

EXPLORING CONSTITUTIONAL PROVISIONS ON EXCLUSIVE RIGHTS AND PRIVILEGES OF A LEGAL PRACTITIONER: APPRAISAL OF THE RIGHT TO APPOINTMENT AS JUDICIAL OFFICER*

Abstract

This paper delved into some of the exclusive rights of a lawyer provided in the Constitution of the Federal Republic of Nigeria with particular reference to the right to be appointed a judicial officer. Relevant provisions of the Constitution were considered in order to ascertain the full import of this right; whether it is the exclusive preserve of lawyers or not. The Constitution established superior courts having appellate and supervisory jurisdictions, and presided over by judicial officers. However, from the provisions of the Constitution, non-lawyers can preside over some superior courts. If judicial office is the exclusive right of lawyers, then should non-lawyers be given such right too? Would it be apt to say that a judicial office is the exclusive preserve of legal practitioners, but there are exceptions? The paper contends that it is but there shouldn't be any exception in the light of conjunctive reading of relevant sections of the Constitution. The academic qualifications required of certain judicial officers viz-a-viz that of Magistrates were considered. Judicial decisions on the principles of interpretation of the Constitution were also considered. Thus, the paper calls for judicial interpretation of certain sections of the Constitution referred to, and subsequent amendment by the National Assembly, where applicable.

Keywords: Legal Practitioner, Rights and Privileges, Judicial Officer, Right to Appointment, Constitutional Provisions, Nigeria

1. Introduction

The Constitution of a country is a unique legal document. It enshrines special kind of norms and stands at the top of the normative pyramid.¹ Constitution denotes the fundamental and organic law of a country.² It is the *grundnorm* from which other laws derive their validity.³ In Nigeria, the provisions of the Constitution bind all authorities and persons throughout the country.⁴ Certain powers, rights and limitations are created under the Constitution. There are fundamental rights provided in Chapter IV of the Constitution, enjoyed by Nigerian citizens and which cannot be derogated from except in accordance with the law. There are also certain privileges, which some legal minds refer to as rights, enjoyed by certain class of people by virtue of their attainment as members of the legal profession. These are the rights exclusively enjoyed by legal practitioners in Nigeria, some of which are provided in the Constitution of the Federal Republic of Nigeria 1999. There are also two schools of thought with divergent views on this issue. While one school of thought regard the exclusive rights as rights, the other school of thought view the exclusive rights as privileges. This paper does not intend to delve into the dichotomy of either rights or privileges but to view them as both rights and privileges enjoyed by only persons regarded as legal practitioners. Thus, the two words may be used conjunctively.

A legal practitioner in Nigeria is a person entitled in accordance with the Legal Practitioners Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings.⁵ The rights and privileges exclusive to legal practitioners are statutorily provided for in the Legal Practitioners Act, in the Constitution, and in some other laws or regulations. A legal practitioner is also a lawyer, and both words will be used interchangeably. This paper shall delve into some of the exclusive rights of a legal practitioner provided in the Constitution with particular reference to the right to be appointed a judicial officer. This paper makes an attempt to relate different provisions of the Constitution in order to ascertain the full import of the right to be appointed a judicial officer; whether it is the exclusive preserve of legal practitioners or not. It is discovered from the different provisions of the Constitution considered in this paper that the right to be appointed a judicial officer is the exclusive preserve of legal practitioners. To buttress the position taken in this paper, judicial decisions on the principles of interpretation of the Constitution will be considered. Thus, the paper calls for judicial interpretation of certain sections of the Constitution referred to, and consequential amendment by the National Assembly.

2. Twin Pillars of the Legal Profession

The legal profession comprises the Bar and the Bench. In Nigeria, the Bar is made up of solicitors and advocates while the Bench is made up of Magistrates and Judges of the various courts.⁶ Lawyers practise at the Bar as barristers

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¹ *Marwa v Nyako* (2012) 6 NWLR (pt. 1296) 199 @ 290, paras. G-H).

² *A.P.C. v E.S.I.E.C.* (2021) 16 NWLR (pt. 1801) 1.

³ *Anka v Lokoja* (2001) 4 NWLR (pt. 702) 178.

⁴ Constitution of the Federal Republic of Nigeria (CFRN) 1999 s1(1).

⁵ Legal Practitioners Act (LPA) (Cap L11) LFN 2004 s24.

⁶C. A. Oputa, *Themes on Judicial Activism and Law* (Justice Watch 2014) 195; J. Olakunle Orojo, *Professional Conduct of Legal Practitioners in Nigeria* (Mafix Books Limited 2008) 87.

and solicitors of the Supreme Court or sit on the Bench as Judges or Magistrates.⁷ There is a higher Bench and a lower Bench. While Judges and Justices amongst others, sit on the higher Bench, Magistrates, Customary Court Judges, Area Court Judges, and Sharia Court Kadis sit on the lower Bench.⁸ Practising at the Bar as barrister and solicitor entails amongst other things, representing litigants in courts and preparing legal documents for clients for a fee. These rights are restricted to lawyers or regarded as exclusive rights of a legal practitioner. On the other hand, sitting on the Bench involves sitting in a court of law as an umpire. Although a non-lawyer may represent himself in court which is a constitutional right,⁹ it is an offence for a non-lawyer to practise at the Bar as lawyer by representing a litigant in court or use the name and title of legal practitioner.¹⁰ This is impersonation of a legal practitioner and punishable under the law.¹¹ Thus, non-lawyers or laymen are not permitted by law to practise as barristers or solicitors. Although practising at the Bar is restricted to lawyers, it appears that sitting on the Bench is not restricted to lawyers, making room for non-lawyers to sit as judges on the lower Bench. Non-lawyers also sit on the higher Bench having appellate and supervisory jurisdiction, but it is the contention of this paper that the reverse should be the case.

3. Exclusive Rights and Privileges of Legal Practitioners

Certain rights and privileges accrue to a legal practitioner in Nigeria by virtue of being called to Bar and enrolled at the Supreme Court in the Roll of Legal Practitioners kept by the Registrar of the apex court. A few examples of the rights and privileges exclusive to legal practitioners are right of audience in court or right to represent a litigant in court, right to prepare instruments relating to immovable property for a fee, right to prepare documents for court proceedings for a fee, right to be appointed a notary public, and right to be appointed an attorney general. While some of these rights and privileges are provided in the Legal Practitioners Act and some other laws, the right to be appointed a judicial officer is provided in the Constitution of the Federal Republic of Nigeria 1999. It appears that the right to be appointed a judicial officer is not an exclusive right and privilege of a legal practitioner, but this paper contends that it is. The educational qualifications for appointment of a judicial officer in two superior courts; Customary Court of Appeal and Sharia Court of Appeal, will be compared with the educational qualification for appointment of a Magistrate in Magistrates' Courts. The Magistrates' Courts Law of a few randomly selected States of the Federation will be considered in the course of this paper. In Nigeria, the Constitution is supreme and what it has stipulated remains sacrosanct and immutable, and nothing can be done about it but to strictly comply with its provisions.¹² Once powers, rights and limitations under the Constitution are created, their existence cannot be disputed in a court of law. At best what can be done is that the extent and implications of those powers, rights and limitations may be sought to be interpreted and explained by the court.¹³

4. Judicial Office and Judicial Officers *vis-a-vis* Magistrates

There is established for the federation of Nigeria, a Sharia Court of Appeal and a Customary Court of Appeal of the Federal Capital Territory, Abuja.¹⁴ At the State level, the Constitution provides that a Customary Court of Appeal shall be established for any State of the Federation that requires it.¹⁵ The Customary Court of Appeal shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.¹⁶ The Constitution also provides that there shall be a Sharia Court of Appeal for any State of the Federation that requires it.¹⁷ This court has appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law regarding Islamic marriage; its validity or dissolution, family relationship where the all the parties are Muslims, guardianship of an infant, etc.¹⁸ Both Customary Court of Appeal and Sharia Court of Appeal, whether at the federal level or State level, are superior courts of record. The offices of President or Judge of the Customary Court of Appeal and Grand Kadi or Kadi of the Sharia Court of Appeal are judicial offices and the holders of these offices are judicial officers. Other judicial offices are Chief Justice of Nigeria or Justice of the Supreme Court, President or Justice of the Court of Appeal, Chief Judge or Judge of the Federal High Court, President or Judge of the National Industrial Court, Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, Chief Judge or Judge of the High Court of a State, Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory Abuja, President or Judge of the Customary Court of Appeal of the Federal Capital Territory Abuja, Grand Kadi or Kadi of the Sharia Court of Appeal of a State, and President or Judge of the Customary Court of Appeal of a State.¹⁹ Holders of these judicial

⁷ C. A. Oputa, *Themes on Judicial Activism and Law* (Justice Watch 2014) 1.

⁸ S. D. Kawu, 'Relationship between the Heads of Courts and Judges of the Lower Courts' in Ahmad Sheu, Abdulyakye Adeleye and Abdullateef Y. Amenullah (eds), *Imprints of Judicial Heritage* (Lawbreed Limited 2023 Vol. 2), 205.

⁹ CFRN 1999 s36(6)(c).

¹⁰ LPA (Cap L11) LFN 2004 s22(1).

¹¹ *Ibid.*

¹² *Ugba v Suswam* (2014) 14 NWLR (pt. 1427) 264.

¹³ *Nwokdei v Anambra State Government* (2022) 7 NWLR (pt. 1828) 29.

¹⁴ CFRN 1999 ss260 (1) and 265(1).

¹⁵ CFRN 1999 s280 (1).

¹⁶ CFRN 1999 s282 (1) and (2).

¹⁷ CFRN 1999 s275 (1).

¹⁸ CFRN 1999 s277 (1) and (2).

¹⁹ CFRN 1999 s318; *Enyi v Benue State Judicial Service Commission* (2021) LPELR 54437 (CA).

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offices are judicial officers. The academic qualifications required to be appointed to these judicial offices are provided in the sections of the Constitution establishing each of the courts. This paper shall focus on the academic qualifications stipulated in the Constitution, for judicial officers manning the offices of President and Judges of Customary Courts of Appeal as well as of Grand Kadi and Kadis of Sharia Courts of Appeal. Other than lawyers, non-lawyers can also be appointed to hold these judicial offices. Thus, making non-lawyers to be judicial officers of superior courts having appellate and supervisory jurisdiction.

The body responsible *inter alia*, for recommending persons to be appointed as judicial officers is the National Judicial Council (NJC). This body is established by section 153 of the Constitution. Its compositions and powers are provided in Part I of the Third Schedule to the Constitution. Members of the NJC are well respected persons in society and they are the Chief Justice of Nigeria who is the Chairman, the next most senior Justice of the Supreme Court, the President of the Court of Appeal, a few retired Justices selected from the Supreme Court or Court of Appeal, the Chief Judge of the Federal High Court, five Chief Judges of States, one President of the Customary Court of Appeal, one Grand Kadi of a Sharia Court of Appeal, five members of the Nigerian Bar Association who shall not be less than 15 years post-Call; one of whom should be a Senior Advocate of Nigeria, and two persons that are not legal practitioners but who are of unquestionable character in the opinion of the Chief Justice of Nigeria.²⁰

It is apposite to state that all judicial officers exercise judicial powers but not all persons who can exercise judicial powers are judicial officers. The three arms of government which are the Legislature, Executive, and Judiciary exercise legislative, executive and judicial powers, respectively.²¹ Judicial power is vested in the Judiciary or the Court. It is the power of a court to decide and pronounce a judgment between persons or parties who bring a case before it for decision and the power to carry the judgment into effect.²² It can also be defined as the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction.²³ The Supreme Court has held that 'judicial powers' means the authority of the Court to adjudicate upon and decide any matter before it, which is within its jurisdiction.²⁴ Furthermore, in the case of *Anakwenze v. Aneke*,²⁵ the Supreme Court *per* Obaseki JSC defined judicial power as the inherent powers and sanctions of a Court of law. Obaseki JSC further stated that judicial power has been defined by the Privy Council as the power that a sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the right relates to life, liberty or property.²⁶ The exercise of judicial power does not begin until some tribunal which has power to give binding and authoritative decision; whether subject to appeal or not, is called upon to take action.²⁷ The judicial powers of the Federation are vested in the courts established for the Federation while judicial powers of a State are vested in the courts established for a State.²⁸ Magistrates' Court, for instance, is a court established for a State.

5. Beyond the Scope of Judicial Officer

Magistrates' Courts are established in different States of the Federation by each State's Judicial Service Commission. The court²⁹ is manned by a Magistrate. A Magistrate is a person or an official who acts as a judge in a law court that deals with minor crimes or disputes.³⁰ A Magistrate can also be referred to as a local official exercising administrative and often judicial functions or a local judiciary official having limited original jurisdiction, especially in criminal cases.³¹ The qualifications a person must possess to be appointed a Magistrate is usually provided in the law establishing the Magistrates' Court of that State. Generally, to be eligible for appointment as a magistrate in Nigeria, a person must have both character and competence. In addition to being diligent, honest, having integrity, good character and reputation, the person must be a legal practitioner in Nigeria and possess sound knowledge of the law. Amongst the different States of the Federation, it appears that the barest minimum post-Call qualification for the lowest grade of magistrates is two years post-Call. In Lagos State, for instance, the Magistrates' Court Law provides

²⁰ Third Sch. to the CFRN 1999 para 20, pt. I.

²¹ CFRN 1999 ss4, 5 and 6.

²² 'Judicial Power', <<https://law.justia.com/constitution/us/article-3/08-judicial-power.html>> accessed 10 August 2024

²³ *Ibid*

²⁴ *Abacha v FRN* (2014) LPELR-22014(SC) 98 para E per Kekere-Ekun, JSC.

²⁵ (1985) LPELR-481 (SC)

²⁶ Privy Council *per* Lord Sankey L.C. defined judicial power in the case of *Shell Co. of Australia v Federal Commissioners of Taxation* (1931) AC 275 at 295-296; *Huddart, Parker & Co. v Moorehead* (1909) 8 CLR 330 at 357 per Griffith C.J.

²⁷ *Ibid*; *Anakwenze v Aneke* (1985) LPELR-481 (SC) *per* Obaseki JSC pp 20-21 para F-C.

²⁸ CFRN 1999 s6 (1) and (2).

²⁹ The equivalence of this court in the northern part of Nigeria, which hears and determines civil matters, is called District Court while the equivalent court that hears and determines criminal cases is called Magistrates' Court. However, the term 'Magistrates' Court' will be used holistically to refer to both Magistrates' Court in the southern part of Nigeria, and District or Magistrates' Court in the northern part of the country.

³⁰ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/magistrate>>; Collins Dictionary <<https://www.collinsdictionary.com/dictionary/english/magistrate>> accessed 25 June 2024.

³¹ Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/magistrate>> accessed 25 June 2024.

that a person qualified to be appointed a Magistrate must be a legal practitioner of not less than five years.³² In Kano State, only legal practitioners of not less than five years are eligible to be appointed magistrates.³³ In Ekiti State, a person must be a qualified barrister or barrister and solicitor and have been so qualified for a minimum of seven years to be appointed a Chief Magistrate or Senior Magistrate, Grade I; or be at least four years post-Call to be appointed Senior Magistrate, Grade II; or a minimum of three years to be appointed Magistrate Grade II; or be at least two years to be appointed Magistrate Grade I.³⁴ In Rivers State, to be eligible for consideration for appointment, a person must be a legal practitioner in Nigeria and must have been so qualified, in the case of a Senior Magistrate, for a minimum period of five years, and in the case of a Magistrate Grade I for a period of not less than four years.³⁵ However, the qualifications a person must have to be appointed a magistrate in Jigawa State is not expressly provided in the Magistrates' Court Law of that State. The law provides for appointment of Magistrates by the State Judicial Service Commission but does not specify the qualifications for persons to be appointed to the different Grades of the Court.³⁶ It is doubtful whether a person who is not a legal practitioner can be appointed a Magistrate in that State.

Although Magistrates exercise judicial powers, they are not judicial officers by virtue of the definition of judicial office, and holders of such office, in the Constitution. However, Section 4(3) of the Lagos State Magistrates' Court Law provides that all Magistrates appointed to the Magistracy of the State shall serve as judicial officers to the exclusion of any other function except as may be provided for under the Magistrates' Courts Law of the State.³⁷ Similar provisions are contained in the Magistrates' Courts Law of Ekiti State.³⁸ The question to be asked is what is the import of these sections? The word 'shall' when used in an enactment denotes mandatory requirement or obligation and gives no room for discretion.³⁹ In responding to the question posed above, it would be appropriate to consider the functions of judicial officers. Amongst other functions, judicial officers hear cases between disputing parties in open court, or in camera⁴⁰ where the need arises; make Orders which must be obeyed else the disobedient party may be cited for contempt of court; deliver judgments which are binding on the parties except overturned on appeal. In summary, judicial officers hear and determine cases between disputing parties, and Magistrates do same. However, referring to a Magistrate as a judicial officer is inconsistent with the Constitution. It is trite that the Constitution is supreme and any law which is inconsistent with the Constitution is void to the extent of the inconsistency.⁴¹ The Code of Conduct for Judicial Officers refers to a judicial officer as a holder of any judicial office defined in the Constitution as well as every holder of similar office in any office or Tribunal where the duties involve adjudication of any dispute or disagreement between persons; whether natural or legal, or between person and government either at the federal, state, or local government level.⁴² This tends to extend the definition in the Constitution, making it inconsistent and thus void.⁴³ Thus, it can be asserted that although the Code of Conduct for Judicial Officers refers to magistrates as judicial officers by implication, and although the Magistrate Court Law of Lagos State 2009 refers to Magistrates as exercising judicial powers, which they do, Magistrates are not judicial officers. The position of Magistrates has already been clarified by the Court of Appeal in the case of *Enyi v. Benue State Judicial Service Commission*⁴⁴ where the court held that a reference to a judicial officer is reference to the holder of any such office specifically mentioned in section 318(1) of the Constitution. And the office of a Magistrate is not mentioned in that section. In considering section 318 of the Constitution, the relevant principle of law is - the express mention of one thing in a statutory provision automatically excludes any other. The Supreme Court in the case of *AG Bendel State v. Aideyan*⁴⁵ held that it is now firmly established that in the construction of a statutory provision, where a statute mentions specific things or persons the intention is that those not mentioned are intended to be excluded. In other words, those things or persons not mentioned are not intended to be included. Reading the provision carefully, it means though a Magistrate may be performing judicial duties, he does not occupy a Judicial Office as contemplated

³² MCL of Lagos State 2009 s4 (2).

³³ Kano State MCL 2018 s4 (2).

³⁴ MCL of Ekiti State 2014 s4 (2).

³⁵ Government of Rivers State of Nigeria, Judicial Service Commission, 'Call for Expression of Interest/Application for Appointment as a Magistrate of the Rivers State Judiciary, 29 March 2023' <<https://www.rsjsc.rv.gov.ng/NOTICE%20OF%20EMPLOYMENT%20FOR%20MAGISTRATES%20%20.pdf>> accessed 26 December 2024.

³⁶ MCL of Jigawa State 1998 [as amended in 2012] s4 Cap M1 – Ministry of Justice <<https://moj.jg.gov.ng/wp-content/uploads/2021/02/MAGISTRATE-COURTS-LAW-rotated-compressed.pdf>> accessed 26 December 2024.

³⁷ MCL of Lagos State 2009 s4 (3).

³⁸ MCL of Ekiti State 2014 s4 (3).

³⁹ *Lingo (Nig.) Ltd v Artco Ind. Ltd* (2020) LPELR-51744 (CA); *Nwankwo v Yar Adua* (2010) 12 NWLR (pt. 1209) 518; *Olabode v Rowland* (2017) LPELR-51198 (CA).

⁴⁰ Proviso to Section 36(4) Constitution of the Federal Republic of Nigeria 1999 excludes certain cases from being heard in open court or in public where publicity would be contrary to the interest of Justice. A court or judicial tribunal may exclude persons other than the parties and their legal practitioners from its proceedings in the interest of defence, public safety, public order, public morality, the welfare of persons who are yet to attain the age of eighteen years, and the protection of the private lives of the parties.

⁴¹ CFRN 1999 s1 (3).

⁴² CCJO 2016 para 1 of Explanatory Notes.

⁴³ CFRN 1999 s1 (3).

⁴⁴ (2021) LPELR 54437 (CA)

⁴⁵ (1989) 9 SC 127

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by the Constitution. Furthermore, the court held that it is injudicious and pedestrian to want to import the definition of Judicial Officer provided in the Code of Conduct for Judicial Officers or other legislation in the interpretation of the Constitution which in fact defined the word and therefore there is no need to go outside to import a definition. Although Magistrates are not judicial officers, they occupy a very sensitive role in the judiciary irrespective of the fact that they sit on a lower Bench and adjudicate cases in inferior court. According to Justice Oputa, Magistrates come more in contact with people seeking justice in Courts and should reflect a beautiful image of the judiciary because on their behaviour or conduct, the entire judiciary may be judged.⁴⁶

6. Dichotomous Constitutional Provision for Qualifications of Certain Judicial Officers

The Constitution amply provides for qualifications of persons to be appointed judicial officers in the various judicial offices stated in section 6. However, emphasis shall be laid on the Customary Court of Appeal and Sharia Court of Appeal of the Federal Capital Territory Abuja and of a State. There is a dichotomous provision for the qualifications of persons that can be appointed to these judicial offices. The Constitution provides that other than lawyers, non-lawyers can also hold these judicial offices and sit as umpires to hear appeals over adjudicated cases in these superior courts. In respect of Customary Court of Appeal of the Federal Capital Territory (FCT) Abuja and that of a State, the Constitution provides that a person shall be qualified to hold the office of President or Judge of the Customary Court of Appeal if he is a legal practitioner in Nigeria of at least 10 years post call, and in the opinion of the National Judicial Council (NJC), he has considerable knowledge and experience in the practice of customary law. Alternatively, the person may not be a legal practitioner, but if in the opinion of the NJC he has considerable knowledge and experience in the practice of customary law, he is qualified to hold that office. Furthermore, the Constitution provides that other qualification may be prescribed by an Act of the National Assembly or by Law of the House of Assembly of a State.⁴⁷ For Sharia Court of Appeal of the Federal Capital Territory (FCT) Abuja and that of a State, the Constitution provides that a person shall be qualified to hold office as Grand Kadi or Kadi of that court if he is a legal practitioner in Nigeria of at least 10 years post call and has obtained a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council. Alternatively, the person may not be a legal practitioner but has attended and obtained a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council for a period of at least 12 years in respect of the FCT or 10 years in respect of a State, and he either has a considerable experience in the practice of Islamic law or he is a distinguished scholar of Islamic law.⁴⁸ This dichotomy in the qualifications of a holder of these judicial offices gives an occasion to non-lawyers to sit on the Bench; one regarded as a higher Bench in the legal profession. In contradistinction to Magistrates' Court which is an inferior court or a lower Bench, the minimum qualification to be appointed a Magistrate is not just Call to the Nigerian Bar and enrolment at the Supreme Court as barrister and solicitor but some years of practice or experience at the Bar. Thus, a person must be a lawyer to qualify to be appointed a Magistrate.

7. National Judicial Council and Other Bodies

Although the NJC is responsible for recommending persons to be appointed judicial officers, there are other bodies established by the Constitution which work in collaboration with the NJC in order for it to recommend suitable candidates. These bodies are the Federal Judicial Service Commission (FJSC),⁴⁹ State Judicial Service Commission (SJSC),⁵⁰ and Judicial Service Committee of the Federal Capital Territory, Abuja (JSC-FCT).⁵¹ The composition and powers of each of these bodies are also constitutionally provided for in Parts I, II and III of the Third Schedule to the Constitution. There are some common features in the composition of the NJC and the other collaborative bodies, which can be said to be very significant. In all these bodies stated above, there are members of the Bar, the Bench and persons who are neither members of the Bar nor the Bench. In the composition of the NJC and FJSC, the legal practitioners who are members must be at least 15 years post-Call.⁵² For the composition of the SJSC, the legal practitioners who are members must be at least 10 years post-Call,⁵³ and in the composition of the JSC-FCT, the only legal practitioner who is a member must be at least 12 years post-Call.⁵⁴ However, in all these bodies, there are also persons who, though not lawyers, are regarded as persons of unquestionable character in the opinion of the President of the Federal Republic of Nigeria in the case of federal courts, or, in the opinion of Governor of a State in the case of State courts. Legal practitioners who are members of either the NJC, FJSC, SJSC or JSC-FCT are barred from being appointed to any judicial office, and the constitutional bar to any judicial-office-appointment extends to a period of three years after the legal practitioners have ceased to be members of any of those bodies.⁵⁵ However, from the

⁴⁶ C. A. Oputa, *Themes on Judicial Activism and Law* (Justice Watch 2014) 86.

⁴⁷ CFRN 1999 ss266 (3) and 281(3).

⁴⁸ CFRN 1999 ss261 (3) and 276(3).

⁴⁹ CFRN 1999 s153.

⁵⁰ CFRN 1999 s197.

⁵¹ CFRN 1999 s304.

⁵² Third Sch. to the CFRN 1999 para 5(e), pt. II.

⁵³ Third Sch. to the CFRN 1999 paras 12(e) and 20(i) pt. I.

⁵⁴ Third Sch. to the CFRN 1999 para 1(e) pt. III.

⁵⁵ CFRN 1999 s289.

wordings of the section of the Constitution barring legal practitioners, it appears that non-legal practitioners that are members of NJC, FJSC, SJSC or JSC-FCT are not barred from being appointed as judicial officers either while serving as members of any of those bodies or immediately after they cease to be members. It would be apposite to replicate the provisions of section 289 of the Constitution of the Federal Republic of Nigeria 1999 at this junction. The section provides thus:

No legal practitioner shall be qualified for appointment as a Justice of the Supreme Court, the Court of Appeal or a Judge of the Federal High Court or Judge of the National Industrial Court or a Judge of a High Court or a Kadi of a Sharia Court of Appeal or a Judge of the Customary Court of Appeal whilst he is a member of the National Judicial Council or the Federal Judicial Service Commission or the Judicial Service Committee of the Federal Capital Territory, Abuja or a State Judicial Service Commission, and he shall remain so disqualified until a period of three years has elapsed since he ceased to be a member.

A conjunctive reading of section 289 of the Constitution and sections 261(3)(b), 266(3)(b), 276(3)(b) and 281(3)(b) of the same Constitution which deal with appointment of non-lawyers to judicial offices of Sharia Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State and Customary Court of Appeal of a State respectively, reveal something significant. From the above sections, legal practitioners cannot be appointed as judicial officers to any judicial office while serving as members of the bodies mentioned above or within a period of three years after they cease to be members. But it appears that non-lawyers could be appointed to the judicial offices of Customary Court of Appeal and Sharia Court of Appeal either of the Federal Capital Territory, Abuja or of a State while they are members of the bodies mentioned above or shortly after they cease to be members. In the construction of statutory provisions, the Supreme Court has stated in the case of *Buhari v. Yusuf*⁵⁶ that where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. This is the *expressio unius est exclusio alterius* rule which means that the express mention of one thing in a statutory provision automatically excludes any other which otherwise would have been included by implication. In the case of *Sun Insurance (Nig) Plc v. Umez Engineering Construction Co. Ltd.*⁵⁷ the Supreme Court held that the rule also applies to the Constitution which is the *grundnorm*. Thus, it can be said that the express mention of legal practitioner - being disqualified to be appointed as a judicial officer while a member of any of the bodies - in section 289 of the Constitution without any mention of non-legal practitioner, excludes non-legal practitioner from that section and from being disqualified. But non-legal practitioners are members of the bodies stated in section 289 of the Constitution, and non-legal practitioners are also appointed to the judicial offices of Customary Court of Appeal and Sharia Court of Appeal. From the wordings of section 289 of the Constitution, it also appears that the drafters did not intend or envisage a non-legal practitioner as a judicial officer since the judicial offices of Customary Court of Appeal and Sharia Court of Appeal are also stated in section 289 of the Constitution.

8. Constitutional Provisions on Exclusive Rights and Privileges

It is worthy of note that certain offices provided in the Constitution are the exclusive preserve of legal practitioners, and that includes office of Secretary of the NJC. The Constitution states that the secretary shall be a legal practitioner.⁵⁸ The import of the word 'shall' has been clearly stated by the Court of Appeal in the case of *Speaker Kaduna State House of Assembly & Ors v. Nkom & Anor.*⁵⁹ The Court stated that 'shall' in its ordinary meaning is a word of command which is normally given a compulsory meaning, intended to denote an obligation. That the word 'shall' when used in a statutory provision means that a thing must be done. It is not merely permissive, it is mandatory.⁶⁰ Thus, it can be said that the office of 'Secretary of NJC' is one of the exclusive rights of a legal practitioner. There are more exclusive rights of a legal practitioner provided for in the Constitution. Aside the offices of Chief Justice of Nigeria and Justices of the Supreme Court, President and Justices of the Court of Appeal, Chief Judge and Judges of the Federal High Court, President and Judges of the National Industrial Court, Chief Judge and Judges of the High Court of the Federal Capital Territory, Abuja and Chief Judge and Judges of the State High Courts, another exclusive right of a legal practitioner which is constitutionally provided for is the office of Attorney General of the Federation and the office of Attorney General of a State. The Attorney General is the Chief Law Officer.⁶¹ A person shall only be qualified to hold or perform the functions of this office if he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of at least 10 years.⁶²

As pointed out earlier, the position of secretary of NJC is meant for only legal practitioners. However, the offices of Grand Kadi and Kadis of Sharia Court of Appeal either of the Federal Capital Territory, Abuja or of a State are, from

⁵⁶ (2003) 14 NWLR (Pt. 841) 446 ; (2003) LPELR-812(SC) (pp. 20 para. B).

⁵⁷ (2015) LPELR-24737(SC) (pp. 24-25 para. E).

⁵⁸ Third Sch. to the CFRN 1999 para 22 pt. I

⁵⁹ (2019) LPELR-50961 (CA).

⁶⁰ Ibid, pp. 13 - 14 para. E, per Daniel-Kalio, JCA; See also *Nwankwo v Yar Adua* (2010) 12 NWLR (pt. 1209) 518.

⁶¹ CFRN 1999 ss150 (1) and 195(1).

⁶² CFRN 1999 ss150 (2) and 195(2).

the wordings of the Constitution, not the exclusive preserve of legal practitioners. The same thing applies to the offices of President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja and that of a State. It is the suggestion of this paper that these two courts being judicial offices and superior courts having appellate jurisdiction, should be the exclusive preserve of and presided over by legal practitioners particularly in an era such as this when there are so many well-trained persons who have been called to the Nigerian Bar; which is referred to as the largest Bar in Africa. The suggestion above is also premised on the fact that Magistrate's Court which is not a judicial office or superior court but regarded as an inferior court is presided over by a Magistrate. And Magistrates are legal practitioners. Furthermore, Customary Court which is the lowest court in the hierarchy of court system, categorized as inferior court is presided over by a Chairman or President and Members of the Court. Customary Court has jurisdiction to entertain *inter alia* matrimonial matters arising from marriages solemnized under native law and custom. The Chairman or President is usually a legal practitioner, or a law graduate; that is, someone who is yet to be called to the Nigerian Bar and yet to enrol in the Supreme Court. In Lagos State, for example, a person shall not be qualified to hold office as the President of a Customary Court unless he is a legal practitioner or a law graduate.⁶³ The other members of the court are required to be degree holders of any recognised university or polytechnic.⁶⁴ In Imo State and Abia State, there are three members of the Customary Courts. The Imo State Customary Court Law 1984 which previously applied to Abia State provides for their qualification. There was no provision for legal practitioners to preside over the courts. However, the amendment to section 8(2) of the Abia State Customary Court (Amendment) Law⁶⁵ introduced a lawyer to the Customary Court Bench.⁶⁶ A lawyer is, by his training and experience is equipped to keep to the evidence and exclude the irrelevant, to decide according to the evidence adduced and not be influenced by extraneous and irrelevant information, to have recourse to legal or reference books, consult and interpret them and generally to know how the proceedings of a court should be conducted.⁶⁷ If inferior courts are presided over by persons called to the Nigerian Bar, then it wouldn't be out of place for superior courts with appellate and supervisory jurisdiction to be presided over by persons already called to the Nigerian Bar and whose name is in the Roll of Legal Practitioners kept by the Registrar of the Supreme Court. This is the submission of this paper.

10. Insights into the import of Constitutional Provisions on Judicial Office Holders

One of the sections of the Constitution worthy of note is section 292. By the provision of subsection 1 of that section, a judicial officer shall not be removed from his office or appointment before his age of retirement except the proper procedure laid down in that section is followed and where the judicial officer is unable to discharge the functions of his office or appointment due to infirmity of the mind or body or where the judicial officer has contravened the Code of Conduct for Judicial Officers or for misconduct done by the judicial officer. Section 292(2) Constitution expressly states that any person who has held office as a judicial officer shall not appear or act as a legal practitioner before any court of law or tribunal in Nigeria on ceasing to be a judicial officer for any reason whatsoever. This implies that where a judicial officer ceases to be one either due to retirement or dismissal, he shall not practice as a legal practitioner. This position is reiterated in the Rules of Professional Conduct for Legal Practitioners (RPC) in the following words – A judicial officer who has retired shall not practice as an advocate in any Court or Tribunal in Nigeria.⁶⁸ Furthermore, the RPC provides that a judicial officer who has retired shall not sign any pleading in any court.⁶⁹ The retirement age for all judicial officers is currently 70 years⁷⁰ as against 65 years for Justices of the Supreme Court and Court of Appeal, and 60 years for judicial officers in other courts.⁷¹ The restriction to practice law is not only imposed on persons who have ceased to be judicial officers but also on serving judicial officers. The Code of Conduct for Judicial Officers stipulates that a judge shall not practice law while he is a holder of a judicial office.⁷² A combined reading of these provisions imply that a person who is a serving judicial officer or who has retired or has been dismissed should not practice law in Nigeria. Practising law means to practice as barrister or as

⁶³Oluwatomi A. Ajayi, 'Justice at the Customary Court Level in Lagos State' <<https://loyalnigerianlawyer.com/justice-at-the-customary-court-level-in-lagos-state/>> accessed 16 August 2024; Customary Court Law of Lagos State 2015 (as amended in 2018) s2.

⁶⁴ Ibid

⁶⁵ No. 6 of 2011

⁶⁶Chika Odoemenam, 'Customary Court Law of Abia State: Effective Mechanism for Expeditious Justice Delivery – A Review' in Ernest Ojukwu and C. K. Nwankwo (eds.), *Law and Social Development: Essays in Honour of Chief Echeme Emole*. (Helen-Roberts Limited 2012) 422.

⁶⁷ Ibid, p. 419.

⁶⁸ RPC 2023 r6 (3).

⁶⁹ RPC 2023 r6 (4).

⁷⁰On 8 June 2023, President Bola Ahmed Tinubu signed into law a Constitutional Alteration Act to introduce a uniform retirement age and pensions rights for judicial officers. This alteration now pegs the retirement age for all judicial officers of superior courts of record at 70 years. Policy and Legal Advocacy Centre <<https://placng.org/Legist/constitution-alteration-places-retirement-of-judicial-officers-at-70-years/>> accessed on 10 August 2024; Premium Times <<https://www.premiumtimesng.com/news/top-news/603366-tinubu-signs-new-law-that-harmonises-retirement-age-of-nigerian-judges.html>> accessed 10 August 2024; The Cable <<https://www.thecable.ng/tinubu-signs-into-law-bill=raising=judges-retirement-age/>> accessed 10 August 2024.

⁷¹ CFRN 1999 s291 (1) & (2).

⁷² CCJO 2016 r9.4.

barrister and solicitor, and this is meant for only legal practitioners. This implies that judicial officers should have been legal practitioners at the time of their appointment, and upon retirement or dismissal from officers, cannot go back to practice as legal practitioners.

Section 288 CFRN is also germane to this discourse. It provides that in the course of appointments to the offices of Justices of the Supreme Court and Court of Appeal, the President shall have regard to the need to ensure that there are among the holders of such offices persons who are learned in Islamic personal law and persons learned in customary law. A person shall be deemed to be learned in Islamic personal law if he is a legal practitioner in Nigeria and has been so qualified for a period of at least 15 years in the case of a Justice of the Supreme Court or for a period of at least 12 years in the case of a Justice of the Court of Appeal. Furthermore, such person must have obtained a recognised certificate in Islamic law from an institution acceptable by the NJC. A person shall be deemed to be learned in Customary law if he is a legal practitioner in Nigeria and has been so qualified for a period of at least 15 years in the case of a Justice of the Supreme Court or for a period of at least 12 years in the case of a Justice of the Court of Appeal. More so, such a person must, in the opinion of the NJC, have considerable knowledge and experience in the practice of customary law. This points to the fact that the judicial officers in the Customary Court of Appeal and Sharia Court of Appeal that are non-lawyers cannot be elevated to the higher Bench of Court of Appeal or Supreme Court since non-lawyers cannot occupy those judicial offices. While every other judicial officer in the different courts lower than the Court of Appeal and Supreme Court as well as Magistrates can rise through the judicial hierarchy to the offices of Court of Appeal and Supreme Court, the non-lawyer judicial officers in the Customary Court of Appeal and Sharia Court of Appeal cannot be elevated to a higher court. This shows to an extent that judicial offices are supposed to be held by legal practitioners and not otherwise. It also reveals a stark dichotomy of holders of judicial office into two classes; the legal practitioner-appointed-judicial officer and the non-legal practitioner-appointed-judicial officer. Both classes of judicial officers enjoy the same benefits or perquisites of office, and that includes extended retirement age to 70 years. But Magistrates in the different Magisterial Districts in the country who are all legal practitioners do not enjoy exactly the same benefits with judicial officers since they are not regarded as judicial officers by the provisions of the Constitution and from decisions of the apex court.

According to Justice Oputa, life is organic, so also is the law. The law of life is to grow or die. The law must be kept alive and abreast with changes in society and social values by legislation and by judicial law making. An expanding society needs an expanding law which should become an instrument of social change, and which should also be interpreted to attune with the onward march of society.⁷³ The Constitution cannot be strictly interpreted like an Act of the National Assembly or a law of a State House of Assembly. It must be interpreted without ambiguity because it being the foundation of all laws, it is not supposed to be ambiguous. It must be literally interpreted so that every section therein will have meaning. All canons of construction will not abate but will be employed with great caution. Therefore, when the Constitution is clear as to its intendment on any subject, the courts in giving construction thereto are not at liberty to search its meaning beyond it.⁷⁴ The Supreme Court has held that where the words in a statute are precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, as the words themselves in such case best declare the intention of the legislature.⁷⁵ The approach of the Supreme Court to the interpretation of the Constitution is one of liberalism based on the principle expressed in the general maxim, *ut res magis valeat quam pereat*. Thus, the Supreme Court will not interpret any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another interpretation equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.⁷⁶ It is trite that the express mention or exclusion of one thing in a constitutional or statutory provision excludes others not mentioned.⁷⁷ Thus, it may be apt to say that a judicial office is the exclusive preserve of a legal practitioner, but there are two exceptions which are the judicial offices of Customary Court of Appeal and Sharia Court of Appeal. However, whenever a court is confronted with the interpretation of a constitutional provision, the provisions of the Constitution as a whole ought to be read in determining the object of the particular provision.⁷⁸ Thus, the court should not interpret a section in isolation of other sections but look at the entire statute.⁷⁹ It is also legitimate to look back at the history of the process which brought the Constitution or a particular provision or section into being in the interpretation of the Constitution. A court of law is not to be oblivious of the history behind the law or section interpreted.⁸⁰ In *Dangana v. Usman*,⁸¹ it was held that in the interpretation of the Constitution, a judge should not only rely on the provisions of

⁷³ C. A. Oputa, *Themes on Judicial Activism and Law* (Justice Watch 2014) 66.

⁷⁴ *F.R.N. v Osahon* (2006) 5 NWLR (pt. 973) 361

⁷⁵ *Rhein Moss Und See Schiffahrtskontor GMBH v Rivway Lines Ltd.* (1998) 5 NWLR (pt. 549) 265.

⁷⁶ *Mohammed v Olawunmi* (1990) 2 NWLR (pt. 133) 458.

⁷⁷ *Jegade v Akande* (2014) 16 NWLR (pt. 1432) 43.

⁷⁸ *P.T.F. v Fidelity Bank Plc* (2022) 9 NWLR (pt. 1836) 475.

⁷⁹ *Santana Medical Services Ltd. v Nigerian Ports Authority* (1999) 12 NWLR (pt. 630) 189 @ 200 para. A; *Ekekeugbo v Fiberesima* (1994) 3 NWLR (pt. 335) 707

⁸⁰ *Onagoruwa v State* (1993) 7 NWLR (pt. 303) 49 @ 102, para. A.

⁸¹ (2013) 6 NWLR (pt. 1349) 50

the Constitution but also on our historical development as a people and the history before the Constitution was enacted.

The courts cannot amend the Constitution, neither can they change its words.⁸² The courts must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words which change with the passage of time and age.⁸³ It is the suggestion of this paper, with due respect, that the dichotomy in the judicial office or the two classes of judicial officers comprising legal practitioners-appointed-judicial officer and the non-legal practitioner-appointed-judicial officer be removed. This paper calls for judicial interpretation of sections 261(3)(b), 266(3)(b), 276(3)(b) and 281(3)(b) of the Constitution of the Federal Republic of Nigeria 1999 which deal with appointment of non-lawyers to judicial offices of Sharia Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State and Customary Court of Appeal of a State respectively, and subsequent amendment by the National Assembly in line with the judicial interpretation, where necessary. It is submitted that all judicial offices, without any exception, should be the exclusive preserve of legal practitioners.

11. Conclusion and Recommendations

This paper explored the academic qualifications stipulated in the Constitution for two judicial offices; the Customary Court of Appeal and Sharia Court of Appeal, both at the Federal and State strata, through the lens of exclusive rights and privileges of a legal practitioner conferred by the Constitution. The paper posited that from the combined reading of the various constitutional provisions considered in this paper, the right to be appointed a judicial officer is solely the exclusive preserve of legal practitioners. It appears that from the intendment of section 292(2) of the Constitution, non-lawyers are not supposed to hold judicial offices since a person must be a legal practitioner in order to act as one before any court or tribunal in Nigeria. Acting as a legal practitioner before a court or tribunal in Nigeria is the right of audience or right to represent litigants in court. This is one of the exclusive rights and privileges of a legal practitioner. According to Justice Oputa, it is pertinent to remind some persons already on the Higher Bench and many of the aspirants to that high Judicial Office that it takes something to be called upon to sit on the Higher Bench *after long standing at the Bar*.⁸⁴ [Emphasis mine]. As stated earlier, the twin pillar of the legal profession is the Bar and the Bench. Long standing at the Bar denotes being called to the Nigerian Bar and having maintained such status, acquiring knowledge and experience as well, for a considerable period. Justice Oputa further stated that, it even takes more to maintain one's seat confidently and comfortably on that Bench; that it requires proper conduct and decorum in addition to erudition in law and jurisprudence.⁸⁵ To an extent this shows that only lawyers (legal practitioners) are intended, by the import of the Constitution to be appointed as judicial officers. It is trite that for a person to practice law generally in Nigeria, such person must have been called to the Nigerian Bar. By placing a restriction on judicial officers to practice law on ceasing to be judicial officers reveals, to an extent, the intention of the drafters of the Constitution that a judicial office should be the exclusive preserve of legal practitioners. And this is the submission of this paper. It was discovered from a combined reading of the provisions of the Constitution on exclusive rights and privileges of a legal practitioner that a judicial office is likely meant for lawyers and not non-lawyers. Thus, this paper is a call for a rethink of the dichotomous constitutional qualifications for the judicial officer under consideration vis-à-vis the qualification for Magistrates.

Expanding diversification of specialization: Law is an omnibus field with different areas for specialization such as constitutional law, property law practice, civil litigation, criminal litigation, corporate law practice, aviation law, maritime law, international law, environmental law, etc. It's rare to find lawyers who specialize in customary law, and only a few may specialize in sharia law. Making the offices of the two appellate courts being discussed in the paper, the exclusive preserve of lawyers, can be a great booster for lawyers to specialize in these aspects of the law with the same confidence or pride as those in other aspects of the law. Lawyers intending to sit on the Bench as Judges of Customary Court of Appeal or Kadis of Sharia Court of Appeal should specialize in Customary Law or Sharia Law respectively. Non-lawyers trained in customary law or Sharia law who are desirous of sitting on the Bench should man the lower Bench in those areas of law such as the Customary Court, the Area Court or Sharia Court as the case may be. Judicial interpretation should be given to sections 261(3)(b), 266(3)(b), 276(3)(b) and 281(3)(b) of the Constitution which relate to non-lawyer judicial officers, and subsequent amendment by the National Assembly where applicable. Magistrates should also be given one of the recent benefits of judicial officers which is increasing their retirement age to 70 years. This can only be achieved at the different States.

⁸² *Dapianlong v Dariye II* (2007) 8 NWLR (pt. 1036) 332.

⁸³ *The Governor of Kwara State v Ojibara* (2006) 18 NWLR (pt. 1012) 645.

⁸⁴ C. A. Oputa, *Themes on Judicial Activism and Law* (Justice Watch 2014) 85.

⁸⁵ *Ibid.*