

# **Developing a Permanent Solution to Frequent Face-offs among Stakeholders in the Process of Appointment of State Chief Judges in Nigeria**

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**By:**

**Dr. Musa Adamu Aliyu**  
**Honourable Attorney-General and Commissioner of Justice Jigawa State**  
**Ministry of Justice Jigawa State**  
**Block BQ4, Second Floor, New State Secretariat, Dutse Jigawa State**  
**[Msaliyu1977@gmail.com](mailto:Msaliyu1977@gmail.com)**

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## **Developing a Permanent Solution to Frequent Face-offs among Stakeholders in the Process of Appointment of State Chief Judges in Nigeria**

### *Abstract*

*This paper presents the challenges being encountered in the appointments of the State Chief Judges in Nigeria. The Office of the Chief Judge of the State is a strategic position in the judiciary of a State. In the appointment of a person to hold that sensitive post, there are inputs of critical stakeholders. It is the duty of the State Judicial Service Commission to nominate suitable persons and forward their names to the National Judicial Council for recommendation to the States' Governors for the appointments. Subsequent to the appointment is a confirmation of the nominee's appointment by the State Houses of Assembly. This paper has identified breach of the tradition of seniority and non-indigeneship of a State as the two major causes of misunderstanding among stakeholders in the appointment of State Chief Judges in Nigeria. Another challenge is bringing a judge outside State High Court to be appointed as State Chief Judge. The Constitution is clear about the criteria for the appointment of the Chief Judge of a State and the apex court ruled that the spirit of the Constitution stipulated checks and balances among the stakeholders in the process of appointing the Chief Judge of the State to ensure transparency and observance of the rule of law. This paper found that the Republic of Kenya had developed a merit-based system of appointment of their Chief Justice and it is the suggestion of this paper that the appointment of the State Chief Judge should be strictly merit-based and each of the stakeholders should be allowed to exercise its powers as provided in the Constitution.*

**Keywords: Appointment; Chief Judge of the State; Governors; National Judicial Council; State House of Assembly; Seniority**

### **Introduction**

There are 36 Chief Judges of the States in Nigeria and their appointment process commences at the States' Judicial Service Commissions which are bodies saddled with the responsibility of nominating candidates to be appointed substantive Chief Judges of the State. The list of nominees by the Commissions will be forwarded to the National Judicial Council, a recommendation body established by the Constitution (as amended) to recommend to the State Governors suitable person to be appointed as State Chief Judges from among the nominated list of the State Judicial Service Commission. It is the responsibility of the State Governors to appoint persons recommended by the National Judicial Council as State Chief Judges and the State House of Assemblies to confirm the appointments. In practice, it is the two most senior judges of the High Court of the States that are being nominated by the States' Judicial Service Commissions. It has been the tradition by the National Judicial Council to recommend the most senior judges of the States' High Courts as recommended Chief Judges for appointment by the State Governors and confirmation by the State Houses of Assemblies. The appointments of some States' Chief Judges had caused disagreements

and misunderstandings among the stakeholders. Currently, there is an impasse among stakeholders in the appointment of the Chief Judge of Gombe State. This paper has been divided into ten (10) parts and it has examined the constitutional provisions for the appointment of the State Chief Judge. In the paper examples of some face-offs in the appointment of the State Chief Judges have also been briefly stated. Seniority and indigeneship are the two major sources of misunderstanding among the stakeholders in the appointment of the State Chief Judges. In the paper, the Kenyan approach in the appointment of Chief Justice was cited as an example of good practice. The paper advocated sticking to the constitution and merit-based system as solutions to the challenge in the appointment of the State Chief Judges.

### **Office of Chief Judge of a State**

The office of a Chief Judge of a State is a creation of the Constitution (as amended). Each of the 36 States of the Federation shall have a Chief Judge for the State.<sup>1</sup> For a person to qualify to hold the office of the Chief Judge of a State, he must be a qualified legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.<sup>2</sup> The foregoing provision of the Constitution is clear that the two criteria a person must possess to be considered for appointment to the exalted office of Chief Judge of a State are to be a legal practitioner and to have a minimum of 10 years post-call. *“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.”*<sup>3</sup>

### **Extant Laws that Regulate Appointment of Chief Judge of the State**

The Laws that regulate the appointment of the Chief Judge of the State are the Constitution (as amended), the Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria, 2014 and National Judicial Council National Judicial Policy, 2016. Constitution is the grund-norm which provides for the general provisions for the appointment of Chief Judge of the State. It also listed the bodies and critical stakeholders involved in the appointment of the Head of Court. The stakeholders are the State Governor, State House of Assembly, the Judicial Service Commission and National Judicial Council.<sup>4</sup> The Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria, 2014 is also a guiding rule in the selection of Chief Judge of the State. In the guidelines step by step procedures for the appointment of Judicial officers have been provided. However, there are no specific provisions for the selection of Chief Judge of the State. In practice, part of the guidelines, most especially security vetting by the Department of

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<sup>1</sup> Section 270(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

<sup>2</sup> Section 271(3) of the Constitution (as amended).

<sup>3</sup> Section 271(1) of the Constitution (as amended).

<sup>4</sup> Section 271(1) of the Constitution (as amended) and Paragraph 5(a) of Part II of the Third Schedule to the Constitution (as amended).

State Service.<sup>5</sup> It is part of the National Judicial Council Policy in the appointment of Judicial Officers which include in the appointment of the Chief Judge that the selection is merit-based.<sup>6</sup>

### **National Judicial Council**

National Judicial Council is a Constitutional body established under Section 153(1),(i) of the Constitution (as amended). The composition and powers of the Federal Executive body have been provided in Part 1 of the Third Schedule to this Constitution.<sup>7</sup> The Council consist of the Chief Justice of Nigeria who serves as the Chairman of the body and 23 members of the Council.<sup>8</sup> Fourteen members of the Council are directly selected or appointed by the Chief Justice of Nigeria.<sup>9</sup> The Chief Justice of Nigeria has a role in the appointment of Ex-officio members of the Council because their appointment as Head of their Courts is being made based on the recommendation of the National Judicial Council.<sup>10</sup> It is also the responsibility of the Chief Justice of Nigeria to appoint five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria based on the recommendation of the National Executive Committee of the Nigerian Bar Association.<sup>11</sup>

The National Judicial Council, by Paragraph 21(c) of Part of the Third Schedule to the Constitution (as amended) has been empowered inter-alia to “*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...*” The Council, in exercising its power shall not be subject to the direction or control of any other authority or person.<sup>12</sup>

### **State Judicial Council**

State Judicial Council is an independent body created by the Constitution. The composition and powers of the body are, as stipulated in Part II of the Third Schedule to the Constitution.<sup>13</sup> The Commission consists of Chief Judge the State who is the Chairman and six (6) Members of the

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<sup>5</sup> Rule 4(2), (e) of the Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria, 2014

<sup>6</sup> Rule 2.1 of the National Judicial Council National Judicial Policy, 2016

<sup>7</sup> See Section 153(2) of the Constitution (as amended).

<sup>8</sup> Paragraph 20(a)-(j) of Part I to the Third Schedule of the Constitution (as amended).

<sup>9</sup> Paragraph 20(d), (f), (g), (h), and (j) of Part I to the Constitution (as amended).

<sup>10</sup> See Paragraph 20(b), (c), (e), (ee), (f), (g) and (h) of Part I to the Third Schedule of the Constitution (as amended); Section 231(2), 238(1), 250(1), 256(1), 261(1), 266(1), 271(1), and 276(1) and 281(1) of the Constitution (as amended).

<sup>11</sup> Paragraph 20(i) of Part I of the Third Schedule to the Constitution (as amended).

<sup>12</sup> Section 158(1) of the Constitution (as amended)

<sup>13</sup> Section 197 (1),(c) and (2) of the Constitution (as amended).

body.<sup>14</sup> The five members of the Commission are appointed by the State Governors and subject to the confirmation by the State House of Assembly.<sup>15</sup>

The commission is a constitutional body responsible “to -- (a) advise the National Judicial Council on suitable persons for nomination to the office of -- (i) the Chief Judge of the State ... (b) subject to the provisions of this Constitution, to -recommend to the National Judicial Council the removal from office of the judicial officers specified in subparagraph (a) of this paragraph...”<sup>16</sup> It is also the powers of the State Judicial Service Commission “to appoint, dismiss and exercise disciplinary control over the Chief Registrar and Deputy Chief Registrar of the High Court, the Chief Registrars of the Sharia Court of Appeal and Customary Court of Appeal, magistrates, judges and members of Area Courts and Customary Courts and all other members of the staff of the judicial service of the State not otherwise specified in this Constitution.”<sup>17</sup> The Constitution has insulated the Members of the Commission in discharging their functions, “In exercising its power ... the State Judicial Service Commission shall not be subject to the direction and control of any other authority or person.”<sup>18</sup>

As Head of the High Court, the State Chief Judge has tremendous powers in regulating practice and procedure in High Court. “Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State.”<sup>19</sup>

From the foregoing, it can be discerned that the Chief Judge of a State is first among equals within the judges of the High Court of a State. He holds a strategic position and, he is the person responsible for the assignment of cases and deployment of the Judges of the High Court to judicial divisions in the state.<sup>20</sup>

### **Procedure for Appointment of Chief Judge of a State**

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.<sup>21</sup> In practice, the appointment of the Chief Judge of a State commences with the appointment of the most senior judge of the State High Court

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<sup>14</sup> Paragraph 5 (b) - (f) of Part II of the Third Schedule to the Constitution (as amended).  
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<sup>16</sup> Paragraph 6(a) - (b) of Part II of the Third Schedule to the Constitution (as amended).

<sup>17</sup> Paragraph 6(c) of Part II of the Third Schedule to the Constitution (as amended).

<sup>18</sup> Section 202 of the Constitution (as amended).

<sup>19</sup> Section 274 of the Constitution (as amended) and *Shagaya & Anor v. Ladan* (2018) LPELR – 44009 per Mustapha JCA at pp. 14-17, paras C-F.

<sup>20</sup> In 2018 the National Judicial Council had recommended compulsory retirement of “Justice Michael Goji of the High Court of Adamawa State...for refusing to proceed on transfer to the Mubi Judicial Division of the State High Court.” It was the Adamawa State Chief Judge who complaint of his misconduct. <https://www.premiumtimes.com> accessed on October, 30, 2021.

<sup>21</sup> Section 271(1) of the Constitution (as amended).

as Acting Chief Judge. The reason for this practice is that the process for appointment of substantive Chief Judge takes time and there is a need for the court to have a Head of the Court who also chairs the Judicial Service Commission. Section 271(4) of the Constitution (as amended) comes in to bridge the gap by empowering the State Governor to appoint the most senior Judge of the High Court to perform the functions of the Chief Judge in an acting capacity. The appointment of the Acting Chief Judge does not require the input of the National Judicial Council and State House of Assembly. However, *“Except on the recommendation of the National Judicial Council an appointment pursuant to subsection (4) of this section shall cease to have effect after the expiration of three months from the date of such appointment and the Governor shall not re-appoint a person whose appointment has lapsed.”*<sup>22</sup>

Usually, it is during the period of the Acting appointment of Chief Judge of a State the processes for the appointment are completed. In practice, the names of the two most senior judges of the High Court which include the Acting Chief Judge are shortlisted in a meeting of the State Judicial Service Commission. The shortlist is being circulated to the retired Chief Judge and Nigerian Bar Association in the state for their comments. In addition to that, the names of the shortlisted candidates will also be submitted to State Security Service for security vetting. The comments and the security report together with the minutes of the State Judicial Service Commission on the appointment will then be forwarded to the National Judicial Council. The meeting of the State Judicial Service Commission which nominates the two candidates is usually chaired either by Grand Kadi or President of the Customary Court of Appeal or Attorney-General of the State as pro-tempore Chairman. The practice of who chairs the meeting varies from one state to another. However, based on the provision of Paragraph 5(b) of Part II of the Third Schedule to the Constitution, it is the opinion of this writer, the Attorney-General of the State is supposed to chair the meeting. In the list of members of the State Judicial Service Commission, the name of the State Attorney-General is ranked next to the Chairman of the Commission. In other words, he may be considered as Deputy Chairman of the Commission.

However, in practice, the National Judicial Council is interviewing the two names nominated by the State Judicial Service Commission and it has been the norm for the most senior nominated High Court Judge to be selected by the Council and recommend him for appointment to the State Governor. On receipt of the recommendation of the National Judicial Council, the State Governor will appoint the recommended person as substantive Chief Judge and forward his name to the State House of Assembly for confirmation in line with Section 271(1) of the Constitution (as amended). Confirmation by the State House of Assembly is second to the last step in the appointment of substantive Chief of the State. The moment the State House of Assembly confirms the appointment, the person confirmed by the State House of Assembly will be sworn in by the State Governor.<sup>23</sup>

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<sup>22</sup> Section 271(4) of the Constitution (as amended).

<sup>23</sup> The swearing in of the Substantive Chief Judge is usually administered by the State Attorney-General in the presence of the State Governor. The substantive Chief Judge subscribes to the Oath of Allegiance and Judicial Oath as contained in Seventh Schedule to the Constitution (as amended).

## Cases of Face-offs

There are cases of disagreement in the appointment of Substantive Chief Judges among stakeholders in Nigeria. In almost all the six geo-geo-political zones in the country, there were such cases. In the North-West, in Kano and Kebbi States there were disagreements as to who was supposed to be appointed substantive Chief Judges in the States.<sup>24</sup> In the South-west there was the case of appointment of Substantive Chief Judge of Osun State.<sup>25</sup> The tussle in the appointment of Chief Judges of Cross River and Rivers State are examples of face-offs from the South-South geopolitical zone.<sup>26</sup> And there is a lingering crisis in Gombe State, a State in the North-East.<sup>27</sup> The foregoing cases are examples of misunderstanding among stakeholders in the appointment of Chief Judges of the State.

On careful perusal of the above examples, one clear fact is clear is that the misunderstandings stem from the issue of seniority, indigeneship and bringing a person outside the state High Court of the State to become substantive Chief Judge. The position of the law in the appointment of the Chief judge is clear. Section 271(1) of the Constitution has provided the requirements – being a legal practitioner with 10 years post-call are the post-call qualification. The Extant Revised NJC Guidelines for the Appointment & Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria, 2014 is silent on the appointment of Heads of Court. There is also a gap concerning the appointment of Heads of Court in the NJC National Judicial Policy, 2016. However, it may be argued that the Policy contemplates a merit-based system in the selection of all Judicial Officers which include the Chief Judges of the State.<sup>28</sup>

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<sup>24</sup> Sani, Abubakar D. (2018, June 12) 'Are Non-Indigenes In-eligible for Appointment as State Chief Judge. *Thisday-Newspaper*. <https://www.pressreader.com/nigeria/thisday/20180612/281865824175759> accessed on 13<sup>th</sup> November, 2021; Nwachkuwu, John O. (2019, June 18) 'Kebbi: Governor Bagudu reveals why ex-acting Chief Judge, Esther Karatu cannot be confirmed.' *Daily Post*. <https://dailypost.ng/2019/06/18/kebbi-governor-bagudu-reveals-ex-acting-chief-judge-esther-karatu-can-not-confirmed/> accessed on 13<sup>th</sup> November, 2021.

<sup>25</sup> Daniel, S. (2012, October 19). 'Osun CJ's nomination crisis deepens.' *Vanguard*. <https://www.vanguardngr.com/2012/10/osun-cjs-nomination-crisis-deepens/>. accessed 13<sup>th</sup> November, 2021.

<sup>26</sup> Adangor, Z. (2015). *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*. vol of journal. 62-79. <https://www.researchgate.net/publication/331684942>. accessed 13<sup>th</sup> November, 2021; Udemezue, Sylvester C. and Hameed, T. (2021) *Legitimate Confines of Powers of the National Judicial Council in Appointment of Substantive Chief Judges for States in Nigeria: Gombe State as a Case Study*. <https://papers.ssrn.com>. accessed 13<sup>th</sup> November, 2021; Adongor, Z. (March, 27 2021) NJC, Governors not Obligated to Recommend Most Senior as Chief Judge. *Thisday-Newspaper*. <https://www.thisdaylive.com/index.php/2021/03/27/njc-governors-not-obligated-to-recommend-most-senior-as-chief-judge/> accessed 13<sup>th</sup> November, 2021; Adegboruwa, E. (March, 16 2021) 'Cross-River Chief Judge and the heroes.' *The Guardian*. <https://guardian.ng/features/law/cross-river-chief-judge-and-the-heroes/> accessed 13<sup>th</sup> November, 2021.

<sup>27</sup> Gombe, Musa K. (September, 12 2020). 'Gombe Chief Judge: Why The Much Ado About Seniority?' *The Nigerian lawyer*. <https://thenigerianlawyer.com/gombe-chief-judge-why-the-much-ado-about-seniority/>. accessed 13<sup>th</sup> November, 2021; Saka, D. (December, 5 2020). 'Between Gov Inuwa Yahaya and Gombe Chief Judge.' *Vanguard*. <https://www.vanguardngr.com/2020/12/between-gov-inuwa-yahaya-and-gombe-chief-judge/>. accessed 13<sup>th</sup> November, 2021.

Seniority among judges is a deeply rooted tradition in the judiciary. Breach of seniority tradition hurts the sentiments of serving judges that is the argument being put forward by the proponent of sticking to seniority over competence in the appointment of judges which include Chief Judges generally.<sup>29</sup> According to the proponents of seniority in the appointment of judges, the Head of Court like the Chief Judge has the additional responsibility of discharging administrative functions. *“It can be reasonably presumed that the most-senior high court judge will be capable of handling their additional administrative duties.”*<sup>30</sup> Contrary to the above view there are people with a view that: *“The upshot of the above discussion is that more than the seniority it should be the merit which should be looked at and should be given preference in appointing judges to the Superior Courts. The credentials, legal acumen, and caliber should be made the basis of the appointments.”*<sup>31</sup> Chief Afe Babalola believes that *“The position of the Chief Justice of Nigeria is so important that it should not be based on promotion but strictly on merit.”*<sup>32</sup> A view with respect to the issue of seniority in the appointment of the State Chief Judge was expressed that *“...the Constitution has not reserved the office of the substantive CJ of any State in Nigeria for the most senior judge in the State, is seen in the constitutional provision for recommendation by the NJC before the actual appointment is made by the Governor.”*<sup>33</sup> In almost all the States where there were face-offs among stakeholders one of the points being put forward was the infraction of seniority tradition in the appointment of the State Chief Judges. The issue is apparent in Gombe, Kebbi, Cross River, Osun, and the Rivers States issues. This writer has the opinion that the merit-based appointment of the Chief Judge should be used over and above seniority.

Another issue that caused the disagreement in the appointment of the Chief State Chief is the issue of indigeneship. This issue was more pronounced in the impasse for the appointment of substantive Chief Judges of Abia and Cross River. An attempt was made to prevent Justice Akon Ikpeme the position of the substantive Chief Judge of Cross River on the ground that My Lord hails from the neighbouring Akwa Ibom State.<sup>34</sup> The same issue arose in Abia State when *“...the appointment of Justice Theresa Uzokwe...sparked resistance from the State House of Assembly and other stakeholders, because according to them, she hailed from Imo State, not Abia...”*<sup>35</sup> The Federal

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Rule 2.1.1 of the Policy provided that “It is a basic and fundamental aspect of the Judicial Policy that the judicial appointment process must be transparent and carefully designed appointment process is indispensable to an efficient and independent judiciary, able to command public confidence in the administration of justice and capable of promoting and protecting the rule of law and human rights.

<sup>29</sup> Naqvi, F. (August, 07 2021) ‘Picking Supreme Court judges and the seniority trap.’ *Geo News*. <https://www.geotv/latest/363958-picking-supreme-court-judges-and-the-seniority-trap>. accessed 13<sup>th</sup> November, 2021.

<sup>30</sup> Ibid.

<sup>31</sup> Pansota, Muhammad A. (September, 05 2021). ‘Judges appointments: Seniority vs merit.’ *Dawn*. <https://www.dawn.com/news/164447>. accessed 13<sup>th</sup> November, 2021.

<sup>32</sup> Ogunje, V. (April 15, 2021) ‘Babola Urges NJC to Appoint CJN by Merit, Not Seniority.’ *Thisday Newspaper*. <https://www.thisdaylive.com>. accessed 13<sup>th</sup> November, 2021.

<sup>33</sup> Egbe, R. (n d) ‘Battle over chief judge appointment.’ *OfCounsel Nigeria*. <https://ofcounselnigeria.com.ng/battle-over-chief-judge-appointment/> accessed 13<sup>th</sup> November, 2021.

<sup>34</sup> Daily Trust (March, 14 2020) ‘Why Ikpeme, Other Female Judges Were Denied Appointments.’ <https://www.dailytrust/why-ikpeme-other-females-judges-were-denied-appointments> accessed 13<sup>th</sup> November, 2021.

<sup>35</sup> Ibid.

Character guiding principles provide the meaning of indigene of a local government and state. “... *A married woman should continue to lay claim to her own state of origin for the purpose of the implementation of federal character at the national Level.*”<sup>36</sup> The NJC Guidelines for the Appointment of Superior Court Judges, 2014 provides that in shortlisting candidates for consideration in the judicial appointments, federal character or geographical spread where necessary should be applied without compromising the independence of the judiciary.<sup>37</sup> Professor Ernest Ojukwu was of the view that “... *I must make it clear that the Federal Character Commission regulation provides that a married woman shall continue to lay claim to her state of origin for the purpose of implementation of the federal character formulae at the national level. This position does not apply to appointments in a state...*”<sup>38</sup> The issue of indigeneship of a State when it comes to the appointment of the Chief Judge of a State is dicey, depending on the structure of the state. It is natural in a State that is heterogeneous for the issue to come up and where a non-indigene is nominated to become substantive Chief Judge. Usually, the issue of indigeneship in the appointment of Judicial Officers in a state is attached to the Senatorial District. Each state has three Senatorial Districts and the appointment of the Superior Judge is being done based on the Senatorial District. However, it is the opinion of this writer that any judge who is serving in another state which is not his state of origin should not be prevented to become substantive Chief Judge on the ground of indigeneship alone.

### **Why the Face-Offs?**

The reason for the face-offs is not clear. However, it will not be far-fetched, if it suggested that the interpretation of Section 271(1) of the Constitution (as amended), Paragraph 21(c) of Part I of the Third Schedule and Paragraph 6(a) - (b) of Part II of the Third Schedule to the Constitution (as amended). The National Judicial Council, being a recommendation body is considering its powers of recommendation as binding on the State Judicial Service Commission, the State Governors and the State Houses of Assembly. This line of reasoning has the support of the Supreme ‘s decision in *Elelu-Habeeb & Anor v. AG Federation & Ors* where the Apex Court held “...*that the National Judicial Council is the body that had been assigned 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 ... Going back to Section 271(1) of the 1999 Constitution, it is also glaringly clear that the National Judicial Council has been given a role to play in the appointment of Chief Judges of the States...*”<sup>39</sup>

Members of the State Judicial Service Commission might be considering themselves as persons that have the power to nominate a suitable candidate for the office of the Chief Judge of the State. It is after the nomination they will forward the nominee to the National Judicial Council for recommendation to the Governor. In exercising their powers, the Members of the State Judicial

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<sup>36</sup> See Column B of the Guiding Principles and Formulae For the Distribution of Posts in the Public Service.

<sup>37</sup> Rule 3 Sub rule 6(iv) of the NJC Guidelines, 2014.

<sup>38</sup> Dailytrust, Op.Cit.,

<sup>39</sup> (2012) LPELR - 15515 SC at pp. 69-70, paras D – F per Mahmud Mohammed JSC, (as he then was).

Service Commission are not under the control of any person or authority as provided in Section 202 of the Constitution (as amended). The State Governors and the Members of State House of Assembly might be considering their powers under Section 271(1) of the Constitution (as amended) as exclusive to them and other stakeholders should not interfere with their functions in the appointment of the State Chief Judges.

In practice, the State Governors, Members of State Houses of Assembly and the State Judicial Service Commission have working relationships. It will be difficult for the National Judicial Council to control them. And that might be the reason for disagreement with the Council in some of their decisions. Sometimes, there may be genuine reasons from their sides. Delicate local factors that Members of the National Judicial Council might not be aware of may influence the decisions of the State Judicial Service Commission, State Governors and State House of Assembly in declining to implement/accept the recommendation of the National Judicial Council.

### **Kenyan Approach in the Appointment of Chief Justice**

In Kenya, the process of appointment of the Chief Justice of Kenya is commenced by the issuance of a Notice of the vacancy in the office of the Chief Justice of Kenya.<sup>36</sup> Eligibility requirements of the office are being stated on the notice, and applicants are required to forward one hard copy of the completed Employment Application Form and attached necessary documents.<sup>37</sup> The Judicial Service Commission has 28 days to conclude the exercise of picking the suitable person whose name is to be submitted to the president for the appointment and ratification by the National Assembly. For transparency in the appointment of the Chief Justice of Kenya, the Judicial Service Commission is to constitute a selection committee of not less than five members. *“The function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.”*<sup>38</sup>

The selection of candidates to occupy the office of Chief Justice of Kenya is conducted publicly. The first Chief Justice of Kenya under the 2010 Constitution was Dr. Willy Mutunga. He was nominated for the exalted position after a round of public interviews. His appointment was made by President Mwai Kibaki and confirmed by Kenyan Parliament.<sup>39</sup> Mutunga, an academic, was appointed to the office from outside the judiciary.<sup>40</sup> Next person to be Chief Justice of Kenya after Willy Mutunga under the 2010 Constitution was Justice David Maraga.<sup>41</sup> Ten applicants were interviewed for the post, and Justice David Maraga of the Court of Appeal emerged best.<sup>42</sup> *“The presiding judge of the court (of appeal) in Kisumu scored 84 marks. He was closely followed by Supreme Court Judge Smokin Wanjala with 74 marks and US-based law professor Makau Mutua who garnered 70 marks. Other candidates interviewed were Supreme Court Judge Jackton Boma Ojwang, Court of Appeal judges Alnashir Visram and Roselyn Nambuye. Also on the list were High Court judge Aaron Ringera, ambassador Daniel Wambura, senior counsel Nzamba Kitonga, Lucy Wanja and Paul Kongani.”*<sup>43</sup>

In 2021, another Justice of the Court of Appeal emerged victorious as the best candidate out of ten applicants for the position.<sup>44</sup> Court of Appeal Judge Martha Koome was selected by the Judicial Service Commission. And her name was forwarded to President Uhuru Kenyatta to succeed former Chief Justice David Maraga.<sup>45</sup> Her lordship's appointment was confirmed by the National Assembly and sworn in by the President.<sup>46</sup> Screening of Applicants by the Judicial Service Commission and confirmation of successful candidate by the National Assembly are shown live on national television stations and other social media platforms.

### **Developing Solution to the Frequent Face-Offs in the Appointment of Chief Judge of the State**

The major stakeholders in the appointment of the State Chief Judges are the States' Judicial Service Commissions, National Judicial Council, State Governors and the State House of Assembly. The foregoing officials have subscribed to the Oaths of office and allegiance contained in the Seventh Schedule to the Constitution. Each of the stakeholders should confine himself within the stipulation of Section 271(1), Paragraph 21(c) of Part of the Third Schedule to the Constitution (as amended) and Paragraph 6(a),(i) of Part II of the Third Schedule to the Constitution (as amended). In exercising their powers of nomination, recommendation, appointment and confirmation of the candidate to the office of the State Chief Judge the stakeholders should have merit at the back of their minds. Members of the public should be taken along the process of selection and confirmation. By the provisions of Section 271(1), 158(1), 202, Paragraphs 21(c) of Part I and Paragraph 6(a),(i) of Part II of the Third Schedule to the Constitution (as amended) each of the Stakeholders has a role assigned to it by the Constitution. The Supreme Court in the Elelu-Habeeb's case the apex court stated that “... *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 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.*”<sup>40</sup>

Flowing from the above, even from the pronouncement of the Supreme Court checks and balance, transparency and observance of rule law has been contemplated by the Constitution in the appointment of the Chief Judges of the States. It is the opinion of this writer that the appointment of the State Chief Judges should be strictly merit-based. Kenya an African country and a commonwealth nation like Nigeria has been using a merit-based system in the selection of the Chief Justice of the country and the system has minimized rancour among judges and stakeholders. The system instils public confidence in the State Judiciary.

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<sup>40</sup> at p. 71, paras A-D per Mahmud Mohammed JSC (as he then was).

## **Conclusion/Suggestions**

There is no doubt the office of Chief Judges in the 36 States of the Federation is important in the administration of justice. The appointment processes are specially designed in the Constitution. The Executive, legislature and State Executive body established by the Constitution plays a vital role in the nomination, appointment and confirmation of the nominee Chief Judge of the State. However, the appointment and confirmation must be preceded by a recommendation from National Judicial Council, a Federal Executive body created by the Constitution. In practice, it is the two most senior judges of the High Court of the States that are being nominated by the States' Judicial Service Commissions. It has been the tradition by the National Judicial Council to recommend the most senior judges of the States' High Courts as recommended Chief Judges for appointment by the State Governors and confirmation by the State Houses of Assembly. The appointments of some States' Chief Judges had caused disagreements and misunderstandings among the stakeholders. Currently, there is an impasse among stakeholders in the appointment of the Chief Judge of Gombe State. This paper has identified infractions of the tradition of seniority and indigeneship as two causes of the disagreements among stakeholders in the appointment of the State Chief Judges. It is the suggestion of this paper that based on examples of some of the face-offs the Kenyan approach in the appointment of Chief Justice is a good practice for Nigeria to adopt. This paper suggests adherence to the Constitution and a merit-based system as solutions to the avoidable face-offs.

**Views Express in this paper are opinion of the writer. They do not represent the official perspective of the Jigawa State Government or Ministry of Justice Jigawa State.**