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SUPREME COURT'S DECISION IN UDEOGU V FRN: POLICY AND PRACTICE IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM IN NIGERIA

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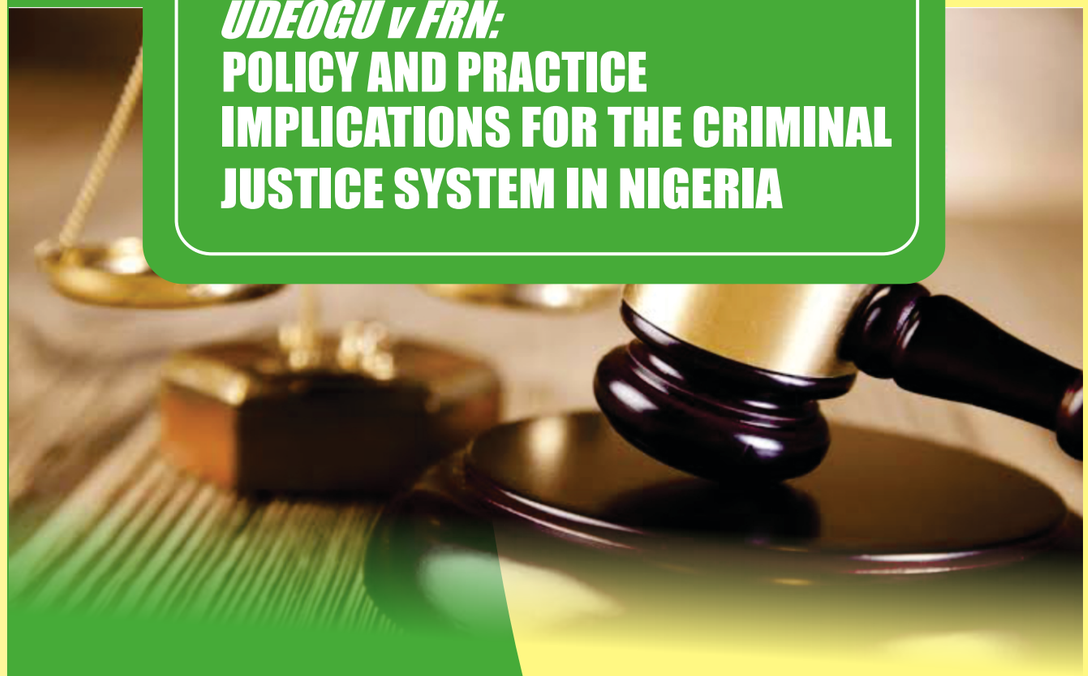

By
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Nigerian Institute of Advanced Legal Studies

MacArthur Foundation

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Foreword

This work arose from the Supreme Court's decision in *Udeogu v FRN* delivered on the 8th day of May, 2020. It is not meant to be a critic nor an attempt to sit on appeal on the judgment delivered by the apex court. Rather, it contributes to the jurisprudence on purposive interpretation of the Constitution and other statutes.

The ideas expressed here are strictly those of the authors and do not reflect the position of the funders on the subject matter.

This work is intended to serve as a policy guide for judicial officers in today's contemporary activism and dynamism in the judiciary. It will serve as a reference material for the adjudication of cases in line with public policy and justice.

Muhammed Tawfiq Ladan, PhD
Hubert Humphrey Fellow, USA
Director General
August, 2020

Acknowledgement

We sincerely express our deep sense of gratitude to the John D and Catherine T MacArthur Foundation, for the immense support in the development of criminal justice system in Nigeria and more importantly, its support in the growing jurisprudence on criminal justice administration in Nigeria.

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Supreme Court's Decision in *Udeogu v FRN*: Policy and Practice Implications for the Criminal Justice System in Nigeria

By

Muhammed Tawfiq Ladan,[*] Lilian Onyinyechi Uche, [**] Jane Ezirigwe,[***] and Okike Chibueze Ajanwachuku [****]

Abstract

It is well known that judges' laws have legal, policy and practice implications. In this work, we demonstrate the implications of the decision of the Supreme Court of *Nigeria in Udeogu v FRN* on the administration of criminal justice, using review and analytical approaches. We examine the contending issues and stakeholders' perspectives on the decision. We find that the courts in interpreting the Constitution must give room for dynamism and development. We make recommendations on imperatives, to ensure that the criminal justice system is not hijacked and jeopardized by the privileged justice shoppers who capitalize on loopholes in the law, to thwart justice in their favour.

Keywords: *Udeogu v. FRN, Administration of Criminal Justice Act, Judicial Dynamism.*

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Introduction

The Supreme Court of Nigeria, as the court of finality,[1] gave its judgment in *Udeogu v FRN*,[2] to the effect that amongst others, section 396 (7) of the Administration of Criminal Justice Act, 2015 (ACJA), is unconstitutional. This sparked up dissenting views in the legal community and condemnation from the public. Here we examine the reasoning of the court in arriving at its decision and argue that the Supreme Court should have applied a balancing test by employing a purposive interpretation that considers both the letter and the spirit of the Constitution and the legislation. We further argue that the decision did not consider the policy and practice implications of such judgements, on the criminal justice system. It also failed to ensure that mere technicalities do not stall justice, a cardinal aim of the justice system, while rewarding illegality perpetuated by the initiator.

We adopt an analytical approach to examine the reasoning that formed the bases of the decision. First, a background is laid on the ACJA, the subject matter of the judgement, in Part II below. Part III lays out briefly the facts of the case under review, for ease of comprehension. Part IV examines the contending issues with the Supreme Court's decision from the perspective of the authors. Thereafter, Part V presents stakeholders' perspective on the decision, in order to

1. Constitution of Federal Republic of Nigeria, S 235.
2. *Ude Jones Udeogu v FRN,* Suit no: (SC 622C/2019, Supreme Court, March 2020).

assess the opinions of criminal justice system experts and users. Part VI revisits the effect of elevation of judges to a higher court and the effect of this on the criminal justice system. Part VII discusses the policy and practice implications of the Supreme Court's decision under review. Part VIII contains the conclusion and recommendations.

Background to ACJA, 2015

Prior to the enactment of the ACJA, the Nigerian criminal justice system was governed by two principal legislation traceable to the British colonial administration, namely the Criminal Procedure Act, (CPA) and the Criminal Procedure Code (CPC) depending on whether such a state was created out of the former northern or southern region respectively. At this time, the criminal justice system was wrought with delays, making exit from justice almost impossible and Nigeria's formal compliance with human rights issues low.[3] The rights and interests of accused persons not yet convicted were also poorly regarded, and the laws significantly discriminated against the rights of women, among other defects in the nation's criminal justice system. Progress of criminal cases defied all mechanisms to ensure that justice was not delayed nor denied to the accused, the state and the victim.

3. Evelyn Okakwu, Analysis: Main features of Nigeria's Administration of Criminal Justice Act (Part 1)' *Premium Times* Wednesday, August 5, 2018; pg1. https://www.premiumtimesng.com/news/headlines/279474-analysis-main-features-of-nigerias-administration-of-criminal-justice-act-part-1.html,Accessed August, 19,2020.

In response to this hydra headed challenge, the Supreme Court, Court of Appeal and the Federal High Court issued practice directions to fast track trials and appeals arising from some category of criminal cases notably cases of corruption, money laundering, human trafficking, kidnapping, rape and terrorism. One of such practice directions issued by the apex court is the Supreme Court (Criminal Appeals) Practice Direction, 2013 which sole aim was to reduce delays in criminal appeal. While these efforts were commendable, they were restricted to the activities in the court and not applicable in the whole gamut of the criminal justice system, including arrest and correctional services. Thus, other challenges to the system including overt disrespect for human rights, "holding charge" syndrome, limited engagement with victims of crime, lack of gender mainstreaming, and lack of interagency cooperation amongst criminal justice institutions were still subsisting.[4]

In a celebrated victory for the criminal justice system, the Administration of Criminal Justice Act was validly enacted in 2015.[5] Section 1 of the ACJA explains the purpose of the Act to include, ensuring that the system of

4. Fatima Waziri – Azi, 'Compliance to the Administration of Criminal Justice Act,
2015 in Prosecuting High Profile Corruption Cases in Nigeria (2015 – 2017)' *Journal of Law and Criminal Justice* [2017] Vol. 5, No 2, (113) 113-128.
5. Law Pavilion, The Administration of Criminal Justice Act, 2015 (ACJA), https://lawpavilion.com/blog/the-administration-of-criminal-justice-act-2015-acja/. Accessed 28 July, 2020.

administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.[6] Its subsection 2 provides that the courts, law enforcements agencies and other authorities or persons involved in criminal justice administration shall ensure compliance with the provisions of this Act for the realization of its purposes.

Section 396(7) of ACJA, the thrust of the decision of the Supreme Court, provides that:

Notwithstanding the provision of any other law to the contrary, a judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time.

The purport of this section was to cure the loophole in the criminal justice administration where cases were unduly delayed due to the elevation of a presiding judge. It then becomes important to explore whether the approaches adopted by the courts in the past have helped matters to the extent that interlocutory and trial de' novo are not used as tools to stall trials of cases *ad-infinitum.*

6. Adedeji Adekunle, Explanatory Memorandum to the ACJA 2015.NIALS, 2015.

Facts of the Case

In 2016, the appellant Ude James Udeogu and the 2nd and 3rd defendants, Orji Uzor Kalu and SLOK Nigeria Ltd respectively were arraigned before Honourable Justice M B, Idris of the Federal High Court on several criminal charges to which they each pleaded not guilty. Trial commenced with the prosecution calling 19 witnesses and closing its case two years later on 11th May 2018. On 28th May 2018, the appellant entered a "no case submission" which was rejected by the prosecution. On the 20th of June 2018, Justice M B Idris was elevated to the Court of Appeal and took his oath of office on the 22nd of June 2018.

On the 2nd of July 2018, the President of the Court of Appeal, acting under section 396(7) of the Criminal Justice Act, 2015 issued to Justice M B Idris a *fiat* to conclude the part heard criminal matter between the *Federal Republic of Nigeria v Orji Uzo Kalu & 2 Ors*,[7] (FRN v Orji and 2 others) which was pending before the Federal High Court. This *fiat* directed Justice M B Idris to conclude the matter before September 2018. Pursuant to the *fiat*, Justice M B Idris, resumed sitting in the criminal matter between *FRN v Orji and 2 Ors*.

The prosecution's application of 16th July 2018, sought to amend the charges, was granted despite being opposed by the defendants. Upon granting the application, a fresh plea was taken to which each defendant pleaded not guilty. The arguments on the appellants' 'no case submission'

7. Among the Two other defendants is the appellant Ude Jones Udeogu, the other being Slok Nigeria limited the 3rd respondent.

was taken on the 25th of July before Justice M B Idris and his ruling on the 'no case submission' was delivered on the 31st of July 2018, where he dismissed the 'no case submission' and called upon the appellant to enter his defence.

In his appeal against the ruling, the appellant challenged the competence of M B Idris, JCA to continue to sit and hear the matter then pending before the Federal High Court. The Court of Appeal heard arguments in the appeal on 7th February, 2019 and on 24th April 2019, and in their judgment the Justices of the Court of Appeal unanimously dismissed the appeal. Hence the appeal to the Supreme Court.

Issues for Determination

The Supreme Court formulated the sole issue for determination to be, whether the Court of Appeal was right when it held that Section 396(7) of the ACJA 2015 vests Justice M B Idris of the Court of Appeal with requisite power to sit and conclude part heard matter at the Federal High Court and that the said section is not in conflict with sections 250 (2) and 253 of the Constitution of the Federal Republic of Nigeria 1999, notwithstanding his lordship elevation to the Court of Appeal and his Lordships subsequent swearing in as a Justice of the Court of Appeal.

Decision of the Court

The Judgment of the Court of Appeal and all actions taken by Justice M B Idris based on the *fiat* were set aside. The case was remitted to the Chief Judge of the Federal High Court, for

reassignment to another Judge of the Federal High Court for the trial to commence de novo.

Reason for the Decision

The Supreme Court allowed the appeal on the ground that section 396(7) is "an unnecessary gratuitous legislative interference with, intrusion into or an outright usurpation of the appointing powers of the executive arm, consigned specifically to the President of the Federal Republic of Nigeria by the Constitution in section 250(1) and 238(2) and that the *fiat* given to Justice M B Idris is ultra vires Sections 1(2)(a) and 19(3)&(4) of the Federal High Court Act being that it is an outright usurpation of the office and powers of the Chief Judge of the Federal High Court.

Contending Issues with the Supreme Court's Reasoning

The decision in *Udeogu v FRN,* is one that has sparked public outrage and elicited several arguments on the validity/legality/ correctness or otherwise of the judgment. The judgment raised several issues which mainly border on the powers of the National Assembly to make certain laws, the powers of the President of the Court of Appeal (PCA) to give certain directives and purposeful interpretation of the Constitution by the Supreme Court.

The contending issues in the above decision are outlined and analysed below.

Constitutionality of the Issuance of Fiat pursuant to section 396 (7) of the ACJA 2015

This is a novel provision in ACJA 2015 duly enacted by the National Assembly to serve the specific purpose of ensuring speedy trial and quick disposal of criminal cases which had hitherto suffered excessive delay, often caused by *de'novo* commencement of part heard cases, due to either death or elevation of the presiding judge to the Court of Appeal. The Supreme Court in arriving at its decision in *Udeogu v FRN* relied on the 1979 case of *Ogbunyiya v Okudo,*[8] and 2009 case of *Our Line Ltd. v S C C Nig Ltd*,[9] decided prior to the enactment of ACJA in 2015. The Court of Appeal had earlier acknowledged and distinguished this fact, that these previously decided cases were before the enactment of ACJA.[10]

The apex court considered the constitutionality of both the statutory dispensation by the National Assembly granting the President of the Court of Appeal (PCA) powers thereunder as well as the administrative *fiat*/ permission,[11] given by the PCA on 2nd July, 2018.[12] The court concluded that S 396 (7) of ACJA is inconsistent with the provisions of the Constitution because the ACJA in using the term "any other law to the contrary", without specifically mentioning the laws it intends to override purports to have included the Constitution,[13]

8. [1979] NSCC 77.
9. [2009] 17 NWLR (Pt.1170) 383; [2009] LPELR-2833 (SC).
10. Lead judgement page 16.
11. See a copy attached as appendix 1.
12. Lead judgement page 13.
13. See para 2 Page 13 of the lead judgment.

and as such is void by virtue of section 1(3) of the 1999 Constitution of Nigeria.[14]

With due deference to the Honourable Justices, we respectfully submit that given the undisputable jurisprudence that no law can be superior to the Constitution, it could never have been that the legislature contemplated that the Constitution was part of the 'any other law' referred to. Without resorting to the Interpretation Act,[15] used to provide for the construction and interpretation of Acts of the National Assembly,[16] to seek clarification on whether 'law' includes the Constitution under the Nigerian legal jurisprudence, the apex court concluded that, 'it appears "any other law to the contrary" includes...including the 1999 Constitution.'[17] Surprisingly, the court itself refers to the Constitution as 'the grund norm', not as a superior law, because it is a well-established allusion in the legal parlance. Additionally, S 18 of the Interpretation Act defines laws to mean, 'any law enacted or having effect as if enacted by the legislature of a State and includes any instrument having the force of law which is made under a Law.' Clearly, this does not include the Constitution.

As examined above, the rules of interpretation guide the courts in interpreting the Constitution and statutes, in order to ensure that the court discharges its aim of justice. It is not and should not be employed and used as to render mere

14. CFRN 1999 (as amended)
15.Cap 192, LFN 1990.
16.See the long title to the Act.
17.Lead judgement page 13.

'judgement without justice'.[18] The court has the obligation to read the provisions of a statute in its entirety and interpret it holistically, to unveil the true intentions of the law makers.[19] This obligation is not discharged by a blind-black-letter interpretation, without the reality of societal realities.[20] The purpose of the Act clearly stated in Section 1 should have guided the court.

Furthermore, the apex court ruled that the sub-section conflicts with Sections 250 (2), 251, 252 and 253 of the Constitution on the appointment, composition and jurisdiction of a Federal High Court judge,[21] as well as S 290 (1) which provides that having taken the Judicial oath of office of the Court of Appeal, the Court of Appeal only has appellate jurisdiction on such matters.[22] The Supreme Court concluded that Justice M B Idris by virtue of being a Judge of the Court of Appeal ought to only perform constitutional functions of the Court of Appeal and not matters of first instance as directed in the *fiat*. Therefore, he lacked jurisdiction to dabble into such matters.

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18. Prof Fidelis Oditah, QC, SAN on the Virtual WOC Justice Summit held on 22nd August, 2020.
19. *Attorney-General of Abia State v. Attorney-General of the Federation*, (2002) 12 NWLR (Part 940) 452.
20. Hakeem Ijaiya and Hakeemat Ijay, *Law as a Means of Serving Justice in Nigeria* (Pandecta 2018) Vol 13. No 1. Pg 1-9 (8).
21. Lead judgment page 22.
22. Lead judgment page 23.

With due respect to the Honourable Justices, we respectfully submit that the ACJA did not invent additional functions for judicial officer, outside their primary responsibilities and jurisdictions. Statutes have in the past permitted Justices of appellate courts to perform functions and exercise the powers of trial courts. For instance, section 16 of the Court of Appeal Act,[23] and section 22 of the Supreme Court Act,[24] allow the Honourable Justices to exercise powers of the trial courts respectively. Additionally, judges have been authorized to assume jurisdiction and sit as chairmen or members of administrative panels, judicial commissions of inquiry, or election tribunals without weakening, contradicting or disputing their powers as either a judge of High Court or a Justice of the Court of Appeal when they concurrently perform such functions or resume their former jurisdiction. Therefore, it will be unfair to declare such additional functions given to the newly elevated judge by a *fiat* as unconstitutional on the same premise as had hitherto been carried on by judicial officers.

23. '...may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below...'
24. 'may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below..'

Subsection 7 of s 397 of ACJA merely included a new function that may be carried out by the 'newly appointed justice of the Court of Appeal but has not diminished his role, position or function as a justice of the Court of Appeal.'[25]

The court also considered and described a judge acting pursuant to such *fiat* as a hybrid judge, a concept not recognized under the Constitution. In the words of Hon. Justice Amina Adamu Augie, JSC:

There is nowhere in that Constitution, where it is provided that one person shall be both High Court judge and Justice of the Court of Appeal at the same time. There is a clear demarcation between a High Court and Court of Appeal, and there is no Constitutional provision that suggests, implies or makes room for the creation of a hybrid judge or hybrid Justice, to operate in both courts. I liken them to ghosts roaming around the four walls of the High courts, because being Justices of the Court of Appeal, the Chief Judges have no say over whatever they do when they are wearing the cap of a High Court judge, and the President of the Court of Appeal has no say over what they do there. In other words, such a situation cannot be the outcome envisaged by section 396 (7) of ACJA on the justice system and court administration, as we know it.[26]

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25. Chino Obiagwu, Appeal Court justice as judge of High Court: A commentary on the Supreme Court decision in *Udeogu v FRN*, vanguard, 14 May, 2020, https://www.vanguardngr.com/2020/05/appeal-court-justice-as-judge-of-high-court-a-commentary-on-the-supreme-court-decision-in-udeogu-v-frn/.
26. See p5 of her judgement.

Respectfully, we refer my Lordship to Section 6 (4) of the constitution, which provides that '[n]othing in the foregoing provisions of this section shall be construed as precluding-

(a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court.

This will mean that the National Assembly is constitutionally empowered to create such hybrid courts as envisaged by my Lord, both in structure and in power, and by so implying, the National Assembly can validly empower the PCA, under whose authority the newly elevated judge reports to, to release such a judge to perform such functions. Although now a Justice of Court of Appeal, he can administratively under a validly enacted law, ACJA, be allowed to perform such judicial functions of a High Court, as empowered by the National Assembly, given that it is only the Justices of the Supreme Court that are constitutionally precluded from exercising original criminal jurisdiction.[27] Respectfully, we think that my Lord's narrow approach to Constitutional interpretation as if the Constitution must list all likely scenarios can only do more harm than good to our justice system. The apex court should be progressive and dynamic to suit the realities of our time. It was Lord Denning that asked in the case of Parker v. Parker:[28]

27.232 (2) 1999 Constitution.
28. [1953] 2 ALL E R 121.

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both.

In the lead judgment, Hon Justice Ejembi Eko considered the *fiat* issued a nullity because it was issued under a non-existent law. He stated that:

The parties particularly the Appellant, seem to think that the President, Court of Appeal, on 2nd July, 2018, issued his 'FIAT/Permission' to Hon. Justice M B Idris, JCA, 'to conclude the part-heard criminal matter-'pursuant to and in furtherance of section 396 (7) of the Administration of Criminal Justice Act, 2015, and not Section 396 (7) of the non-existent Criminal Justice Act, 2015.[29]

With due respect to my Lords, our understanding is that such technical errors should not be a clog in the attainment of substantial justice, as the court should be drawn to the substance rather than the form. Such clerical errors subsist in the administrative parlance, even with the production of the judgements of my Lords, as evident in this case.[30]

29. At pages10-11 of the lead Judgment.

30. For instance, see p 14 of the lead judgement with the word avoid instead of void.

Powers of National Assembly to make Laws for Courts

Section 6(3) of the Constitution gives the National Assembly powers to modify or add to the powers of the superior courts. It provides thus, '…**save as otherwise prescribed by the National Assembly** or by the House of Assembly of a State, each court shall have all the **powers o**f a superior court of record.' (emphasis added).

What then could constitute these extra powers of the court that can be granted by an Act of the National Assembly? It will be safe to conclude that it would include such extra powers as has been granted by National Assembly to do as my Lord, Hon. Justice Eko termed it, a dispensation to the Honourable Justice M B Idris, JCA to continue to act.
According to Hon. Justice Eko in his lead judgment:

Dispensation', according to both Oxford Advanced Learner's Dictionary and Black's Law 9th Ed., is a permission to do something that is not usually done, allowed, legal or lawful. Therefore, the question is, on what constitutional authority does either the National Assembly or the President of the Court of Appeal stand to grant this 'dispensation' to the Honourable Justice M B Idris, JCA to continue to act as a Judge of the Federal High Court after he had ceased to be a judge of the Federal High Court upon his elevation to the Court of Appeal?[31]

31. Pgs 5-6 of the Lead judgment.

This highlighted power of the National Assembly above, respectfully answers my Lord's questions on the authority of the National Assembly to enable the PCA to grant the *fiat*.

In addition, section 4 (1-4) of the 1999 Constitution empowers the National Assembly to make laws for peace, order and good governance of the federation or any part thereof which means that the National Assembly in making any law for the good of the country can make laws to strengthen the lax criminal justice system in Nigeria. The wordings of Section 251 (1) of the 1999 Constitution thus reproduced below empowers the National Assembly to make laws or regulation that confer additional jurisdiction to the Federal High Court:

251 (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters. (emphasis added).

In the same vein, the Constitution under section 46 (4) empowers the National Assembly to confer on the High Court more powers in addition to those conferred already by the Constitution, if it thinks necessary or desirable for the purpose of enabling the court to effectively exercise its functions, more effectively.[32]

32. Section 46(4) 1999 Constitution, The National Assembly - (a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National

The words, 'notwithstanding' in S 251 (1) above, must be emphasized and read together with any other section of the Constitution on the appointment, constitution and jurisdiction to act as a Federal High Court judge.

Additionally, from the analysis of the Supreme Court's decision, it is not out of place to say that the National Assembly did not err in the passage of the ACJA 2015 with special reference to section 396(7). Indeed, my Lord Justice Kudirat Kekere-Ekun had replicated the position by Lord Ayoola JSC in *INEC v Musa*,[33] that 'where the Constitution has enacted *exhaustively* in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted, must show that it ***derived the legislative authority to do so from the Constitution***.'[34] (emphasis added).

The underlined word in the quote is an indication that the subject or situation must have been exhaustively provided for in the Constitution. That is obviously not the case, given the provisions of s 251 (1) reproduced above and the fact that the criminal justice system was being derailed with the de novo trials, necessitating the enactment of ACJA. The requirements in the bolded words are fulfilled by the

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Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section.

33. [2003] LPELR-24927 (SC) @ 100 A-C.

34. Judgement by Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC, p9.

constitutional authority to the National Assembly in Sections 4 and 6 (3) of the Constitution.

In furtherance to this assertion, it was the National Assembly that, pursuant to section 232 (2) of the Constitution, added additional original jurisdiction to the Supreme Court on any dispute between the National Assembly and the President or the National Assembly and any State House of Assembly.[35] If such additional jurisdictions which were not hitherto added in the Constitution were validly added by the Act of the National Assembly, it will indeed be illogical to argue on the unconstitutional nature of S 396 (7) of ACJA, only on the ground that the National Assembly did not have such powers.

Can a litigant benefit from a known wrong or a known illegality initiated by the litigant?

This stems from the fact that one of the defendants relying on section 396(7) of the ACJA requested that Justice M. B Idris be allowed to conclude the trial which he presided over at the lower court, as a Judge of the Federal High Court. The litigant in a letter to the President of the Court of Appeal,[36] requested her to exercise her powers under section 396(7) the ACJA because the matter has lingered for 11 years at the Federal High Court, therefore starting the trial *de novo* was going to cause untold hardship to the parties. This prayer was granted by the Court of Appeal. However, after he was sentenced to 12 years imprisonment over the alleged fraud, the accused person

35. Supreme Court (additional Original Jurisdiction) act, 2002, No 3.

36. Annexed herein.

appealed against the jurisdiction of the presiding judge to continue the part heard matter since he has been elevated to the Court Appeal. In doing so, the accused challenged the constitutionality of the same law which he relied on in his letter to the PCA.

Clearly, the respondents twisted the hands of the court to serve their own selfish interest by appealing against a judgment which got its form from their prayers. From the facts of the case, the Supreme Court did not avert its mind to the mischief intended to be perpetuated by the litigants because it is unjust to benefit from a known illegality. In this case, the appellants already perfected their plans to obstruct the course of justice by relying on section 396 (7) which they had always perceived to be unconstitutional.

Although the Supreme Court held in *Ariori & Ors v Muraino B O Elemo & Ors*,[37] held that '[w]hen a right is conferred by the Constitution, a waiver of such a right would depend on whether the right is solely for the benefit of individual or whether it involved a matter of public interest or public policy… It has become public and cannot be waived by parties. The law does not permit a person to contract himself out of or waive the effect of a rule of public policy',[38] this is distinguishable from the present case. In that case, the inordinate delay by the judge before delivering the judgement was interpreted as affecting the right to public justice, which

37. [1983] LPELR-SC.80/1981.
38. See paras 2, 5 and 6.

cannot be justified by the excessive adjournments alleged to have been requested by the parties.

In the present case, the respondents had sought to have a law be put in motion, at their instance. It was in the interest of public justice and in giving effect to their right to speedy trial that the request was granted. The respondent subsequently conceived, or having pre-conceived what seemed like a loophole in the law, decided to short change the system, by literally eating its cake and having it. Would justice then be said to be done, with such privileged justice shoppers jeopardising the system by trying different gimmicks, to suit their interest? We do not think so. The question the Supreme Court failed to ask the respondents is whether they would have appealed the judgment of the Federal High Court or challenged the constitutionality of the law if the judgment had gone in their favour. Does this decision then deter criminals or does it encourage and enable them to seek for and capitalize on loopholes in the system? To what end then, will justice be served in these situations? We think it will not serve any justice.

The situation here can be likened to the doctrine of *ex- turpi causa non oritur* action mainly used in contract law. It states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act. The principle underlying *ex turpi causa* is not limited to circumstances where the injuries are sustained during the course of a joint criminal enterprise. This old and well-known legal maxim is founded on good sense, and expresses a clear and well recognized legal

principle. No court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him. It is available wherever the conduct of the plaintiff giving rise to the claim is so tainted with criminality or culpable immorality that as a matter of public policy the court will not assist the plaintiff to recover.[39]

Stakeholders' Perspective on the Supreme Court's Decision

The decision of the Supreme Court under review has been analyzed by different stakeholders in the criminal justice sector. While some support the decision of the court, others are of the view that the decision will further clog the wheels of justice as it relates to the efficient and speedy dispensation of criminal justice. Most of those that disagreed with the reasoning of the court argued that the apex court disregarded certain pertinent concerns.

39. *Hall v Herbert, Justice Gibbs of the British Columbia Court of Appeal* added: *Hall v Herbert* 53 BCLR 2d 201; also at 28 MVR 2d 94 or 6 CCLT 2d 294 or 46 CPC 2d 192 (BCCA, 1991).

Chino Obiagwu, SAN,[40] argues that a statutory provision cannot be considered as conflicting with the constitution if it does not interfere or limit or obstruct the provisions of the constitution. He further posits that section 396(7) of ACJA did not interfere with section 290 of the Constitution to limit or diminish its purport as judges of the High Court or Justices of appellate courts are regularly appointed as judges of tribunals or chairs or members of administrative panels of inquiry.[41] This argument is plausible because if there was no direct mention of the Constitution in section 396(7) of the ACJA 2015, one can also argue as above, that the reference to any other law did not include the Constitution.

Femi Falana, SAN,[42] posits that the Supreme Court sits as a High Court, by virtue of section 16 of the Court of Appeal Act which empowers the Justices of the Court to exercise the powers of a trial court, as if the proceedings had been instituted in the Court of Appeal as a court of first instance and that a similar provision is provided in section 22 of the Supreme Court Act which vested the Justices of the Supreme Court with the powers of a trial court, as if the

40. Senior Advocate of Nigeria and National Coordinator, Legal Defence and Assistance Project.

41. Chino Obiagwu,, Appeal Court Justice as a Judge of High Court: A Commentary on the Supreme Court decision in Udeogu v FRN, *Vanguard news* May 14, 2020 Available at <https://www.vanguardngr.com/2020/05/appeal-court-justice-as-judge- of-high-court-a-commentary-on-the-supreme-court-decision-in-udeogu-v-frn/> accessed 20 June 2020.

42. Senior Advocate of Nigeria and a Human Rights Activist.

proceedings had been instituted in the Court as a court of first instance.[43] He further argues, in line with our earlier argument that a number of tribunals, commissions of inquiry both within and outside Nigeria have been headed by judges of the Court of Appeal based on a *fiat* issued by the President of the Court of Appeal.[44]

Falana's argument on the validity or otherwise of a *fiat* issued by the President of the Court of Appeal or the Chief Justice of Nigeria is predicated on the precedence already set by these superior courts. Although, there may be counter arguments that a commission of inquiry cannot be at the same parlance as a superior court of record, especially as a court with criminal jurisdiction where the burden of proof in itself is beyond every reasonable doubt with the unfettered requirements to ensure that justice is delivered in a manner that is seen as fair and just, they all rest on the same premise as discussed above.[45]

Vincent Adodo, Esq,[46] while focusing on the interpretation of statutes, particularly the Supreme Court's interpretation of section 396(7) inferring that the provision was not inconsistent with the constitution quoted Niki Tobi JSC in the case of *Engr Charles Ugwu v Senator Ifeanyi Ararume*,[47]

43. Femi Falana, Supreme Court also sits as a High Court, *ThisDay Live*, May 19, 2020 Available at https://www.thisdaylive.com/index.php/2020/05/19/supreme-court-also-sits-as-a-high-court-2/ accessed 30 June 2020.
44. *Ibid*.
45. See section 3 above.
46. Legal Practitioner Center for socio legal studies.
47. [2007] LPELR-3329 (SC) at 34 paragraphs B-E.

where the learned jurist stated that in the interpretation of statutes, courts take into consideration the history behind the enactment of the law and the mischief it was introduced to cure.[48] This fundamental principle in OUR opinion, of this paper should have been put into consideration by the Supreme Court in interpreting section 396(7). The mischief in this case was delay in criminal trials occasioned by trial de novo as a result of the elevation of trial judges. Adodo further argued that Sir Udo Udoma JSC in *Nafiu Rabiu v State*,[49] stated that:

My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim ut res magis valeat quam pareat. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

This then means that the Constitution is envisaged to be a living document and the Court should interpret its provisions with the dynamism expected of any living thing.

48. Vincent Adodo, Udeogu v FRN: ACJA's Section 396(7) and constitutional conflict, *The Nation,* August 4, 2020 <https://thenationonlineng.net/udeogu-v-frn-acjas-section-396-7-and-constitutional-conflict/> Accessed 14 July 2020.
49. [1980] NSCC 291 at 300.

Kemi Pinheiro, SAN,[50] stated that he is of the firm view that the interpretation adopted by the Supreme Court based on the previous decision in Ogbunniya and Our Line Ltd's case is not in tune with the realities of today and spirit of the people for which the law exists.[51] This is because the interpretation unfortunately ignores the mischief for which section 396(7) of the ACJA was enacted. He further argued that the mischief intended to be cured by section 396(7) of the ACJA is to prevent delay and obstruction of part- heard criminal trial as a result of the elevation of the judge hearing the matter.[52] In his opinion, the Supreme Court failed to take cognizance of the mischief intended to be cured and merely viewed the issue from the narrow compass of an attempt to avoid the implication of the previous interpretation of the Constitution by the Court, thereby bounding itself only to the letters of the law.[53] He further submitted that the Supreme Court should have adopted a purposive approach in its interpretative role by taking into cognizance the fact that the Constitution as at the time it was made could not have envisaged the current situation in terms of the level of corrupt practices and delay in the administration of criminal justice.

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50. Senior Advocate of Nigeria.

51. Kemi Pinheiro SAN, RE: Orji Uzor Kalu (Ude Jonens Udeogu v FRN & Ors); Matters Arising -What the Supreme Court Failed to Consider, *Law parliament issues* May 28, 2020, <https://lawparliament.com.ng/2020/05/28/re-orji-uzor-kalu-ude-jones-udeogu-v-frn-ors-matters-arising-what-the-supreme-court-failed-to- consider/ accessed 14 July 2020.

52. *Ibid.*

53. *Ibid.*

The purposive approach expects the court to, in addition to looking to see what gap existed in the old law, make a decision as to what they feel the Parliament sought to achieve.[54] This approach evolved to give statutory or constitutional provisions an interpretation that best suits the purpose for which the law was enacted.[55] This means that rather than depending solely on the text in the statute when interpreting the law, the court may consider the extraneous and extrinsic materials that constituted the pre-enactment stage of the legislation, including early drafts, committee reports, white papers, among other things and any other available material that may assist the court in understanding the very purpose,[56] of the statute sought to achieve.[57] Therefore, the

54. The rules of statutory interpretation available at https://alison.com/course/1244/resource/file/resource_39-1489684445350655804.pdf accessed 24 August 2020;

55. Olorunfemi, John & Oloworaran, Benson. (2012). Taming the Unruly Horse of Rules of Interpretation: A Review of *Marwa & Anor v Nyako & Ors* LAW AND POLICY REVIEW. 4.available at https://www.researchgate.net/publication/322273319_Taming_the_Unruly_Horse_of_Rules_of_Interpretation_A_Review_of_Marwa_Anor_v_Nyako_Ors/citation/download accessed 24 August 2020.

56. Per Lord Denning in *Notham v London* Borough of Barnet [1978] 1 WLR 220.

57. Olorunfemi, John & Oloworaran, Benson. (2012). Taming the Unruly Horse of Rules of Interpretation: A Review of Marwa & *Anor v Nyako & Ors* LAW AND POLICY REVIEW. 4.available at https://www.researchgate.net/publication/322273319_Taming_the_Unruly_Horse_of_Rules_of_Interpretation_A_Review_of_Marwa_Anor_v_Nyako_Ors/citation/download accessed 24 August 2020.

purposive approach to construing section 396(7) of the ACJA would have entailed a process in which the Supreme Court takes account of the words of the legislation according to their ordinary meaning, the context in which they are used and the purpose of the legislation in order to give effect to the true intent of the legislation and not just the intention of parliament as clearly stated in section 1 and 2 of the ACJA 2015.

Olasupo Shasore SAN,[58] is of the view that the judgment of the court did not declare section 396(7) vacant.[59] This in his view is because of the question framed by the Court:

on what constitutional authority does either the National Assembly or the President of the Court of Appeal stand to grant this 'dispensation' to the Honourable, M. B. Idris, JCA to continue to act as a Judge of the Federal High Court after he had ceased to be a judge of the Federal High Court upon his elevation to the Court of Appeal?

His argument which is in agreement with the perspective of previous stakeholders analyzed above and derives from the point of view that the Supreme Court

58. Former attorney general and commissioner for justice, Lagos State and senior partner at Africa Law Practice (ALP) Nigeria.
59. Joseph Onyekwere and Sunday Aikulola, Administration of Criminal Justice Act does not contradict the constitution, *The Guardian* 19 May, 2020 <https://guardian.ng/features/law/administration-of-criminal-justice-act-does-not-contradict-the-constitution-says-shasore> accessed 14 July 2020.

deliberately limited and narrowed its view and shut out the ACJA, by adopting the literal approach in its interpretation of section 396(7) rather than a purposive approach.[60]

Many criminal justice sector stakeholders are of the view that the Supreme Court should revisit its decision in this case, by adopting a purposive approach to the interpretation of section 396(7) thereby giving life to the Constitution which in itself is a document that should be dynamic and represent current challenges. The Supreme Court therefore should have considered the mischief section 396(7) sort to cure and the attendant consequence on delays in criminal trial and expediency of justice.

Contrary to the above views and in support to the decision of the apex court, Ozekhome SAN,[61] argues that section 397(7) ACJA appears to be a frontal attack and violation of sections 238(2), 240, 250(2) and 253 of the Constitution of the Federal Republic of Nigeria, 1999, and decided cases on the subject matter. To that effect, the section is null and void by virtue of section 1(1) and section 1(3) of the 1999 Constitution, on the supremacy of the Constitution and the effect of any law that is inconsistent with the Constitution.[62] He

60.*Ibid.*

61.Mike Ozekhome SAN, is a Senior Advocate of Nigeria and foremost Nigeria Human Right Crusader.

62. Mike Ozekhome, Of Law, Sentiments, And Politics: Applauding The Supreme Court Verdict On The Orji Uzor Kalu Case, *The Nigeria Lawyer* May 8 2020

further argues that having taken the oath of the Court of Appeal Hon Justice M B Idris, JCA is bound to sit as judge of the Court of Appeal as prescribed in section 238 of the 1999 Constitution. Ozokhome's argument is based on the effect of the standing of the elevated Judge and not predicated on the need to see the essence of section 396(7) ACJA or the defect it sought to cure. It rather focuses, unfortunately, on other issues such as the title of the elevated judge. He likened the judge occupying 2 courts as having dual citizenship accorded to him by the ACJA.[63] The learned silk did not appreciate the defect section 396(7) seeks to cure, which is the issue of delayed criminal trial nor did he consider that the judicial oath taken by both courts are one and the same.

Awomolo SAN,[64] supporting the view elucidated by Ozekhome SAN, ironically acknowledged the fact that the administration of criminal justice in Nigeria became a victim of corruption to the extent that criminal trial of politically-exposed persons dragged on for many years.[65] It is important to state here that the instance case under discussion is one of a criminal trial that had to do with political exposed persons and corruption. He argues that Section 253 of the Constitution

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<https://thenigerialawyer.com/of-law-sentiments-and-politics-applauding-the- supreme-court-verdict-on-the-orji-uzor-kalu-case-by-mike-ozekhome-san/> accessed 31 July 2020.

63. *Ibid*

64. Adegboyega Awomolo is a Senior Advocate of Nigeria.

65. Adegboyega Awomolo, Is Section 396(7) of ACJA constitutional? *Punch News* August 9 2018 <https://punchng.com/is-section-3967-of-acja-constitutional/> accessed 31 July 2020.

provides that, "the Federal High Court shall be duly constituted if it consists of at least one judge of that court." Hence the intendments of the provision is that the jurisdiction conferred on the Federal High Court by virtue of Section 251 (1), (2) and (3) and 252 of the Constitution shall be by, at least one judge of that court – the Federal High Court only. He states that unless this provision is amended, no judge of the State High Court, National Industrial Court or any judge of any other court of coordinate jurisdiction can constitutionally exercise the powers under Section 253, not being a judge of that court. The Constitution specifically identified the judge as "one of that court."[66]

In Awomolo's interpretation of the Constitution, he pointed to the fact that the Constitution referred to judicial officers of the Federal High Court as judges of that court, whereas it referred to judicial officers of the Court of Appeal as Justices of the Court of Appeal.[67] The focus here by the learned silk is on the strict interpretation of the phrase "one of that court" and the oath of office. In as much as he acknowledges the problem with the criminal justice sector which the ACJA sought to address, he is of the opinion that no Act of the National Assembly alone can amend, expand, alter or substitute "judge of that court" with any judge or Justice of the other courts established under Section 6 of the Constitution.[68] He

66. *Ibid.*
67. *Ibid.*
68. *Ibid.*

concluded that the best option is to begin the trial de novo, notwithstanding the provision of Section 396(7) of the ACJA.[69]

Continuing in his article titled "Is Section 396 (7) of ACJA Constitutional?" Awomolo SAN states as follows,
"…It is clearly a contradiction of the judicial oath for the Honourable Justices of the Court of Appeal to descend to the lower court to hear uncompleted cases. It is invalid, null and void.…On a lighter note, how would the justice sign the judgment? If he signs as 'a judge of the Federal High Court,' he lies; and if he signs as a Justice of the Court of Appeal, it is unlawful. How then does he sign?"

In reply to this, Abdulrasheed Ibrahim, Esq,[70] replies that, "On question as to how a judge like Hon. Justice M B Idris will sign the judgment he goes to the (sic) lower court I e Federal High Court to conclude, if he signs as a judge of the Federal High Court, he cannot be said to have lied in my opinion because whenever he is sitting to conclude the matter he left behind, he is working in that court on special duty and in the capacity of a judge of that court pursuant to Section 396 (7) of ACJA 2015 and the *fiat*/ permission given to him by the President of the Court of Appeal which he must even indicate in that judgment."

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69. *Ibid*.
70. Unini Chioma, Supreme Court And The Administration Of Criminal Justice: A Critique Of *Udeogu v. FGN, Orji Uzor Kalu & Slok Nig Ltd*, May 17, 2020, https://thenigerialawyer.com/supreme-court-and-the-administration-of-criminal-justice-a-critique-of-udeogu-vs-fgn-orji-uzor-kalu-slok-nig-ltd/.accessed August 10,2020.

Regardless of what ever side of the divide one may find himself, the following questions should come to play; who does a delayed trial favour? Does it bring pustice to the victim and society? Does it serve as a deterrent to crime? Does it bring about efficiency in our criminal justice sector? What is the attendant effect of delayed criminal trials to the integrity of the Nigerian judicial system *vis a vis* global perspective? These questions are certainly answered to be to the detriment of the system, the victim and the society while unduly favouring the accused.

While insinuating that the *fiat* by the President of the Court of Appeal amounts to usurpation of the powers of the Chief Judge of the Federal High court, since the Chief Judge of the Federal High Court is the only one empowered to assign cases in a Federal High Court, the questions that beg for answers are whether the counter signing of the *fiat* from the Court of Appeal by the Chief Judge of the High Court will cure the supposed defect elucidated by the learned silks or is *trial de novo* a better option, considering that this appeal process from the Court of Appeal to the Supreme Court has lasted for two years and did not address the reason behind the trial in the first instance?

Revisiting the Effects of Elevation of a Judge to a Higher Court

The issues surrounding elevation of judges dredges up age-old issues in the administration of justice, with consequences that are far-reaching on the litigants and counsel in significant ways. The immediate fallout of this development is that the matters

that were at trial and post-trial stages before the elevation of the judge(s) originally presiding over these matters will normally have to commence *de novo*. This is often without due regard to the checkered history of the matters, the time, energy and efforts so far expended on the affected cases. This practice also affects matters that are within post-trial category. One major problem that has piqued the criminal justice system of Nigeria is access to justice but the resultant effect of trial *de'novo* has made exit from justice a recurring decimal.

Currently, by the provisions of Order 49 rule 4,[71] where a judge retires or is transferred to another Division and having part-heard cause or matter which is being re-heard de novo by another judge, the evidence already given before the retired or the Judge transferred out of the Division can be read without the witness who had given it being recalled. By this, the new Judge hearing the matter de novo can adopt the evidence and the proceedings in the part-heard matter and proceed from where the erstwhile Judge stopped. As useful as this proviso appears to be, it still does not cover scenarios that involve elevation of Judges.[72] In fact, in a more recent case of *Wulge v Olayinka*,[73] the Court of Appeal comprehensively dealt with this issue of law and after considering several earlier

71. Federal High Court (Civil Procedure) Rules, 2009.
72. Olalere-Niyi, Effects of Elevation of a Judge to the Court of Appeal, *Dispute Resolution Categories* 27th July 2018. http://www.spaajibade.com/resources/effects-of-elevation-of-a-judge-to-the-court-of-appeal-olalere-niyi/> accessed July 24, 2020.
73. (2017) LPELR-43356 (CA).

decided cases, Abiru JCA, gave the lead judgment and stated as follows:

It is settled law that in deserving circumstances, there is nothing wrong with one Judge reading the judgment written by a fellow Judge of the same Court who is unavoidably not available to deliver it.[74] Case law authorities however suggest that this ability of a Judge to read the judgment written by another Judge who is unavoidably absent lasts only as long as the Judge who wrote the judgment remained in the service of that same Court and that where the absence of the Judge is by reason of elevation to a higher bench, death, dismissal or retirement, it will be incompetent for a Judge to read the judgment written by the absent Judge from the date of the occurrence of the event causing the absence. In other words, another Judge is incompetent to read the judgment written by a Judge who has either been elevated to a higher bench or who has died or was dismissed or who has retired or was retired, from the date of such elevation, death, dismissal or retirement.

It is a well-known principle that justice delayed is justice denied and this cannot be truer in any other scenario than where a matter has been set down for judgment and the trial Judge is suddenly elevated.

74. See also *Yunusa v Otun* (1967) LLR 34, *Edibi v The State* (2009) LPELR-8702(CA), *Attorney General of the Federation v. All Nigeria Peoples Party* (2003) 15 NWLR (Pt 844) 600, *IPC (Nig) Ltd v Nigerian National Petroleum Corporation* (2015) LPELR-24652(CA).

In the case being reviewed, the matter had gone on at the Federal High Court for 13 years largely due to incessant and frivolous interlocutory applications which is one of ills that the ACJA 2015 came to cure. Therefore, the citation and reference to the case of *Ogbuinyinya & Ors v Okude & Ors* [75] and *Our Line LTD v S C C Nigeria & Ors,*[76] are of no consequence and should not be relied on forever, because as stated earlier, at the time they were decided, there was no statutory provision permitting or authorizing a judge elevated to the Supreme Court or the Court of Appeal, as the case may be, to conclude the matters commenced before their elevation. That is not to say that the provision of the ACJA overrides or has amended section 250(2) and 253 of the 1999 Constitution, rather this position is arguing that the Constitution being a living and written document which cannot easily be amended should be interpreted in such a way to give room for development.

Progressively, there is need to review the provisions of the law to include retired judges coming back to their last known courts with a *fiat*, to conclude part heard matters as this will save cost, energy and time of both the parties and courts. The reason the ACJA was enacted in the first place was to reform the criminal justice system and literally change the way things are done in the administration of

75. 1979 NSCC77.
76. [2009] NWLR (Pt. 1170)3838, In the mentioned cases the court held that the elevation of Justice Nnaemeka Agu JCA and Justice Iguh to the Court of Appeal respectively declared their decisions in the cases even without taking oat of the of the a nullity.

criminal justice but as it is, there is still a very long way to go in its implementation.[77] The quality of our criminal justice system is a reflection of the integrity of not just those saddled with adjudicating over trials, but also of the entire structure put in place for the proper administration of justice. For any country to experience economic growth, it must first have a functional judicial system that would not only encourage local and foreign investors but also guarantee conducive environment for such businesses to thrive. Incessant delays reduce the chances of ever concluding cases in a satisfactory manner and in the process, witnesses lose interest, parties to the process die, judges retire, the public lose faith in the judiciary and investors keep off. Delay in the delivery of justice is as a result of a compromised system, either in the interest of the prosecution or the defendants.

Where delay is as a result of the prosecution or the court itself, the implication is that the fight against corruption is being conducted in violation of the constitutional and statutory guarantees. In the instant case where the case had lingered for 13years in the trial court, the Supreme Court dismissing the appeal and ordering for a fresh trial does not depict a progressive judicial system.

77. Fatima Waziri – Azi, Compliance to the Administration of Criminal Justice Act, 2015 in Prosecuting High Profile Corruption Cases in Nigeria (2015 – 2017), *Journal of Law and Criminal Justice* 2017, Vol. 5, No. 2, pp 113-128, p 114.

Policy and Practice Implications

Before delving into the policy implications of the decision, it will be important to examine some significant notions that touch on the fundamental roles of judges in the criminal justice system, which deconstruct the consequences of their decisions. These include, justice and those who primarily dispense it, the approach to interpretation of Constitutions and the law/policy making role of judges.

Justice and Those who Dispense It

Justice is a universal concept, desired in all criminal justice systems around the world. Under the Nigerian Constitution, all arms of government are to conform and observe the fundamental principles of the Constitution,[78] including the courts. Justice appears as a key concept underlying these guiding principles. Under S 17(1) of the Constitution, the State social order is founded on ideals of Freedom, Equality and Justice. The national ethics of the country comprises compulsory principles, including justice, integrity and patriotism.[79] This means that judges are bound by these principles.

In addition, s 15 (5) of the Constitution demands that all corrupt practices and abuse of power are abolished. The independence, impartiality and integrity of courts of law, and easy accessibility thereto shall also be secured and maintained.[80] Lastly, under s 6 (6) of the Constitution, the judicial powers

78. Section 13 of 1999 CFRN.
79. Section 23 of 1999 CFRN
80. Section 17 (e) 1999 CFRN

'shall extend, **notwithstanding anything to the contrary in this Constitution**, to all inherent powers and sanctions of a court of law,' (emphasis added). What then are the inherent powers of the courts? In simple terms, it is to do justice. Justice is a cardinal end that judges should render.[81] It must be championed by judges.

In recognition of the fundamental aim of the criminal justice system, judges have been consistently instructed to do justice at all cost. Justice Chukwudifu Oputa opined that:

the judge should appreciate that in the final analysis the end of law is justice. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand… To this end he should be advised that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In any 'fight' between law and justice, the judge should ensure that justice prevails – that was the very reason for the emergence of equity in the administration of justice. The judge

81. D'Amato, Anthony, "On the Connection between Law and Justice" 26 U C Davis L Rev. *Faculty Working Papers*. 527-582, (1992-93) Paper 2. <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2 p2.> accessed August 15, 2020.

should always ask himself if his decision, though legally impeccable in the end achieved a fair result. 'That may be law but definitely not justice' is a sad commentary on any decision.[82]

Pats –Acholonu, JCA continues with this line of advice:

In the quest to do justice, the court should at all times endeavor to find a loophole, if any, to do justice to all manner of men (and not to be blinded by a procedure that would asphyxiate and choke justice and which would not now stand the test of time) ….'[83]

Admittedly, the judge is the soul of the machinery of justice. He is the main actor in the control of court proceedings. It was an Austrian Jurist, Eugen Ehlich, that stated that, 'there is no guarantee of justice except the personality of the judge.'[84] This raises the all-important interrogation on the qualification, recruitment, remuneration and discipline of judges.[85] Although beyond the scope of this

82. Hakeem Ijaiya, Hakeemat Ijay, Law as a means of Justice in Nigeria, 2008, *Pandecta* Volume13. Number 1. June 2018, Pg1-9. http://journal.unnes.ac.id/nju/index.php/pandecta, Accessed 22 August, 2020.
83. *Nwolisah v Nwabufou* [2004] 9 NWLR 879 507 @ 526-27.
84. Omoleye Benson Oluwakayode and Eniola Bolanle Oluwakemi. "Administration of Justice in Nigeria: Analysing the Dominant Legal Ideology." Journal of Law and Conflict Resolution 10, no. 1 (2018): 1-8.
85. Adetokunbo Ademola, Personnel Problems in the Administration of Justice in Nigeria. Pg 577

paper, it will suffice to emphasize the need to ensure that the process of selection and appointment of justices and judges of the courts are strengthened, to ensure that the personalities that would occupy such sensitive position are well groomed in both legal jurisprudence and the sensitivity of contemporary judicial civilisation. They must be progressive and dynamic, with a firm resolute to do justice, at all cost.

The Correct approach to Constitutional Interpretation

There exists a plethoral of case law, both within and outside the Nigerian jurisprudence, to guide courts on the correct approach to the interpretation of the Constitution. In *Attorney General of Lagos State v Attorney General of the Federation,*[86] the Supreme Court held that in interpreting the Constitution, a restrictive meaning should not be assumed, unless it becomes necessary to do so. It proposed a wide and liberal interpretation of the Constitution, except there is express provision to the contrary and this must be done in order to carry out or give effect to the intention of the makers of the Constitution. One may ask, in this case, what were the intentions of the drafters of the Constitution with regards to the powers of the National Assembly to modify the powers and jurisdictions of the court as

https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2939&context=lcp accessed August 20, 2020.

86. [2003] 12 NWLR (Pt 833) p 117 paras G-H; 159, para C-E, See also, *Nafiu Rabiu v State* (1981) 2 NCLR 293; (1980) 8 - 11 SC 130; *Tukur v Government of Gongola State* (1989) 4 NWLR (Pt 117) 517; *Aqua Ltd v Ondo State Sports Council* (1985) 4 NWLR (Pt 91) 622; *Ishola v Ajiboye* (1994) 6 NWLR (Pt.352) 506, and *A-G of Ondo State v A-G of the Federation & 35 Ors* (2002) 9 NWLR (Pt.772) 222 at p. 28." Per UWAIS CJN. (P 124, paras A-C).

well as the requirement on the 'judge of that court' (Federal High Court), as held by the court? Certainly, it is obvious that the only place the drafters intended that such variation should not occur was in apportioning a criminal jurisdiction to the Supreme Court, as a court of finality.[87] For all other unforeseen cases, the drafters of the Constitution had created a leeway for the National Assembly to validly step in and enlarge or modify the powers of the court. This was rightly done by the National Assembly with the ACJA.

In *A T Limited v A D H Limited*,[88] the Supreme Court held that while interpreting the provisions of the Constitution, the entire provisions must be read together as a whole so as to determine the objective of the provisions. In the words of Onnoghen JSC:

It is settled principle of law that where a court is faced with alternatives in the course of interpreting the Constitution or Statute, the alternative construction that is consistent with smooth running of the system shall prevail as held in Tukur. v. Government of Gongola State (1989) 4 NWLR (Pt 117) 517 at 579: "I must remember that this court has said it several times *that the provisions of the Constitution ought to be read and interpreted as a whole in that related sections must be construed together …*[89]

87. S 232 (2) 1999 CFRN.
88. [2007] 15 NWLR (Pt1056) p.166.
89. Pp. 48-49.

This means that where a court is faced with options in interpreting the Constitution or a statute, the option that is consistent with the smooth running of the system shall prevail, and the option, which will disrupt the smooth development of the system, is to be rejected. This principle of constitutional construction is expressed in the *maxim ut res magis valeat quam pereat*.[90]

This approach to constitutional interpretation is not only applicable to the Nigerian legal system. In the Australian case of *James v Commonwealth of Australia*, [91] Lord Wright had this to say:

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrates and illuminates the full import of that meaning.

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90. Alexander Tsesis, Maxim Constitutionalism: Liberal Equality for the Common Good, *Texas Law Review,*2 013, [Vol.91:1609], Pg 1609-1685 https://www.corteidh.or.cr/tablas/r31364.pdf accessed July 20, 2020 https://legal-dictionary.thefreedictionary.com/Ut+res+magis+valeat+quam+pereat
91. [1936] AC 578, at 614.

This captures very vividly, the narrow interpretation given to the phrase, 'one judge of that court' (Federal High Court), in the case under review. While 'judge of that court' would be rightly interpreted as a judge of the Federal High Court in 2014, that narrow interpretation must give way at the enactment of ACJA, 2015 because it was intended that a judge, elevated from that court can return and conclude his part heard criminal cases, in his capacity as the judge of that court, enabled by the *fiat*. This assertion is firmly strengthened by the words of Obaseki JSC in *Attorney General Bendel State v Attorney General of the Federation,*[92] where he said:

While language of the Constitution does not change, the changing circumstances of progressive society for which it was designed can yield a new and further import to its meaning. Thus, principles upon which the Constitution is designed rather than the direct operation or literal meaning of the words used should measure the purpose and scope of its provisions.

In addition, in interpreting s 396 (7) of ACJA, the court ought to have read the whole provisions of the ACJA, especially section 1 which provide for the purpose of the legislation and section 2 which enjoins the court to ensure compliance with the provisions of ACJA.

The law and Policy making Function of the Courts

The Constitution of the Federal Republic of Nigeria has had a phenomenal influence on the Nigerian society and the clamour

92. [1981] 10 SC 179–180.

for the development of our constitutional jurisprudence has meant that the courts have had a number of challenging decisions to consider. The interpretation of law by the judiciary can be deemed to be the final stage in a legislative process. According to the concept of concretisation, the process of law-making is not completed by the enactment of legislation. What is required is a harmonisation of the abstract legislative text with the facts of the case through interpretational methods, within the framework of the Constitution or relevant law. What this means in effect is that the judiciary does in fact have a 'peripheral and subordinate lawmaking function'.[93]

According to Devenish, there is an implied delegation of quasi-legislative competence to the judicial arm of government. Consequently, the courts play a vital and unique role in developing and formulating the law.[94] This is largely due to the fact that there will inevitably be a certain amount that the legislature may have left out during the drafting of legislation. This is referred to as the "drafting device of ellipsis,[95] and accordingly some established legal principles, particularly administrative and constitutional law principles, may be over-looked by parliament. This is when the delegated

93. Botha C. J, Statutory Interpretation *Juta Cape Town* [2005] 161 as cited in Singh A and Bhero MZ "Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of Section 39(2) of Constitution" *PER / PELJ* [2016] 19 – DOI http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1504 > accessed August. 20, 2020.
94. Devenish GE, Interpretation of Statutes, *Juta Cape Town* [1992]
95. Bennion F, Statutory Interpretation 5th ed, *Lexis Nexis,* London [2010] 240.

"quasi-legislative" powers of the judiciary would come into play.[96]

In the case of *Corocraft Ltd v Pan American Airways*,[97] Donaldson J explained the role of judges in the interpretation of legislation in a manner consistent with the theory of "concretisation" as follows:

In the performance of this duty, the judges do not act as computers into which are fed statutes and the rules for construction of Statutes and from which issue forth the mathematically correct answer. The Interpretation of Statutes is a craft as much as a science and the judges, as craftsmen, select and apply appropriate rules as the tools of their trade. They are not legislators, but finishers and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

Indeed, the above quotation succinctly sums up the role of judges in the process of law-making. Due to the fact that judges are regarded as being representatives of the judicial system, the manner in which they execute their duties, particularly with regard to the interpretation and application of the law, has always been a subject of interest. Philosophically, Ronald Dworkin, who is renowned for his theory of "Law as Integrity" developed an idea of "constructive interpretation"

96. Cross R, Statutory Interpretation 3rd ed *Butterworths London* [1995] 166.
97. *Corocraft Ltd v. Pan American Airways* [1973] 3 WLR (714) 732.

and contended that judges must always seek to derive the best solution in cases taking into consideration, the legal doctrine and political structure in a community. In extending this theory, he created a mythical judge, Hercules J, who according to him always derived the correct decision, for which he argued there was always one best-fitting conclusion.[98] This means that the court in interpreting the law must consider the entire body and spirit of the law and this includes evaluating the relevant legal principles, the theories and the policy implications of their decisions.

Most significantly, the role of the Supreme Court in the criminal justice system, further places it in a focal position, demanding such legal and socio-political considerations. By section 287 (1) of the Constitution, 'the decision of the Supreme Court shall be enforced in any part of the Federation by all authorities and persons, and by courts with subordinate jurisdiction to that of the Supreme Court'. This means that the Supreme Court as the final court in Nigeria, ought to or is envisaged to lay down principles of law in their decisions, which would shape case law jurisprudence and steer future cases. This is because, the decisions of the court are binding on all courts, authorities and persons in Nigeria.

98. Rosenfield M, Law, Justice, Democracy and the Clash of Cultures *Cambridge University Press Cambridge* [2011] 184, 185.

Policy and Practice Implications of the case under Review

Given the detailed discussions above on the paramount role of judges in general and the Supreme Court in particular, as a court of finality, the decision of the Supreme Court under review has far reaching policy and practice implications on the criminal justice system, on the fight against corruption, on financial resources and on the economy of Nigeria. The court, like all other courts of the judicial system must ensure that justice is not only done, but must be seen to be done. This means that judicial system shoppers, investors and indeed the entire public must see the court as a place where justice is served. The annihilation of justice on the altar of technicalities, unprogressive interpretation and ideological drawbacks portray the judicial system in a bad light and undermine public confidence in the judiciary. This is especially so, where those that benefit from this kind of anomaly are those of the ruling class, depicting a class bias in the criminal justice system,[99] that allows the rich to evade justice. This undermines predictability of judicial decisions, which is the hallmark of any reliable justice system.

Most importantly, there are about 50 cases standing on the same premise as the case under review. The implication is that they will suffer the same set back, as the trials will have to be nullified or discontinued. This also has implications on the resources of time, money and effort spent in litigating the cases thus far. This is discouraging for the prosecution, the witnesses and the victims of crime.

99. Femi Falana, SAN, at a virtual meeting for stakeholders in the criminal justice system held on 24th June 2020.

The decision is also a set-back in the fight against corruption. Professor Itsey Sagay (SAN) in expressing his views on the Supreme Court's decision under review asserts,

"I think this judgment is a great disservice to this country. It's a great setback because it drags us back into iniquity of cases that have no end without any good reason at all…We found, in many cases, judges who had spent five to seven years on a case, they were promoted and then could not continue with it. A new judge would start and the case would begin all over again. It was killing our judicial system. That's why the National Assembly passed that law under the ACJA…I' m not aware that the constitution specifically outlaws it…"[100]

Furthermore, the decision will embolden other litigants to challenge this and other provisions of the ACJA,[101] leading to a possible proliferation of cases that want to cache in on these loopholes, to escape justice. This will mean that some high profile politically exposed persons who have the funds to engage the judicial system to the apex level will abandon the substance of their trial and pursue technicalities. These will overburden the system with such frivolous cases and expend tax payer's money on unjustifiable ends.

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100. Professor Itsey Sagay (SAN), Kalu: Supreme Court judgment a setback, says Sagay, *Punch News* May 8, 2020, https://punchng.com/kalu-supreme-court-judgment-a-setback-says-sagay/. Accessed July 30, 2020.
101. Prof Akinseye Geroge, SAN, at a virtual meeting for stakeholders in the criminal justice system held on 24th June 2020.

Conclusion and Recommendations

The courts are not limited to 'judicial re-drawing of legislative boundaries', they also engage in 'judge-made policy-making'.[102] This review explored the bases of the reasoning of the apex court in delivering its decision in *Udeogu v FRN,* to ascertain their validity, given the important role that a court of finality plays in legal development, justice dispensation and policy propositions. It found that although the court sought to uphold the letters of the Constitution, albeit in a restrictive manner, it failed in giving a purposive interpretation to the spirit of both the Constitution and the ACJA, as well as in considering the policy implications of its decision on the judicial system and the country at large. The court therefore failed in taking the opportunity to reinforce the famous words of Lord Denning, "No matter what the law says, I will do justice".

The finality of the Supreme Court ruling on a constitutional question like this, can only be varied with a legislative amendment of the Constitution or by the court giving a new ruling on the question,[103] or by the court overruling itself on the earlier decision. From these options, the first is not

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102. Ran Hirschl, The Judicialization of Politics, Gregory A Caldeira, and others (eds), The Oxford Handbook of Law and Politics, (2009), <DOI:10.1093/oxfordhb/9780199208425.003.0008.> accessed August 12, 2020.

103. The Court and Constitutional Interpretation, Supreme Court of the United States, https://www.supremecourt.gov/about/constitutional.aspx. Accessed July 18, 2020.

within the purview of the court. Additionally, a proposal to amend the Constitution to include or incorporate the provisions of section 396 (7) of ACJA is procedurally an uphill task, which may be devoid of the political will to carry through, given that some of the members of the legislature are former executive officers currently under-going trial. This however remains the best option, and is highly recommended.

A quick win from the legislative angle will be to amend the ACJA to allow for previously electronically recorded proceedings to be admitted in evidence where a new case is started.[104] Thankfully, the Evidence Act allows for the admittance of electronic evidence. This will help shorten the time to be spent on the new case, ensure that resources spent under the former presiding judge are not wasted and guarantee no loss of witnesses to death or unavailability.

The last two options are options that can be freely exercised by the apex court. It can either decide where applied to, to upturn its earlier decision or where given another opportunity by any appeal case, to give a new ruling. Given that it was a unanimous decision of all seven justices, it is most unlikely that upturning its decision is feasible. It could however give a new ruling as it did concerning S. 306 of ACJA in *Olisa Metuh v FRN*.[105] Unfortunately too, these options cannot be exercised by the apex court, unless presented with the

104. Prof Akinseye Geroge, SAN, at a virtual meeting for stakeholders in the criminal justice system held on 24th June 2020.

105. *Metuh v FRN* [2017] 11 NWLR (part 1575) 157.

opportunity. Given these limitations, stakeholders in the criminal justice system must proffer innovative steps that should be taken to forestall the ill-effect of this decision, while an opportunity is presented to the Supreme Court.

It is therefore recommended that the National Judicial Commission exercises its discretion to monitor judges nominated for elevation and liaise with the presiding judges to ensure that new cases are not assigned to them, once they are being tipped for possible elevation. In addition, using administrative arrangements, such judges should first finish up their cases that have reached certain levels, before taking an oath of office for the new appointment. A challenge here is that some of the newly appointed/elevated judges may be eager to take the oath of office and resume, in order to trigger their seniority in the system. This challenge can be overcome, if administratively, it is documented, in such a way that the same cohort appointment reads the same date.

Finally, criminal justice experts are recommended to continuously engage with the Honourable Justices on developmental and ideological changes. While a lot of training and orientation have been done with the judges of the High court, prosecutors, lawyers and law enforcement agencies, very little of these opportunities have been offered to the Court of Appeal and Supreme Court Justices. Admittedly, some of them galvanized efforts to get ACJA on board, in order to cure the defects in the criminal justice system. Nevertheless, there is need to constantly engage them, on the spirit and letters of the ACJA as well as on purposive interpretation of the

Constitution. This will help to strengthen our criminal justice system, while reinforcing the confidence of the public.