# A Legal Homily on Why the Office of the Chief Judge of a State Is Not an Exclusive Inheritance of the Most Senior Judge In the State

# (By Udems)

# BACKGROUND

# There is a 22 November 2020 news item titled, *“Hon. Justice Beatrice Iliya Petitions NJC, Says Exclusion of Her Name from List of Nominees for Gombe CJ Is an Injustice”,*[[1]](#endnote-1) followed by a related item, under the head, *“Any List for Gombe Chief Judge excluding Justice Beatrice Illiya’s name is in contravention of NJC Strict Directive – NBA President Reacts*”[[2]](#endnote-2). In her petition, Hon Justice Illiya had argued as follows, as reported by *TheNigeriaLawyer:*

*“My Lord, I humbly refer to my letter dated 22nd September, 2020 on the inaction of the Gombe State Judicial Service Commission (JSC) following the directive of the NJC for re-submission of the nomination for the appointment of substantive Chief Judge of Gombe State to do the right thing by including my name as the most senior judge of the Gombe State High Court of Justice in the list of nominees….I have been reliably informed that the JSC has sent a memo to the NJC re-submitting the names of Hon. Justice Muazu A. Pindiga and Hon. Justice Joseph Ahmed Awak for the appointment of the Chief Judge of Gombe State excluding my name as the most senior judge which is not in compliance with the directive of the NJC following its meeting on 11th August, 2020… I wish to state that the current re-nomination made by the JSC is in defiance to the directive earlier issued by the NJC on this matter….My Lord, the consideration of seniority as a factor to be borne in mind in appointing the substantive Heads of Court, has been the acceptable convention and in my case, there are no extenuating circumstances warranting departure from convention by the JSC except sheer injustice.”*

As reported by *BarristerNG,* the intervention of the NBA (Nigerian Bar Association) reads, in part:

***“The President of the Nigerian Bar Association, Olumide Akpata has declared that any List of Judges for Gombe Chief Judge excluding the most Senior Judge from the State, Justice Beatrice Iliya’s name is in contravention of NJC’s Strict directive….*** *The NBA President who was copied in the petition stated that he is very concerned about the development but is however hopeful that the NJC at its meeting on Monday would do the right thing and insist on the appointment of the most senior judge of the state…. The NBA President also stated that he has reached out to the Chairman of the NJC interview panel, Hon Justice Bode Rhodes-Vivour JSC and confirmed that the panel is in receipt of Justice Illiya’s Petition.”*

With the greatest respect to the NBA leadership, and with NO intentions at setting my humble self, nor at being, on a collision course with the highly respected NBA leadership, I am constrained to respectfully submit here, that I do not think the position taken by the leadership of the NBA in this matter, represents the true position of the rule of law or justice according to law; I shall explain in details, herein-below. Meanwhile, because of the crucial position the NBA occupies in society, as a significant defender of rule of law, it is reasonably expected, in all matters, and at all times, that the position of the NBA leadership should boldly illustrate the rule of law. This is in line with **Article/Section 3(11) of the Constitution of the Nigerian Bar Association, 2015,** which provides that *“The aims and objects of the Association shall be the:* ***Promotion and protection of the principles of the rule of law*** *and respect for the enforcement of fundamental rights, human rights, and people’s rights”.* As pointed out by **Oputa, JSC**,[[3]](#endnote-3) *“here in Nigeria even, under a Military Government, the law is no respecter of person, principalities, government or powers…”* In ***Governor of Ekiti State v. Fakiyesi,[[4]](#endnote-4)*** Nigeria’s Court of Appeal observed, and rightly, in my view, that *“If we are to keep our democracy, there must be only one commandment – thou shall not ration justice.”* As I shall explain shortly, I understand “justice” to mean justice according to the nature, purport, and application of the rule of law, as enshrined in the Constitution, and in line with the intentions of the framers of the Constitution, no matter whose ox is gored.

1. **Nature and Application of Rule of Law**

The Black`s Law Dictionary defines rule of law as the doctrine that every person is subject to the ordinary law within the jurisdiction.[[5]](#endnote-5) Rule of law is the predominance that is absolute of an ordinary law over every citizen and institution regardless of status, position, power. Much of the content of the rule of law can be summed up in two points, one of which is “that the people (including, one should add, the government) should be ruled by the law and obey it.[[6]](#endnote-6) Rule of law requires that all persons and organizations including governments and government officials (such as Governors and the most senior judges) are subject, and accountable to, ordinary laws of the land. On its part, the Supreme Court of Nigeria has repeatedly emphasized that *“the Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. Nigeria, being one of the countries in the world which profess loudly to follow the rule of law, there is no room for the rule of self-help by force to operate*.”[[7]](#endnote-7) Also, as has been said, *“the rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised*.”[[8]](#endnote-8) Under a rule of law regime, in a constitutional democracy, justice must be done according to the dictates of rule of law and the constitution of the land, and not vice versa. Any violation of rule of law or the supremacy of the constitution is injustice or a desecration of justice. The case of ***AP v Owodunni[[9]](#endnote-9)*** further illustrates the principle that justice or injustice must be measured by the lens of what is consistent with law as laid down in a society. Acknowledging that the law is an ass, the Supreme Court of Nigeria, in that case, had declared as follows:

*“But, once more the plaintiff must fail again because of its failure to serve correct and proper notices.* ***This is sad. The law, it has been said, is an ass. And the unruly ass must keep galloping along so long as litigants refuse to follow simple rules clearly laid down by statute. This is of the very nature of justice according to law:*** *and the courts must take the blame! Be that as it may, the two courts below were right to have held the defendant's tenancy had not been determined according to law, and that the defendant would remain in possession until that is done.”*

1. **Matters Arising from Gombe**
2. **Is a Governor Obliged to Appoint the Most Senior Judge in the State as The Substantive Chief Judge of the State?** ▪️Section 271(4) of the Constitution of the Federal Republic of Nigeria, 1999, provides:

*“If the office of Chief Judge of a State is vacant or if the person holding the office is for any person 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 the State shall appoint the most senior Judge of the High Court to perform those functions”*.

1. **Does the most senior judge in a state have an exclusive right to be appointed the CJ of the State, in view of section 271(4) CFRN, 1999?** From the petition by Hon Justice, Illiya, it appears her lordship`s contention is founded on two major grounds:
2. That there is a subsisting directive of the National Judicial Council (NJC), following after the NJC meeting of 11 August 2020, instructing that the name of the most senior judge of the Gombe State High Court of Justice must be included in the list of nominees for appointment as the Chief Judge (CJ) of the State; and
3. That in appointing the substantive Heads of Court, it has been the acceptable convention to appointment the most senior, and therefore, that *“in my own case, there are no extenuating circumstances warranting departure from convention”.*

In its statement, condemning the non-inclusion of the name of the most senior judge in Gombe State, and advising the NJC to “do the needful”, the NBA confirmed Justice Illiya`s claim that there was/is indeed an NJC directive that a list of nominees for appointment into such position must include the name of the most senior judicial officer in the State. However, assuming this is the true position, and suppose one takes the respectful view that the true purport of section 271(4) of the Constitution is that the most senor judicial officer need not be appointed, the question thrown up is as to whether the NJC Directive should be regarded as ranking above the Constitution of the Federal Republic of Nigeria, 1999. Section 1(3) CFRN,1999 provides:

*“any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void”.*

1. **What is the Most Appropriate Interpretation of Section 271(4) of the Constitution?** From the words used by its framers, it is obvious that the intention of the Constitution is that ***“until a person has been appointed to and has assumed the functions of”*** of the office of the substantive Chief Judge of a State, *the Governor of the State shall appoint the most senior Judge of the High Court”* to be the Acting Chief Judge of the State. Mr. Zaccheaus Adangor,[[10]](#endnote-10) a Senior Lecturer in the Department of Public Law, Faculty of Law, Rivers State University, Port Harcourt, Nigeria, has put forward the following argument in support of appointment of the most senior judicial officer as the substantive CJ of a state:

*“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.”*

However, in my respectful view, the submission of my respected learned friend appears grossly flawed; with due respect to the respected gentleman, the language of the constitution leaves no one in doubt as to the true intentions of the framers. In interpreting provisions of the Constitution or statute, we have a paramount duty to try objectively to decipher the true intention of the legislature or the *Mens legis[[11]](#endnote-11)* which is a Latin term meaning *“the mind of the law;”* the purpose, spirit or intention of a law or the laws in general. Our duty, and the duty of the courts, in this wise, is that of objectively determining the legislative intention with guidance, furnished by accepted principles.[[12]](#endnote-12) The first step is to look inwards, within the statute, to find out the meaning intended by the makers of the statute, interpretation being the process of ascertaining the true meaning of the words used in a statute, based on the intentions of the legislature as conveyed expressly or impliedly in the language used. I will now refer to my statement in a yet-to be-published, although accepted for publication, journal article, written by me:

*“The “Noscitur a sociis” Rule appears to be relevant here; it postulates that “words (used in a statute) have no meaning except in the context they are used.”[[13]](#endnote-13) …The meaning of an enactment must be ascertained from its text, in light of its purpose and in its context. The legislature must be taken in a statute to have said exactly what it means, and also to mean in a statute exactly what it has said therein. Although jurists may take the help of both the Rules or Canons of Interpretation as well as some Internal Aids and External Aids to the Rules in the interpretation of Statutes, it goes without saying that interpretation of a word or expression must depend on the text and the context. In* ***People v. Jefferson****,[[14]](#endnote-14) the* [*California Court of Appeals*](https://en.wikipedia.org/wiki/California_Court_of_Appeals)*, 4th District, USA, observed that the role of the courts “in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. According to the Court of Appeals of the US state of* [*Indiana*](https://en.wikipedia.org/wiki/Indiana_Court_of_Appeals)*, "the first and often last step in interpreting a statute is to examine the language of the statute"[[15]](#endnote-15)As one writer puts it, “ statutory test should be both the ending point as well as the starting point for interpretation.”[[16]](#endnote-16) This is because, words are the skin of the language, while language is the medium of expressing the object that a particular provision or the Act seeks to achieve. In other words, to find the real intentions of the drafters of a statute, regard must be had to the context, subject-matter and object of the statutory provision in question. Courts and jurists achieve this by carefully analyzing the whole scope and provisions of the statute or section relating to the word or phrase under consideration.[[17]](#endnote-17) Though schools of statutory interpretation vary on what factors should be considered, all approaches to statutory interpretation start (if not necessarily end) with the language and structure of the statute itself.[[18]](#endnote-18) This is because the language and provisions of a statute are the most reliable indicator of the intent of the makers of the statute.[[19]](#endnote-19)*

Second, it is submitted that learned Law Teacher Adangor failed to ask relevant questions and to provide apposite answers, based on relevant principles and rules of statutory interpretation. The literal rule is apt here; where the words used are clear, the ordinary meaning must be preserved. Under **the literal rule**,[[20]](#endnote-20) the words of the **statute** are given their natural or ordinary **meaning** and applied without the judge seeking to put a gloss on the words or seek to make sense of the **statute**. Although the golden rule[[21]](#endnote-21) of statutory interpretation (requiring the application of a secondary meaning) may be applied where an application of the literal rule would lead to an absurdity,[[22]](#endnote-22) as I shall show shortly, there is absolutely NO absurdity that would or could result from the application of the literal rule, to warrant any resorting to the golden rule. Section 271(4) of the Constitution in very unambiguous language, states that ***“until a person has been appointed to and has assumed the functions of”*** of the office of the substantive Chief Judge of a State, ***the Governor of the State shall appoint the most senior Judge of the High Court”***, to act as the CJ.If the constitution had intended that the office of the substantive CJ of a State is reserved exclusively forthe most senior judicial officer in that state, there would not have been any need for the Constitution to have made any provisions for appointment of an “acting CJ” in-between the time the office becomes vacant and the time a substantive appointment is made. The fact that the Constitution provides that the most senior should be appointed to discharge the functions of that office pending the time “a person” is appointed as the substantive CJ, is a clear indication that the constitution does not intend that the most senior judge should automatically become, or be appointed, the substantive CJ. It also shows that the Constitution has left it entirely within the discretion of the Governor to appoint “a person”[[23]](#endnote-23) he pleases, from among the judges in the state, or even from among other suitably qualified persons/lawyers,[[24]](#endnote-24) to be the substantive CJ of the State. It is because the Constitution does not want a vacuum in leadership,[[25]](#endnote-25) that is why it provides for the most senior judge to discharge the functions of the CJ in an acting capacity, pending when the governor exercises his exclusive discretion, following due process to appoint a substantive Chief Judge (CJ).

Third, assuming the Constitution had intended the most senior judge to have an exclusive claim to that office, perhaps, section 271(4) would have been couched thus, or perhaps something close to that, so that no one is left in doubt that the most senior must step into the office any time a vacancy occurs (although, and happily,[[26]](#endnote-26) this is not the case):

*“If the office of Chief Judge of a State is vacant, the Governor of the State shall appoint the most senior Judge of the High Court to perform those functions in a substantive capacity, and if the person holding the office is for any reason unable to perform the functions of the office, the Governor of the State cshall appoint the most senior Judge of the High Court to perform the functions of the office in an acting capacity, until the person holding the office has resumed those functions.”*

Fourth, another thing that makes it crystal clear 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. For God`s sake, why would the constitution require the NJC to do any “RECOMMENDING” if it is all so obvious that only one person (namely, the most senior judge in the state high court) is entitled exclusively to be appointed into the office in a substantive capacity? Contrary to my learned friend, Mr. Adangor`s use of the word, “absurd”, what I consider absurd is the constitution directing (happily, it does not so direct) that the NJC should do a recommendation to the Governor in a situation in which it is already clear that the Governor has an obligation to appoint only the most senior judge as the substantive CJ. The requirement for an NJC recommendation implies that several names may be sent to the NJC, from among which, the NJC may recommend one or more, for such an appointment; if the office of the substantive CJ of the state is reserved as a birthright exclusively for the most senior judge in the state, there would have been no need for any such NJC recommendation because the governor already knows what he must do as a matter of obligation, having no choice in the circumstances. Mandamus may even lie against the Governor if he fails to appoint the most senior judge as the substantive CJ, as soon as the office become vacant, mandamus being *“a writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, municipal corporation, or individual, to perform, or refrain from performing, a particular act, the performance of which is required by law as an obligation*.[[27]](#endnote-27)

1. **The Language of the provisions of section 271(4) of the Constitution Is A Blessing in Disguise.**

Finally, may I respectfully submit that the decision of the framers of the Nigerian Constitution to not make the situation too rigid by reserving the office of the substantive CJ of a State for the most senior judge in the state high court, is most reasonable and highly commendable, in view of the serious complications a contrary scenario would have caused under such the circumstances. Imagine what would happen if the Constitution had provided that, in the case of vacancy in the office of the CJ of a State, the Governor of the state **must** appoint the most senior judge in the State as the substantive CJ! What if under such a situation it is reasonably discovered at the time of such vacancy, that the person who occupies the office of the “most senior judge in the state high court” does not possess the requisite integrity for appointment as the substantive CJ, or has so soiled his or her hands that it is so obvious that he or she is not, at least in the eyes of reasonable bystanders, a “fit and proper person” for appointment into that office? Besides, what if at or prior to the material time, the most senior judge is already facing some investigation over allegations of professional misconduct, breach of the Code of Conduct or over (weighty) allegations of corruption or commission of some other criminal offence? The list is endless, of such other circumstances that would or could render the most senior judge reasonably “unfit for the office”.

What would be the way out? Of course, under such circumstances, the Governor has no choice but to appoint the most senior judge in the state (the same person whose name, reputation and integrity are already soiled) into the office of the substantive CJ of the state, since such is the strict requirement of the law, which leaves the governor with no discretion in the circumstances. Yes, the governor has an enforceable obligation to appoint the most senior judge, no matter the circumstances, because the governor`s hands are tied under the circumstances. Is that not a real absurd situation? And do not tell me that the governor is entitled, under such circumstances, to unilaterally bypass the most senior judge, and select the next most senior judge, because, and I so submit, that would not work; no matter the gravity or number of allegations against the current most senior judge, and no matter whatever investigations or charges he is already facing, the law is that he is presumed innocent unless and until his guilt or liability is proven before a court of law.

Accordingly, any attempt to deny such a person what is already his exclusive birthright, merely on the basis of any such ongoing investigations, allegation or other indictment against him, which are yet to be proven before a court, may be set aside or struck down by a court of law, the same being a gross violation of his/her fundamental right. Under such circumstances, the correct position would be that, the most senior judge, being the only one entitled to be appointed as the substantive CJ, must necessarily be so appointed, in strict compliance with the clear wordings of the constitution. Did my learned friend not advert his mind to how absurd it could, indeed would, be to see a person carrying such (heavy) allegations bothering on corruption, misconduct or criminal offense, appointed the substantive CJ of a State, only because the law has tied the hands of the Governor and leaving no room for choice? Recall how the *“law is an ass”!*

A.V. Dicey's first postulation on the principle of rule of law was that *“no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”*.[[28]](#endnote-28) In ***Amaechi v. Independent National Electoral Commission*** (2008) 5 NWLR (Pt 1080), where Hon Rotimi Chibuike Amaechi, then the Governorship candidate, was replaced by his political party on the basis that he (Amaechi) had been indicted on allegations of corruption by Nigeria`s Economic & Financial Crimes Commission (EFCC),[[29]](#endnote-29) at a time no court of law had made an order disqualifying Amaechi from contesting the Governorship elections in his home state, Rivers. The Supreme Court of Nigeria took time to denounce in very strong terms, such an imposition of penalty, disqualification, persecution or other form of punishment or deprivation over alleged embezzlement or fraud solely on the basis of an indictment for corruption, contrary to Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999, which provides that an accused person is presumed innocent until found guilty in a court of law. Hear the Apex Court (per George Adesola Oguntade. J.S.C):

*“I say again that convictions for offences and imposition of penalties and punishments are matters appertaining exclusively to judicial power.   See Sokefun v. Akinyemi [1980] 5-7 S.C. (Reprint) 1; [1981] 1 NCLR 135; Garba v. University of Maiduguri [19861 1 NWLR (Pt. 18) 550. An indictment is no more than an accusation:   In Sokefun v. Akinyemi (supra) this court per Fatayi-Williams, CJN said at page 146 as follows: It seems to me that once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing. …The jurisdiction and authority of the courts of this country cannot be usurped by either the Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever….It is not a simple matter to find a citizen of Nigeria guilty of a criminal offence without first ensuring that he is given a fair trial before a Court of Law….It is simply impermissible under a civilized system of law to find a person guilty of a criminal offence without first affording him the opportunity of a trial before a court of law in the country. …Indeed, it is a subversion of the law and an unconcealed attempt to politicize the investigation and prosecution of criminal offences.”*

What is more? Reserving the office of the substantive Chief Judge of a State exclusively for the most senior judge in the state might wreak yet another serious havoc on the affected state, assume the constitution had ventured into making such an unwise decision. Imagine what would be the case where the most senior judge for whom the substantive office is reserved in any case of vacancy, happens to be bedridden and therefore indisposed to discharge the functions of that office, at a time such vacancy occurs! Sure, the Governor would have to appoint an acting CJ, pending when the most senior judge (whose exclusive birthright the office is) returns, but for how long? For how long would the Governor keep appoint an Ag CJ, at a quarterly interval? What if the most senior is, at the material time, and due to illness, imprisonment or other legal or physical incapacity, unable to perform the functions of that office, and so remains for the next two or three or four or more years? So, the governor must continue recycling Acting CJ`s, since only the “most senior serving judge” can be appointed as the substantive CJ? Sure, yes, because the most senior judge, although bedridden, no matter how long, is yet not dead nor retired or dismissed. Consequently, as such, although ill, and unable to discharge the duties of the office, he or she remains a serving judge, indeed the most senior, for whom the office of the substantive CJ is (as a matter of a legal obligation) exclusively reserved, the same being his/her exclusive birthright. If such a judge has the next ten years to retire and remains bedridden for the whole of the ten years, whoever is the governor must never appoint any substantive CJ, but only an Acting CJ, every three months, pending when the judge whose property the office is, returns. In this way, the State is unjustly denied the opportunity of having a substantive CJ for the whole of the ten years, only in a bid to respect, as a matter of obligation, the exclusive right of one man/woman, a right that the law says must be respected, because ***the law is an ass!*** What a huge absurdity! Such an unpleasant, detestable scenario could never have reasonably been in the contemplation of the makers of the Constitution; indeed, such would be a most illogical and unreasoning situation for the nation`s *grund norm* to have contemplated.

Happily, it was in an effort to avoid these possible/likely scenarios that might foist an irresoluble controversy or impasse upon a state, that the drafters of the Constitution had wisely left the decision as to who to be appointed into office as the substantive CJ of the State at the discretion of the State Governor, the power to be exercised after a recommendation by the NJC, made from among the list of names sent to the NJC.

1. **The National Judicial Policy**.[[30]](#endnote-30)

Paragraph 2.1.5 of National Judicial Policy**[[31]](#endnote-31)** provides that *“The Judicial Appointment Policy will ensure that lack of comparative seniority will not be an obstacle to the appointment of deserving candidates of palpable high standard of integrity and excellence.”* Paragraph **2.1.2 provides that *“****Every aspect of judicial appointment process should, therefore, be such as would command public respect and confidence that the best persons in terms of skill, learning, integrity and courage are appointed as Judicial Officers.”* Nowhere in the National Judicial Policy is any mention made of the appointment of the head of any court being required to be based strictly on seniority in the state bench.

1. **Conclusion: Not Politicization of the Judiciary, But Merely A Clash of Legal Positivism/Realism and Idealism/Naturalism**

From the wording of the constitution, as I have tried to explain, it is clear that the office of the substantive CJ of a state is not the exclusive preserve of the most senior judge in the state. May I now respectfully recall my earlier comments on a WhatsApp platform,[[32]](#endnote-32) on a similar issue:

*“I do not support anyone but the law. It is my humble suggestion that we leave morality out in interpreting the law as it.  Although, as Prof HLA Hart had advocated, a law should have a minimum moral content, this is not mandatory; the true position is that whatever the law-making authority has dished out in lawful exercise, and within the legitimate boundaries, of its law-making powers, is law and accordingly is binding on all subjects and authorities, until amended, repealed or otherwise struck down by a subsequent decision of a court of law. Hence, as is obvious from section 271(4) of the Constitution of the Federal republic of Nigeria, 1999, the constitution has placed NO obligation on a state governor to appoint as the substantive State Chief Judge of a State, the most senior judge in the state`s judiciary… the governor is at liberty to elect to appoint as the substantive CJ, a judicial officer or lawyer other than the most Senior judge in the state. If we do not like the law as it is, we are entitled to advocate its amendments, but until the law is amended, the LAW AS IT IS, is binding on all persons and authorities. Accordingly,* ***my advice to all those currently occupying the next-most-senior-judicial-officer position in their respective States or judiciary, is this: work, pray and hope for the best but prepare your mind for the worst, i****n view of the clear words of the constitution which leaves no one in doubts that the position of the next substantive CJ of your State High Court is not your birthright. The law is not bound to comply with “conventions” or “traditions” or notions of morality and seniority, although it is desirable that it does comply with these exalted attributes. Nevertheless, as I have pointed out, any rule made by the authority responsible for law-making in any given society/state, while acting within its law-making powers, following lawfully laid down procedures and processes, and taking into account universal essentials characteristics of law, is the law, subject to subsequent judicial interpretative power of the courts of the land. The Constitution in section 271(4) must be taken to have said what it means and meant what is says. Where the provisions of the law made by the legislature, are in clear conflict with directives of administrative authorities or with existing conventions, the law must prevail over these. That is the demand of rule of law. Application or invocation of the sovereignty of rule of law is not dependent on the law`s compliance with certain norms, conventions of notions of seniority, as the NBA and Hon Justice Illiya wants to make us believe”*

By way of conclusion, and with the greatest respect to all stakeholders, it would not be fair for the Gombe State Governor to be coerced or stampeded into exercising his discretion against his will. The Constitution awards the Governor a discretion in this matter. If he decides to nominate Hon Justice B. Illiya as the Chief Judge of Gombe State, let him add her name to the ones already before the NJC. If, on the other hand, the Governor chooses, for whatever reasons, to exclude Hon Justice Illiya, who obviously is the most senior judge in the State, it is entirely within the Governor`s discretionary powers in this instance. The Gombe State Governor has not violated any law in excluding the name of the most senior judge in the state. The Constitution, which the Governor had sworn to uphold, was fully complied with, the very moment the Governor sent some names from the Gombe State judiciary, to the NJC. The ball is now in NJC`s court, to make a recommendation (as required by law) from among the names already sent to it, following after the Governor would then make an appointment and thereafter submit the name of the person so appointed, to Gombe State House of Assembly for possible confirmation, so that a substantive Chief would emerge for Gombe State. The Governor owes his allegiance to the supremacy of the Constitution, and not to any NJC Directive nor to any other convention/tradition, which, with due respect, has been shown to be inconsistent with clear provisions of the Constitution. Section 1 of the Constitution is apt here:

*“1. (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. (2) The Federal Republic of Nigeria shall not be governed… except in accordance with the provisions of this Constitution. (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”*

Although no man has the right to do what he wants unless he wants what is right, yet in this instance, in my opinion, the Governor has done the right thing according to law. My Lord, the Hon Justice B. Illiya erroneously believes that the Governor`s departure from the convention of appointing the most senior judge as the substantive CJ, is driven by “*sheer injustice”.* I beg to disagree; what is just and amounts to justice in this instance must be measured in line with the provisions of the Constitution. Since the Governor has fully complied with the Constitution, or so in my opinion, the governor should be taken to have done justice as required by extant law. The relevant/applicable justice is *Justice*According to Law and not Law According to Justice. Therefore, my lord sir, instead of measuring law through the lens of your own perception of justice, the objective thing to do is to measure your perception of justice from the lens of law. Only in this way would you see clearly, that there is no injustice when the law is fully compiled with, because the ends of law is justice, which in turn is deemed enthroned the moment rule of law has been given its pride of place. A very senior member of the legal profession,[[33]](#endnote-33) has this to say about this controversy:

*Oputa, JSC, in Willoughby v IMB had declared, correctly, that Justice isn’t a Carte Blanche hanging in the air adorning judges with omniscient possibilities. It is always justice according to law. The opposing school of thought, the Convention School aside being unnecessarily formalist, wants to infuse convention (the principle of the most senior judge), a non sequitur, into our written constitutional principles for judicial appointments, by ascribing to the NJC’s recommending powers more than it lawfully has. By going that route, they set out to place a recommending body over an appointing body in terms of recruitment powers under our constitution. That’s not what the framers of the Constitution intended. Such an outlook turns our national judiciary into a unitary one by totally gutting its federal structure. That’s unacceptable because, if such is allowed, who becomes the CJ of State A may be decided in State B via the NJC route rather than by through the exercise of the Governor’s appointing and the House’s ratifying powers under the Constitution.*  
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The Constitution is the supreme law of the land and while the validity of the provision of any law is determined by reference to the Constitution, the reverse is not the case.[[34]](#endnote-34) The effect of the concept of constitutional supremacy extends to all other laws, without any exception. All other laws are subordinate, and must bow, to the Constitutional supremacy.[[35]](#endnote-35) In ***Marwa v. Nyako[[36]](#endnote-36)*** (2012) LPELR-7837(SC), the Supreme Court explained the concept of the supremacy of the constitution, thus:

*“The Constitution is described as the grundnorm and the fundamental law of the land. All other legislations in this country take their hierarchy from the provisions of the Constitution. It is not a mere common legal document. It is an organic instrument which confers powers and also creates rights and limitations. It regulates the affairs of the nation state and defines the powers of the different components of government as well as regulating the relationship between the citizens and the state. … The provisions of the constitution take precedence over any law…. A-G Ondo State v. A-G Federation (2002) 1 NWLR (Pt.772) pg.222. A-G Abia State v. A-G Federation (2002) 6 NWLR (Pt.763) pg.204. Abacha v. Fawehinmi (2000) 4 SC (pt.11) pg.1. Balonwu v. Gov. Anambra State (2009) 18 NWLR (Pt.1172) pg.13."*

**Sir Thomas Jefferson**, a founding father and 3rd President of the United States of America, once said, *“In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution…on every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or intended against it, conform to the probable one in which it was passed."* Besides, civilized existence is one which respects the extant law, both the wise, the good and the bad laws, and one whose constitutional basis is the will of the people. When one does not like a particular law, the remedy resides in modifying it or revoking it by the procedures established for that very purpose. In the meantime, as advised by George Washington, ***the Constitution is the guide which we must never abandon.*** My final word on this, is taken from **A.E. Samaan:** *“Rights given by fad and fashion are just as easily taken away.* ***Let no one mess with the Constitution. The Constitution matters*.”**

Respectfully,

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**End Notes**

1. https://thenigerialawyer.com/hon-justice-beatrice-iliya-petitions-njc-says-exclusion-of-her-name-from-list-of-nominees-for-gombe-cj-is-an-injustice/ [↑](#endnote-ref-1)
2. https://www.barristerng.com/any-list-for-gombe-chief-judge-excluding-justice-beatrice-illiyas-name-is-in-contravention-of-njc-strict-directive-nba-president-reacts/ [↑](#endnote-ref-2)
3. In Military Governor of Lagos State v. Ojukwu (1986) LPELR-3186(SC) [↑](#endnote-ref-3)
4. (2009) LPELR-8353 [↑](#endnote-ref-4)
5. Garner, B, In: *Black’s Law Dictionary* (9th ed., Thomson Reuters, 2009) 1148 [↑](#endnote-ref-5)
6. Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988 [↑](#endnote-ref-6)
7. see for example, Military Governor of Lagos State vs. Ojukwu (2001) FWLR (Part 50) 1779 at 1802 & 1799 [↑](#endnote-ref-7)
8. Michael Joseph Oakeshott, an English philosopher and political theorist (1901-1990), put it this way: [↑](#endnote-ref-8)
9. (1991) LPELR-213(SC) [↑](#endnote-ref-9)
10. Adangor, Z. A., ' 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 ' (researchgate.net January 01, 2015) accessed 23 November 2020 [↑](#endnote-ref-10)
11. See <https://definitions.uslegal.com/m/mens-legis/>, accessed November 12, 2020 [↑](#endnote-ref-11)
12. R v. Secretary of State for the Environment expert Spath Holme, (2001) 1 All ER 195, p. 216(HL). [↑](#endnote-ref-12)
13. See Inland Revenue v Frere [1964] 3 All ER 796 [↑](#endnote-ref-13)
14. (1999) 21 Cal.4th 86, 94 [86 Cal.Rptr.2d 893, 980 P.2d 441 [↑](#endnote-ref-14)
15. See *Ashley v. State*, 757 N.E.2d 1037, 1039, 1040 (2001) [↑](#endnote-ref-15)
16. <https://www.everycrsreport.com/reports/97-589.html>, accessed November 12, 2020 [↑](#endnote-ref-16)
17. Rao, S., *“External Aids to Interpretation of Statutes: A Critical Appraisal,”* published on [ww.ssrn.com](http://ww.ssrn.com/), accessed 22 December 2019. [↑](#endnote-ref-17)
18. Everycrsreport, *Op Cit* [↑](#endnote-ref-18)
19. *People v. Lawrence* (2000) (US) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228]; See also [*Barnhart v. Sigmon Coal Co.*](https://en.wikipedia.org/w/index.php?title=Barnhart_v._Sigmon_Coal_Co.&action=edit&redlink=1), 534 U.S. 438, 450 (2002) [↑](#endnote-ref-19)
20. See < <http://e-lawresources.co.uk/Literal-rule.php#:~:text=The%20literal%20rule%20of%20statutory%20interpretation%20should%20be%20the%20first,make%20sense%20of%20the%20statute>.> accessed 22 November 2020 [↑](#endnote-ref-20)
21. *Ibid* [↑](#endnote-ref-21)
22. See River Wear Commissioners v Adamson) (1876-77) L.R. 2 App Cas 743; R v Allen (1872) LR 1 CCR 367; Re Sigsworth [1935] 1 Ch 98; Adler v George [1964] 2 QB 7  [↑](#endnote-ref-22)
23. which means “any person” [↑](#endnote-ref-23)
24. It is submitted that the office of the substantive CJ of a State is not reserved for only serving judges; an objective interpretation of the section 271(4) would appear to accommodate other lawyers who are not yet judges, provided they meet the legal requirements. [↑](#endnote-ref-24)
25. The legal maxim is “horror vacui”, a term used by Aristotle to mean that “every space in nature needs to be filled with something.” [↑](#endnote-ref-25)
26. As ai shall explain hereinafter [↑](#endnote-ref-26)
27. Farlex Inc., ' Mandamus' (legal-dictionary.thefreedictionary.com 2020) < https://legal-dictionary.thefreedictionary.com/mandamus> accessed 22 November 2020 [↑](#endnote-ref-27)
28. Craig Paul, ' APPENDIX 5: PAPER BY PROFESSOR PAUL CRAIG: THE RULE OF LAW' ( https://publications.parliament.uk/ 20017) < https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm> accessed 22 November 2020 [↑](#endnote-ref-28)
29. The Act mandates the EFCC to combat financial and economic crimes. The Commission is empowered to prevent, investigate, prosecute and penalise economic and financial crimes and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes, including: Economic and Financial Crimes Commission Establishment act (2004); The Money Laundering Act 1995; The Money Laundering (Prohibition) act 2004; The Advance Fee Fraud and Other Fraud Related Offences Act 1995; The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994; The Banks and other Financial Institutions Act. See < <https://www.efccnigeria.org/efcc/about-efcc/the-establishment-act>> accessed 22 November 2020. [↑](#endnote-ref-29)
30. Se <https://njc.gov.ng/national-judicial-policy> accessed 22 November 2020. [↑](#endnote-ref-30)
31. The national Judicial Council, ' The National Judicial Policy ' (njc.gov 2018) < https://njc.gov.ng/national-judicial-policy> accessed 22 November 2020 [↑](#endnote-ref-31)
32. the Legal Practice Discourse [↑](#endnote-ref-32)
33. Charles Uwensuyi-Edosomwan, SAN, Life Bencher, former Attorney General and Commissioner for Justice, Edo State [↑](#endnote-ref-33)
34. Madumere v. Okwara (2013) LPELR-20752(SC), per NGWUTA ,J.S.C (p. 38, paras. A-D) [↑](#endnote-ref-34)
35. KAYILI V. YILBUK (2015) LPELR-24323(SC) Per OGUNBIYI ,J.S.C ( pp. 33-34, paras. G-E) [↑](#endnote-ref-35)
36. (2012) LPELR-7837(SC), the Supreme Court [per Adekeye, J.S.C (pp. 169-170, paras. B-F)], per Adekeye, J.S.C (Pp. 169-170, paras. B-F) [↑](#endnote-ref-36)