (4) of the 1999 Constitution supports the position that the framers of the 1999 Constitution could not have intended to limit eligibility for appointment to the office of Acting Chief Judge of a State to the most senior Judge of the State High Court while throwing the door wide open to every person in respect of appointment to the office of Chief Judge of the State in substantive capacity.

In other words, since the Acting Chief Judge of a State is required to be the most senior Judge of the State High Court, there is no reason to suppose that the substantive Chief Judge of the State should be anything less. To argue otherwise is to create absurdity and patent inconsistency. The practice at the federal level relating to the appointments of Chief Justice of Nigeria, President of the Court of Appeal and Chief Judge of the Federal High Court which is based on seniority on the bench supports our position that the appointment of Chief Judge of a State must reflect a similar practice because the constitutional provisions governing these appointments are identical.²

As already argued, courts are required in the exercise of their interpretative jurisdiction to give constitutional provisions reasonable construction so as to avoid absurd consequences.³ It is for this reason that Coker, J. S. C., warned in *Shosimbo v. The State*⁴ that great care should be exercised “in arriving at momentous decisions which turn on the interpretation of the Constitution.” Clearly the learned trial Judge, with due respect, was wrong when he held that the 1999 Constitution (as amended) does not require the NJC to recommend only the most senior Judge of the State High Court to the Governor for appointment to the office of Chief Judge of the State and that Hon. Justice P.N.C. Agumagu, former President of the Rivers State Customary Court of Appeal, was qualified to be recommended by the NJC to the governor of Rivers State for appointment to the office of Chief Judge of Rivers State.

It is very arguable that the learned trial Judge interpreted s. 271(1) of the 1999 Constitution with stultifying narrowness. As one learned author puts it:

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. “An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.” Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction.⁵

The fact that similar appointments have been made in the past from outside the High Court of a State as pointed out by the learned trial Judge at page 69 of the Judgment offered no justification for the decision reached by the trial court. Clearly, one case of unconstitutionality cannot be rationalized by reference to previous acts of unconstitutionality, particularly where such previous acts were never subjected to judicial scrutiny.

Unarguably, the interpretation given by the learned trial Judge poses a grave danger to orderly succession to the office of Chief Judge of the State High Court in that it gives the State Judicial Service Commission and the Governor of the State the prerogative to recommend and/or appoint any Judge of the High Court of the State or indeed any Legal Practitioner who has attained 10 years post-call qualification to the office of Chief Judge of the State. The clear and present danger inherent in this position is that the appointment of the Chief Judge of a State will become highly politicized as the Governor of the State would prefer to appoint a stooge as the Chief Judge of the State who would readily take instructions from him in the discharge of his onerous judicial and administrative powers as the State Chief Judge. In this way, the independence and integrity of the Chief Judge as the head of the state judiciary will be easily compromised.

¹ [1985] 1 N. W. L. R. (Pt. 4) 572, 601.

² See sections 230, 231, 237, 238, 249, and 250 of the 1999 Constitution (as amended).

³ *Elelu-Habeeb* (n31) 490; *Ishola v. Ajiboye* (n30) 559.

⁴ (1974) 10 S. C. 91, 103

⁵ P. St. J. Langan, *Maxwell on The Interpretation of Statutes* (12th edition LexisNexis, New Delhi 2006) 199 citing *Artemiou v. Procopiou* [1966]1Q. B. 878 @ 888, per Danckwerts L. J., and *Luke v. I. R. C.* [1963] A. C. 557 @ 577, per Lord Reid.

Furthermore, the absence of an orderly and predictable system of succession to the office of Chief Judge of the State will encourage executive mindedness among Judges who may hope to earn the confidence of the Governor for the purpose of securing appointment to the office of Chief Judge of the State. It is also arguable that the absence of an orderly and predictable system of succession to the office of Chief Judge of the State will encourage unhealthy rivalry and acrimonious competition amongst Judges for appointment to the office of Chief Judge. The combination of these factors will destroy the brotherly bond amongst Judges and stymie the growth of a cohesive, strong and vibrant judiciary. A weak, docile and compromised judiciary poses more danger to society and the liberty of its citizenry than the assault of a rampaging army.

Finally, the interpretation runs contrary to the practice at the federal level where the appointment of the Chief Justice of Nigeria, President of the Court of Appeal and Chief Judge of the Federal High Court is predictably certain and devoid of political considerations and manipulations. Appointments to these offices are based strictly on seniority among serving Justices of the Supreme Court, Court of Appeal and Judges of the Federal High Court.¹ There is obviously no reason to justify a departure in the state judiciary.

PROCEDURE FOR APPOINTMENT OF THE CHIEF JUDGE OF A STATE

The resolution of the above question leads us to the consideration of the procedure for appointment of the Chief Judge of a State under s.271 (1) of the 1999 Constitution (as amended). We have already referred to s.271 (1) of the 1999 Constitution which provides as follows:

s.271(1): The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State.²

The above provision is to be read in conjunction with paragraph 21(c) of Part 1 of the Third Schedule to the 1999 Constitution which provides that the National Judicial Council shall have power to:

- (a) xxxxxxxxx
- (b) xxxxxxxxx
- (c) recommend to the Governors from among the list of persons submitted to it by the State Judicial Service Commissions persons for appointments to the offices of the Chief Judges of the States and Judges of the High Courts of the States, the Grand Kadis and Kadis of the Sharia Courts of Appeal of the States and Presidents and Judges of the Customary Courts of Appeal of the States.

Also relevant to the appointment of Chief Judge of a State is paragraph 6(a)(i) of Part II of the Third Schedule to the 1999 Constitution which provides that the State Judicial Service Commission shall have power to “advise the National Judicial Council on suitable persons for nominations to the office of the Chief Judge of the State.”

It is evident from the above plain and unambiguous provisions of the 1999 Constitution that the process of appointment of Chief Judge of a State involves the active participation of the three organs of government, namely the Judiciary (the State Judicial Service Commission and the National Judicial Council); the Executive (the Governor); and the Legislature (the State House of Assembly). Since the appointment of Chief Judge of a State involves a process which is consummated with the formal appointment under the hands of the State Governor, it is beyond any dispute that the 1999 Constitution does not vest the power of appointment of Chief Judge of a State solely in the Governor. On the contrary, the power of appointment of Chief Judge of a State is shared among the three organs of government in order to ensure checks and balances and avoid arbitrariness and abuse of power.

In *Elelu-Habeeb v. A.-G., Federation*³ it was held by the Supreme Court that by virtue of s.271 (1) and paragraph 21(c) and (d) of Part 1 of the Third Schedule to the 1999 Constitution, the National Judicial Council is vested with the duty and responsibility of recommending to the Governors of the States of the Federation suitable persons for appointments to the offices of Chief Judges of the States and other Judicial officers in the States. Mohammed, J.S.C., (as he then was) who delivered the leading judgment of the apex court underscored the tripartite scheme enshrined in the 1999 Constitution (as amended) for the appointment of Chief Judge of a State at page 493 of the Law Reports thus:

It can be seen here again, although the Governor of a State has been vested with the power to appoint the Chief Judge of his own State, that power is not absolute as the Governor has to share the power with the National Judicial Council in recommending suitable persons and the State House of Assembly in confirming the

¹ The last Chief Justice of Nigeria to be appointed from outside the Supreme Court Bench was the Hon. Justice T. O. Elias, C. J. N., who was appointed from the bar and the last Justice of the Supreme Court of Nigeria to be appointed straight from the Nigerian Bar was Hon. Justice Augustine Nnamani, J. S. C.

² Underlining supplied for emphasis.

³ *Elelu-Habeeb* (n31) 492-493.

appointment. It is in the spirit of the Constitution in ensuring checks and balances between the three arms of government that the role of the Governor in appointing and exercising disciplinary control over the Chief Judge of his State is subjected to the participation of the National Judicial Council and the House of Assembly of the State in the exercise to ensure transparency and observance of the Rule of Law.

The assignment of the power of appointment of Chief Judges and other judicial officers of the States to the State Governors under the 1999 Constitution may appear questionable at first sight not least because it raises the fear that the executive arm of government could interfere with the independence of the judiciary through the exercise of such enormous power. However, Nwabueze has provided a compelling justification for the vesting of the power of appointment of judicial officers in the executive. According to the erudite constitutional jurist:

The office of a Judge is a strategic one in the machinery of government, and in a country that professes democracy it might be argued that judicial appointments should depend on the consent of the people just as those of the legislature and the executive do. That is indeed the position in some States of the United States, where judges are elected directly by the people. But the office of a judge requires special qualifications and ability, which cannot adequately be judged by the electorate.¹

Continuing, Nwabueze notes that:

Given the unsuitability of the people as a body to appoint judges, it becomes important, if the requirements of democracy are to be adequately met, that the people's elected representatives in government should be actively associated in the process of appointment. The executive in particular has been chosen by the people and entrusted by them and by the constitution with full responsibility for the government of the country. Its responsibility for government requires that, except for those elected directly by the people, it should have an effective say in the appointment of all important functionaries of the state.²

The vesting of the power of appointment of judicial officers in the executive, therefore, derives from the notion that since the government of the state has been entrusted to the executive by popular vote in accordance with the constitution, the executive as the representative of the people, should be involved in the appointment of persons to be entrusted with the onerous task of administering justice in the name of the state. The same argument logically justifies the role assigned to the legislature under the constitution to confirm the appointments of judicial officers proposed by the executive before the same can take effect.

The tripartite scheme laid down in the 1999 Constitution (as amended) for the appointment of Chief Judge of a State requires strict compliance with certain pre-requisites which can be distilled from a community reading of s. 271, paragraph 21(c) of Part 1 of the Third Schedule and paragraph 6(a) (i) of Part II of the Third Schedule to the 1999 Constitution (as amended).

First, the State Judicial Service Commission submits a list of persons considered suitable for nomination to the office of Chief Judge of the State to the National Judicial Council for consideration. The role of the State Judicial Service Commission is to "advise" the National Judicial Council on the suitability of the nominees proposed on the list for appointment to the office of Chief Judge of the State.³ Therefore, the nominees on the list may be arranged in their order of preference by the State Judicial Service Commission. In practice, two nominees are usually proposed by the State Judicial Service Commission to the National Judicial Council for consideration for recommendation to the Governor. Given that the role of the State Judicial Service Commission is purely advisory, it is very arguable that the National Judicial Council is not bound to accept the preferred nominee of the State Judicial Service Commission for recommendation to the Governor although the National Judicial Council cannot recommend a person not proposed in the list submitted by the State Judicial Service Commission.

Secondly, the National Judicial Council considers the list of nominees submitted to it by the State Judicial Service Commission and recommends one person only from the said list to the Governor of the State for appointment to the office of Chief Judge of the State. Thus, unlike the State Judicial Service Commission that proposes at least two suitable nominees for consideration, the National Judicial Council on its part "does not send a list of preferred candidates for any single vacancy"⁴; it merely recommends one suitably qualified candidate to the Governor for appointment to the office of Chief Judge of the State. It is arguable that although

¹ See B.O. Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst & Company, London, 1982) 302.

² Nwabueze (n41) 302; See also Roberts-Wray, "The Independence of the Judiciary in Commonwealth Countries" in J. N. D. Anderson (ed), *Changing Law in Developing Countries* (George Allen & Unwin Ltd., London 1963) 67-68.

³ See paragraph 6(a) of Part II, Third Schedule to the 1999 Constitution (as amended).

⁴ B. M. Wifa, "The Independence of the Judiciary in the context of the Doctrine of Separation of Powers under The 1999 Constitution" Being Paper Presented at the July Monthly Meeting of the Nigerian Bar Association, Port Harcourt Branch (Port Harcourt, July 2014) 23.

the 1999 Constitution (as amended) does not require the National Judicial Council to consider the list submitted to it by the State Judicial Service Commission by reference to any particular criteria or material, the overriding consideration of the NJC is to recommend the most suitably qualified candidate to the State Governor for appointment to the office of Chief Judge of the State. In discharging its constitutional responsibility in this regard, it is expected that the National Judicial Council will give adequate consideration to relevant information on each nominee on the list including such matters as seniority on the bench, performance, integrity, comportment, and available security reports.¹

Thirdly, the Governor considers the recommendation of the National Judicial Council and if he accepts the recommendation, transmits the name of the candidate so recommended to the House of Assembly for confirmation before the appointment is made.

It is clear that the wording of s.271 (1) of the 1999 Constitution prescribing that the Governor shall appoint the Chief Judge of a state “on the recommendation of the National Judicial Council” contrasts with the wording of s.235 (1) of the 1979 Constitution which provided that the Governor shall appoint the Chief Judge “on the advice of the State Judicial Service Commission.” The difference between the language of s.271(1) of the 1999 Constitution and that of s.235(1) of the 1979 Constitution lies in the fact that under the 1999 Constitution and unlike the position under the 1979 Constitution, the Governor of a State is not bound to accept the recommendation of the National Judicial Council although he cannot himself, appoint a person not recommended by the National Judicial Council nor can he recommend to the National Judicial Council a person whom he wishes to be appointed to the office of Chief Judge of the State. Therefore, although the Governor is not bound by the recommendation of the National Judicial Council, he cannot appoint any person to the office of Chief Judge of the State without the prior recommendation of the National Council. In other words, the prior recommendation of the National Judicial Council constitutes a condition precedent to any valid appointment by the Governor.

Thus, the 1999 Constitution does not contemplate a unilateral appointment by the Governor of any person to the office of Chief Judge of a State of the Federation without the favourable recommendation of the NJC. The position has been well stated by Nwabueze when he noted that appointment by the President or Governor on the recommendation of the National Judicial Council does not:

Completely exclude a discretion in the president or governor. He cannot of course appoint a person who has not been recommended by the commission. The wording of the provision that ‘the appointment of a person to the office of judge... shall be made by the president (or Governor) on the recommendation of the Federal (or state) Judicial Service Commission makes it clear that a person must be favourably recommended before he can be appointed. But the president or governor is not bound to appoint a person on whom a favourable recommendation has been made. A binding recommendation is a contradiction in terms.²

The learned constitutional jurist then stated the option open to a Governor who wishes to reject the recommendation of the commission to appoint a particular person thus:

Where, however the president or governor turns down a person recommended by the commission, he cannot appoint someone else who has not been recommended at all.

He must ask the commission to recommend another person.³

It is submitted that based on the above interpretation of the phrase, “on the recommendation of the National Judicial Council,” in s. 271(1) of the 1999 Constitution (as amended), the Governor of Rivers State lacked the power to appoint Hon. Justice P.N.C. Agumagu to the office of Chief Judge of Rivers State without the prior recommendation of the National Judicial Council. It is immaterial that Hon. Justice P.N.C. Agumagu, P., was the preferred candidate on the list submitted by the Rivers State Judicial Service Commission to the National Judicial Council because the recommendation on which the governor’s appointment is required to be predicated under s. 271(1) of the 1999 Constitution is that made by the National Judicial Council, rather than the State Judicial Service Commission. Thus, the list submitted by the State Judicial Service Commission to the National

¹ See the National Judicial Policy, S.I. No.23 of 2013 which came into operation on 1st day of July, 2013; Code of Conduct for Judicial Officers of the Federal Republic of Nigeria; See generally, Justice Niki Tobi, “Code of Conduct and Professional Ethics for Judicial Officers in Nigeria” in J. O. Irukwu and Justice I. A. Umezulike (eds), *Judicial Excellence: Essays in Honour of Hon. Justice Anthony I. Iguh (J.S.C)* (Snaap Press Limited, Enugu 2004) 37, 39-83.

² Nwabueze (n 41) 303; See also the Hon. Justice A. O. Ejiwunmi, “Commentary” on the Paper delivered by the Hon. Justice Okay Achike titled “The Place of all Courts of Law in Nigeria Including Area Courts and Customary Courts under the Constitution” in All-Nigeria Judges’ Conference Papers 1993, Port Harcourt 15th -20th November, 1993 (Anatraco Limited, Lagos 1994) 25, 28; c/f *Stroud’s Judiciary Dictionary of Words and Phrases* (4th edn, Sweet & Maxwell, London 1974) 2287 for the opinion that “Recommendation” in a will implies a freedom to follow or not to follow; to accept or to reject the recommendation according to one’s own discretion.”

³ (Nwabueze (n41) 303(underlining supplied for emphasis)

Judicial Council while forming the basis of the recommendation of the National Judicial Council cannot form the foundation of the appointment to be made by the Governor under s.271(1) of the 1999 Constitution.

It is further submitted that the setting aside by the Federal High Court Port Harcourt of the recommendation of Hon. Justice Daisy Okocha, J., by the National Judicial Council to the Governor of Rivers State for appointment to the office of Chief Judge of Rivers State cannot be interpreted as paving the way for the Governor to appoint Hon. Justice P.N.C. Agumagu, P., to the office of Chief Judge of Rivers State without a fresh recommendation by the National Judicial Council.¹ This is particularly so since the learned trial Judge had declined to make any consequential order after setting aside the recommendation of the NJC to the Governor of Rivers State.

In any event, it is not for the court to recommend to the Governor of a State the person to be appointed to the office of Chief Judge of the State nor can the court direct the Governor of a State to appoint the preferred candidate of the State Judicial Service Commission. That duty is reserved exclusively to the National Judicial Council by the 1999 Constitution and cannot be usurped by the court.

It is submitted that the option open to the Governor of Rivers State following the judgment of the Federal High Court Port Harcourt was to direct the Rivers State Judicial Service Commission to send a fresh list of nominees to the National Judicial Council advising the latter of suitable persons to be considered for recommendation to the Governor. It is very arguable that by proceeding to appoint Hon. Justice P. N. C. Agumagu, P., without the recommendation of the NJC, the Governor clearly denied the council the vital role assigned to it by the constitution in the appointment of Chief Judge of the State and this taints the appointment with unconstitutionality. The 1999 Constitution will never give the NJC the right of participation in the appointment of Chief Judge of a State with “one hand and remove such right with another hand.”²

The rationale for vesting the National Judicial Council with the power of recommending to the Governors suitable persons for appointments to the offices of Chief Judges of the States of the federation is not farfetched. First, in the words of Mohammed, J.S.C., the arrangement is designed to ensure “checks and balances between the three arms of government” and thereby guarantee “transparency and observance of the rule of law.”³

Secondly, the active participation of the National Judicial Council in the appointment of Chief Judges and Judges of the High Courts of States of the federation is designed to guarantee the independence of the judiciary. To be sure, the independence of the judiciary which is the cornerstone of the rule of law demands that the judiciary should not be subservient or subordinated to the executive arm of government in terms of the appointment, discipline and removal of judicial officers. Judges are to dispense justice fairly and evenly to all parties appearing before them without fear of earning the displeasure of the executive or the temptation of seeking their favour. Lord Denning stated the concept of independence of the judiciary thus:

If I be right thus far— that recourse must be had to law – it follows as a necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused. This independence, I am proud to say, has been achieved in England. The judges for nearly 300 years now have been absolutely independent not only of government and of Ministers, but also of trade unions, of the press, and of the media. They will not be diverted from their duty by any extraneous influences; not by hope of reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges.⁴

According to Hon. Justice Oputa, the concept of independence of the judiciary implies the followings:

- i. That the decision of important and controversial cases and issues shall proceed on the basis of merit and principle rather than on the basis of expediency.
- ii. It means resisting the pressure of hysteria and fanaticism.
- iii. It is that ingredient which allows a judge to rise above passion, above public clamour and above the politics of the moment.
- iv. It insulates the judge from Executive and legislative violence and mob hysteria and violence.

¹ Governor of Rivers State (n1).

² *Elelu-Habeeb's case* (n31) per Adekeye, J.S.C. @ 521.

³ *Elelu-Habeeb's case* (n31) @ 493.

⁴ Rt. Hon. Lord Denning, *What Next in the Law* (Butterworth's, London 1982) 310, Nwabueze defined the concept of an independent judiciary as “implying; “first that the” powers exercised by the courts in the adjudication of disputes is independent of legislative and executive powers, so as to make it usurpation to attempt to exercise it either directly by legislation, as by a Bill of Attainder, or by vesting any part of it in a body which is not a court; secondly, that the personnel of the court are independent of the legislature and the executive as regards their appointment, removal and other conditions of service.” See B.O. Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publications, 1992) 23; See also Afe Babalola “Corruption, Democracy and Human, Rights in West Africa” in Ayo Olanrewaju and Basil Fawehinmi Biobaku (eds), *Afe Babalola, The Living Legend Vol. II* (Biographers Nigeria Limited, Ikeja 2008) 8 @ 25-26.

- v. Without judicial independence no judge, however brilliant and hardworking, however well prepared by qualities of heart, mind and professional training, can give full effect to the enduring values enshrined in the constitution or even do justice to justice.¹

It is submitted that the concept of independence of the judiciary has both subjective and objective elements. The subjective element relates to the personality and quality of the *judex*; his character, integrity, learning, and independence of mind. A judge who lacks learning, industry and integrity is less likely to be independent no matter the constitutional guarantee. This point was well made by Ade-Ajayi and Akinseye-George when they noted that:

It seems from Kayode Eso's performance in judicial office that the personal qualities of a judicial officer, that is, his learning, character and industry are the primary factors on which the independence of the judge largely depends. In other words, although a judge may be appointed under a defective constitutional arrangement, his independence and performance in judicial office will ultimately depend more on his personalities.²

The above view was also shared by Hon. Justice Oputa who posited that judicial independence will scarcely exist where the judge himself lacks the requisite measure of self-confidence. As the eminent jurist stated it, "if a judge merits his appointment he is more likely to have his own view and will not allow himself to be pushed about."³

The objective element of judicial independence relates to the constitutional and institutional prerequisites for insulating judges from the external influence of those who wield power. In this respect, the process of appointment, conditions of service, discipline, and removal of judges should be free from undue executive influence and manipulations. The rationale for this requirement according to Hon. Justice Kayode Eso is that:

A judge whose appointment has been so influenced by the Governor, might consider himself, or, at least, be so considered, by the public, to whom he should appear independent (and this is worse) to be answerable to his benefactor, the Governor.⁴

Arguably, if the process of appointment of a person to the office of Chief Judge of a State is characterized by needless executive influence and manipulations, the likelihood is that the Chief Judge will not only dance to the tune of the executive but will also yield himself to unimaginable external influence.

It is submitted that both the subjective and objective elements of judicial independence must coalesce in order to ensure a vibrant judiciary that can truly serve as the last hope of the common man. Sir Ivor Jennings stated it thus:

This indicates that the independence of the judges depends rather upon a general feeling that judges ought to be independent, and in particular upon the independent spirit of the legal profession, than upon the forms of the law, though the forms were useful in establishing the tradition and must be maintained to assist the maintenance of the tradition. The demand for judicial independence rests upon a belief that the judicial function demands impartiality.⁵

It is in order to preserve the independence of the judiciary in both the subjective and objective senses that the Framers of the 1999 Constitution (as amended) deliberately entrust the National Judicial Council with the exclusive power to recommend suitable persons to the State Governors for appointments as Chief Judges of the States of the federation. In order to guarantee the independence of the NJC in the discharge of this onerous duty, s. 158 (1) of the 1999 Constitution provides that in the exercise of its power to make recommendations for appointments or exercise disciplinary control over judicial officers, the NJC "shall not be subject to the direction or control of any other authority or person." In *Manuwa v. National Judicial Council*,⁶ the Court of Appeal held that the purport of s. 158 (1) of the 1999 Constitution is that the NJC shall remain independent and shall not be influenced by any person or authority while exercising its power to make appointments or exercise disciplinary control. According to the court, the independence of the NJC in respect of appointments starts from the point of recommendation to either the President or Governor as the case may be and during this process, no authority or person can interfere by giving directives or exercising any form of control over the council.

The vesting of this onerous power in the National Judicial Council can be justified on the ground that apart from

¹ See Hon. Chukwudifu Oputa, "The Independence of the Judiciary in a Democratic Society – Its Need, its Positive and Negative Aspects" in T.O. Elias and M.I. Jegede (eds) *Nigerian Essays in Jurisprudence* (MIJ Publishers Limited, Lagos 1993) 222, 230.

² See J.F. Ade-Ajayi and Yemi Akinseye-George, *Kayode Eso: The Making of a Judge* (Spectrum Books Limited Abuja 2002) 136.

³ Oputa (n52) 231;

⁴ See Kayode Eso, "Further Thoughts on law and Jurisprudence (Spectrum Law Publishing, Abuja 2003) 264.

⁵ Sir Ivor Jennings, *The Law and the Constitution* (fifth edn, The English Language Book Society, Kent 1979) 244-5.

⁶ [2013] 2 N. W. L. R. (Pt. 1337) 1 @ 24-6

the peculiar advantage which the council has by virtue of the caliber of its membership to assess the performance and industry of judges, the council is also seized of all relevant materials and information on all judicial officers and is placed in the best position to make informed recommendations to the State Governors. The peculiar advantage which the NJC has cannot avail a State Governor because the latter simply does not have the capacity to assess the performance, integrity and comportment of individual judges. It is obviously for these reasons that the recommendations of the National Judicial Council have generally been treated with the greatest respect by the executive until the recent crisis that erupted in Rivers State.

One is not by any means suggesting that the NJC should be a lord unto itself when performing its constitutional duty of recommending suitable candidates to State Governors for appointment as Chief Judges or while exercising disciplinary control over Judges. To be sure, the actions of the NJC are liable to judicial review by the courts in the exercise of their supervisory jurisdiction where the NJC exceeds its power or exercises it in a manner inconsistent with the relevant constitutional provisions. However, a court exercising its power of judicial review over a decision of the NJC which is sought to be impugned has no jurisdiction to substitute its own opinion for that of the NJC because it is not part of the purpose of judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. What the court is concerned with is the manner by which the decision being impugned was reached and not its merits or wisdom.¹

THE WAY FORWARD

In view of the unimaginable damage which the crisis in the Rivers State Judiciary had inflicted on the entire State, the need to forestall its reoccurrence has become imperative. While the crisis lasted, it was obvious that those who wielded power in the State had refused to place the corporate interest of the State above their personal interests and to uphold the constitution which they swore to protect.

Several proposals were made by different interest groups including the Nigerian Bar Association on how to resolve the crisis in the Rivers State Judiciary. It was even suggested by some commentators that the two contenders to the office of Chief Judge of Rivers State, namely Hon. Justice P. N. C. Agumagu, and Hon. Justice Daisy Okocha, Ag. C.J., should either be persuaded to retire voluntarily or forced to retire from the service of the Rivers State Judiciary in order to pave way for a new list of nominees to be sent by the Rivers State Judicial Service Commission to the National Judicial Service Council.

The drawback of the above proposal was that compulsory retirement of a judicial officer presupposes that the judicial officer in question has been found guilty of a misconduct which was not the case here. Furthermore, a new list of nominees could not be transmitted by the Rivers State Judicial Service Commission to the NJC until a new Chief Judge or at least, an acting Chief Judge was appointed because by the clear provision of paragraph 5(a) of Part II of the Third Schedule to the 1999 Constitution, the Chief Judge (and by logical extension, the Acting Chief Judge) is the chairman of the State Judicial Service Commission. The patent weakness of the above proposals clearly shows that the resolution of any similar crisis in future would not lie in any extra-constitutional option.

In its attempt to provide interim solution to the crisis, the NJC appointed Hon. Justice Daisy Okocha, J., to function as the “Administrative Judge”² of the High Court of Rivers State with the specific mandate to assign cases to Judges of the High Court of Rivers State and carry out other administrative functions necessary to keep the Rivers State Judiciary going. Thus, the essence of the appointment was to enable Judges to attend to the thousands of matters pending before them and allow new matters to be filed and assigned within the Port Harcourt Judicial Division of the High Court of Rivers State.³ However, this option also failed to provide the needed solution because of the threat issued by the Amaechi’s administration to sack any staff of the Rivers State Judiciary who recognized or took directives from Hon. Justice Daisy Okocha as the Administrative Judge of the High Court of Rivers State.

For the long term solution, there is need to re-examine the entire s. 271(1) and (4) of the 1999 Constitution (as amended) in the light of the crisis that engulfed the Rivers State Judiciary over the appointment of the Chief Judge of the State. It is humbly suggested that s. 271(1) of the 1999 Constitution should be amended to bring it in line with s. 271(4) of the self-same Constitution by prescribing that only the most senior Judge of the High Court of a State shall be recommended by the National Judicial Council (NJC) to the Governor of the State for appointment to the office of Chief Judge of the State. It must be noted that s. 271(4) of the 1999 Constitution does not confer any discretion on the NJC as to whether or not to recommend the most senior Judge of the State

¹ *Abdullahi v. Governor, Kano State* [2014] 16 N. W. L. R. (Pt. 1433) 213 @ 246; *Manuwa* (n57) 25.

² Every Judge or the most senior of the Judges sitting in a judicial division outside Port Harcourt is in a sense an “administrative judge” because he assigns cases filed in that division or causes them to be transferred to the Chief Judge for re-assignment in appropriate circumstances.

³ The Chief Judge or “Administrative Judge” is not required to assign cases to High Court Judges sitting outside the Port Harcourt Judicial Division except such cases are transferred matters.

for appointment as the Acting Chief Judge of the State. This is understandable because there is no reason to suppose that a serving Judge of the High Court of the State will be considered unfit or unsuitable by the NJC to occupy the office of the Acting Chief Judge of a State. The disciplinary power conferred on the NJC over Judges of the State Judiciary under paragraph 21(d) of Part I of the First Schedule to the 1999 Constitution enables it to deal with cases of indiscipline among judges. Accordingly, it can be said that any reason that would disqualify the most senior Judge from being appointed as Acting Chief Judge of a State would have disqualified him from continuing to serve on the High Court Bench in the first instance. Thus, it is difficult to fathom any circumstance that would disqualify a serving most senior Judge of the High Court of a State from being appointed as the Acting Chief Judge of the State.

It is submitted that the provision of section 271(4) of the 1999 Constitution relating to the appointment of the Acting Chief Judge of a State should be replicated for the appointment of the Chief Judge of a State and that the NJC should not possess any discretionary power as to whether or not to recommend the most senior Judge of the High Court of a State to the Governor for appointment as the Chief Judge of the State. It is very arguable that this proposal will enhance predictability and minimize politicization in the process of appointment of Chief Judge of a State. One cannot agree more with the Chief Justice of Nigeria, Hon. Justice Mahmud Mohammed, C. J. N. that:

The violation of the principle of checks and balances by the state governor in Rivers State as enshrined in the constitution for the appointment and discipline of erring chief judges or judges is equally unacceptable. Seniority is part and parcel of the legal profession. To just appoint a chief judge from any position without recourse to seniority arrangement is an invitation to anarchy in the system, just as we are witnessing in Rivers State.¹

It is also clear from the crisis in the Rivers State Judiciary the appointment of a State Chief Judge could create overt conflict between the recommending authority (NJC) and the appointing authority (State Governor). It was the irreconcilable positions taken by the NJC and the former Rivers State Governor that forced the later to appoint Hon. Justice P. N. C. Agumagu as the Chief Judge of Rivers State without the prior favourable recommendation of the former. In order to forestall such clash of authority in future, it is proposed that section 271(1) of the 1999 Constitution should be redrafted to prohibit any unilateral appointment of the Chief Judge of a State by the Governor without the prior recommendation of the National Judicial Commission. The proposed amended section 271(1) of the 1999 Constitution should read thus:

s. 271(1) Whenever the office of Chief Judge of a State becomes vacant, the Governor of the State shall appoint the most senior Judge of the High Court of the State as the Chief Judge of the State on the recommendation of the National Judicial Commission subject to confirmation of the appointment by the House of Assembly of the State:
Provided that under no circumstances shall the Governor of the State purport to appoint any person to the office of the Chief Judge of the State without the prior recommendation of the National Judicial Council.

CONCLUDING REMARKS

It is the view of this paper that the appointment of a person to the office of Chief Judge of a State is far too serious to be left to the absolute discretion and dictates of a State Governor. The NJC must be actively involved in the process of appointment and no appointment of a Chief Judge or Judge of the State High Court should be made by a governor without the prior recommendation of the NJC. The governor is not to dictate to the NJC who should be recommended to him for appointment as Chief Judge nor is he to determine the criteria to be used by the NJC in making its recommendation.

There is no doubt that the crisis in the Rivers State Judiciary seriously constrained “the legitimacy of effective democratic governance”² in the State whilst it lasted. In an emerging federal democracy like ours where the constitutionality of various executive and legislative actions requires to be tested in the court of law, no one could ever have imagined that the gates of the High Court of Justice could be sealed for upwards of one year without any genuine efforts by those in authority to resolve the impasse.

Needless to say that the crisis in the Rivers State encouraged resort to self-help and other forms of criminality which posed serious threats to the stability of our fledgling democracy. The Police cells throughout the State were filled with detainees who should have been arraigned before the courts. As the Police cells became completely over-stretched, the Police was constrained to decline to keep some suspects in their custody even in cases where such suspects would have been detained to safeguard the lives and properties of other Nigerians.

Nigerians and foreigners doing business in the State who suffered infraction of their legal rights were unable to seek redress in the court of law. The government of Rivers State also lost huge revenue from filing fees payable

¹ Adesomoju (n6).

² Wifa (n44) 25.

by litigants and applicants. Properties bequeathed by Wills were tied up because such Wills could not be read nor probate granted. Applicants for letters of administration were frustrated in their quest to obtain the needed legal authority from the court to manage the properties left behind by their deceased loved ones. Members of the legal profession were also thrown out of job as they could not represent their clients before the court.

Thus, the adverse impacts of the crisis in the Rivers State Judiciary on the state were palpably unimaginable. One thing is certain: the crisis had not only eroded public confidence in the capacity of the judiciary to continue to serve as the last hope of the common man but also compromised the security and welfare of the people which undoubtedly, are the primary purpose of government under s. 14(2)(b) of the 1999 Constitution.

The enormity of the adverse impacts of the crisis in Rivers State Judiciary on democratic governance in the State and the need to forestall its reoccurrence in any part of the federation underscore the imperativeness of an urgent constitutional amendment in the manner set out in this paper. It is hoped that the proposed amendment will remove the discretionary power which the former Governor of Rivers State purportedly exercised to the detriment of administration of justice in Rivers State.

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