

INTERPRETATION OF STATUTES AND THE RETROSPECTIVE APPLICATION OF THE FOURTH ALTERATION ACT NUMBER 21, 2017 BY THE SUPREME COURT OF NIGERIA*

Abstract

This paper examines the provisions of the Fourth Alteration Act No. 21 2017 which amended section 285 CFRN 1999, against the back drop of the interpretation given by the Supreme Court and its application to cases commenced prior to the commencement of the Act. It gives a historical overview of the Fourth Alteration Act No. 21 2017 and also examined the major rules of interpretation to ascertain which of these rules was adopted by the Court. The paper takes the position that the Supreme Court's decision cannot be justified under known rules of interpretation, is not in consonance with common sense or the notion of justice, particularly where the provisions did not specifically provide for such retrospective application. The paper recommends that Public interest litigation should be taken up, and sponsored by civil rights and liberties organisations with a view to getting the Supreme Court to depart from its current approach of retrospective application of the provisions of the Fourth Alteration Act No. 21 2017, while the Supreme Court should, at the earliest opportunity presented to it, depart from its current stand on the retrospective application of the provisions of the Fourth Alteration Act No. 21 2017.

Keywords: Interpretation of statutes, Fourth Alteration Act, Supreme Court of Nigeria, Retrospective application

1. Introduction

Laws are not made for the mere fun of it. Every law is meant to serve either a general or a specific purpose depending on the circumstances under which such law was made. There is no gainsaying the fact that the impact of law on the society is intended to be positive though, inadvertently, some negative outcome may follow the enactment of a particular law. In the same vein, a law made with the intent to promote the interest of the general citizenry, even though the rights or interests of some individuals may be hampered or infringed on. The constitution has been described as the basic or *grundnorm* in any legal system on which the validity of all other laws or norms are predicated. Thus, every law inconsistent with the provisions of the constitution would, to the extent of such inconsistency, be declared null and void¹. However, one major difference between the constitution and all other laws in the land is the process of amendment, particularly in countries like Nigeria which practice the federal system of government with a written constitution. A look at section 9(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)², which provides the procedure for its amendment, shows just how rigid the constitution is³. One can therefore appreciate the effort put in by the National Assembly in bringing about the Fourth Alteration to the Constitution. The provisions of the said Fourth Alteration have been interpreted and applied in some cases by the Supreme Court with some rather unexpected result.

This paper examines the provisions of the Fourth Alteration Act No. 21 2017 which amended section 285 CFRN 1999, against the back drop of the interpretation given by the Supreme Court and its application to cases commenced prior to the commencement of the Act. It is divided into six segments. The first segment of this paper deals with the general introduction. The second segment gives a historical overview of the Fourth Alteration Act No. 21 2017, while the third segment briefly examines the major rules of interpretation of statute. An analysis of the Supreme Court's retrospective application of the provisions of the Fourth Alteration Act No. 21 2017 is given in the fourth segment while the fifth segment embodies the concluding part of the paper. Some of the recommendations made are shown in the sixth segment.

2. A Brief History of the Fourth Alteration to the CFRN 1999

When the CFRN 1999 came into force on 29th May 1999⁴, the provisions of section 285 comprised of four subsections, as at then, and provided for the establishment of election petition tribunals. It however did not provide

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¹ See s 1(3) Constitution of the Federal Republic of Nigeria 1999 (as amended).

² Hereafter referred to as CFRN 1999

³ See s 9(2) CFRN 1999 which provides thus; 'An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States'.

⁴ See s 320 CFRN 1999 which states that the provisions of the constitution shall come into force on the 29th day of May 1999

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for the time within which to initiate election petition or for the duration of the hearing and determination of election cases by the tribunals or the appellate court. Neither did it provide for pre-election matters. Sometime in the year 2010 the CFRN 1999 was altered pursuant to the First Alteration Act No. 5 2010 by substituting some existing subsections to section 285 while four more subsections were added to the existing ones as follows;

- (5) An election petition shall be filed within 21 days after the date of the declaration of result of the elections.
- (6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.
- (7) An appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal.
- (8) The Court in all appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a later date⁵.

It is worth noting that this alteration to section 285 was confined to election tribunals. No mention was made of pre-election matters. This was the status quo until January 2016 when the Senate and the House of Representatives set up committees to review the CFRN 1999 with the mandate to conclude work on the Fourth Alteration Bill one year before the conduct of the 2019 general elections⁶. The Senate Committee was made up of 46 senators while that of the House of Representatives comprised of 49 members⁷. Thirty-two new amendments to the CFRN were proposed⁸ but at the end of the exercise, only the following amendments were incorporated into the Fourth Alteration as follow;

1. Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 4) Act, 2017 ACT No. 7.
2. Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 9) Act, 2017 ACT No. 9
3. Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 16) Act, 2017 ACT No. 10
4. Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 21) Act, 2017 ACT No. 7⁹
5. Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 27) Act, 2017 ACT No. 6

The Fourth Alteration Act No. 21 provides as follows;

1. The Constitution of the Federal Republic of Nigeria 1999 (in this Act referred to as ‘the principal Act’) is altered as set out in this Act.
2. Section 285 of the principal Act is further altered by-
 - (a) Substituting for the marginal note, a new ‘marginal note’- ‘Time for determination of pre-election matters, establishment of Election Tribunals and time for determination of election petitions’;
 - (b) Substituting for subsection (8) a new subsection ‘(8)’- ‘(8) Where a preliminary objection or any other interlocutory issue touching on the jurisdiction of the tribunal or court in any pre-election matter or on the competence of the petition itself is raised by a party, the tribunal or court shall suspend its ruling and deliver it at the stage of final judgement’, and
 - (c) Inserting, after subsection (8) a new subsections (9) to (14)-
- (9) Notwithstanding anything to the contrary in this constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit;
- (10) A court in ever pre-election matter shall deliver its judgement in writing within 180 days from the date of filing the suit;
- (11) An appeal from a decision in a pre-election matter shall be filed within 14 days from the date of delivery of the judgement appealed against.
- (12) An appeal from a decision of a court in a pre-election matter shall be heard and disposed of within 60 days from the date of filing the appeal.

⁵See s 285(5)(6)(7) (8) CFRN 1999, introduced into the CFRN by the First Alteration Act No. 5 2010

⁶A Adebisi, ‘4th Alteration to the 1999 Constitution : The Journey So Far’ (*Leadership*, 1 August 2017) <<https://leadership.ng/2017/08/01/4th-alteartion-1999-constitution-journey-so-far/>> accessed 2 October, 2019

⁷ Ibid.

⁸ A Osinubi, ‘Full List of Constitution Amendments by Senate’ (*Punch*, 27 July 2017) <<https://punchng.com/full-list-of-constitution-amendments-by-senate/>> accessed 2 October, 2019

⁹An Act to alter the provisions of the Constitution of the Federal Republic of Nigeria, 1999 to provide time for the determination of pre-election matters, and for related matters. This Act, which substituted subsection (8) introduced by the First Alteration Act, with a new subsection (8) while adding subsections (9) (10) (11) (12) (13) and (14), is the foundation of this paper.

(13) An election tribunal or court shall not declare any person a winner at an election in which such a person has not fully participated in all stages of the election.

(14) For the purpose of this section, 'Pre-election matter' means any suit by;

(a) An aspirant who complains that any of the provisions of the Electoral Act or any Act of the National Assembly regulating the conduct of primaries of political parties and¹⁰ the provisions of the guidelines of a political party in respect of the selection or nomination of candidates for an election.

(b) An aspirant challenging the actions, decisions or activities of the Independent National Electoral Commission in respect of his participation in an election or who complains that the provisions of the Electoral Act or any Act of the National Assembly regulating elections in Nigeria has not been complied with by the Independent National Electoral Commission in respect of the selection or nomination of candidates and participation in an election; and

(c) A political party challenging the actions, decisions or activities of the Independent National Electoral Commission disqualifying its candidate from participating in an election or a complaint that the provisions of the Electoral Act or any other applicable law has not been complied with by the Independent National Electoral Commission in respect of the nomination of candidates of political parties for an election, time table for an election, registration of voters and other activities of the Commission in respect of preparation for an election¹¹.

Subsections (9), (10), (11), (12) and (13) have been applied in some cases by the Supreme Court with some controversial outcome. Before examining the effect of the Supreme Court's interpretation of the additional subsections introduced into Section 285 by the Fourth Alteration Act No. 21 2017, it is necessary to briefly consider some of the rules of interpretation with a view to establishing which, if any, of the rules must have formed the basis of the court's decisions.

3. Rules of Interpretation of Statute

Interpretation has been defined as the process of determining what a something, especially the law or a legal document means; the ascertainment of the meaning to be given to words or other manifestation of intention¹². It is also the use of a group of rules or techniques employed by judges to determine the meaning of a word, a clause or a norm, and choose between conflicting alternative reasonable interpretations¹³. Gasiokwu, on his part, sees interpretation as a definite thinking process meant to establish and explain the content of legal norms¹⁴. Although there is no universal rule for constitutional interpretation, hence there is no mandatory approach¹⁵, over the years some rules have gained prominence when it comes to interpretation, the most notable of which are the literal rule, the golden rule and the mischief rule. The primary rule of interpretation is the literal rule and it is to the effect that words of a statute should be given their ordinary, plain, grammatical meaning. It is best summarised in the words of Tindal C. J. thus;

The only rule for the construction of Acts of parliament is that they should be construed according to the intent of parliament, which passed the act. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. Those words themselves alone, in such a case, best declare the intention of the law giver...¹⁶.

In fact, by a strict adherence to this rule of interpretation, the courts should not concern itself with whether a literal interpretation of the words of a statute would lead to injustice or absurdity. In such a case, it is the business of the legislature, and not the court, to remedy such absurdity of injustice¹⁷. However, the rule is not sacrosanct, and admits of certain exception that has come to be known as the golden rule. The golden rule advocates the literal approach to interpretation unless such approach would lead to absurdity, injustice, or inconsistency, in which case a variation or

¹⁰The use of 'and', instead of 'or' shows that the complaints must involve violation of the Electoral Act and Act of National Assembly and the guidelines of the party on conduct of primaries or nomination of candidates for election

¹¹See Section 285(8), (9), (10), (11), (12), (13) and (14) CFRN 1999 introduced by the Fourth Alteration Act No. 21 2017

¹²BA Garner, *Black's Law Dictionary* (9th edn, Thompson Reuters 2009) 894

¹³DEB Hutt, 'Against Judicial Supremacy in Constitutional Interpretation', (2017) 31 *Journal for Constitutional Theory and Philosophy of Law* 2

¹⁴MOU Gasiokwu, *Sociology of Law* (Chenglo Limited, Enugu 2007) 92

¹⁵Hutt (n 13) 5

¹⁶Per Tindal C. J. *Sussex Peerage Case* (1844) 11 CI and Fin 85, 8 E.R. 1034, [1844] Eng. R. 822

¹⁷Gasiokwu (n 14)

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modification of the language of the statute would be allowed to avoid such inconvenience¹⁸. This rule has been followed by the Nigerian Supreme Court in a plethora of cases as it appears to be the preferred rule. In the case of *Uwazurike v. Attorney-General Federation*¹⁹ the Supreme Court held that where the language of a statute is plain, clear and unambiguous, the task of interpretation can hardly arise. It is, therefore, the duty of the courts in such a situation, to give the words their ordinary, natural and grammatical construction unless such interpretation would lead to absurdity or some repugnancy or inconsistency with the rest of the legislation²⁰. Similarly, in *Attorney-General of Bendel State v. Attorney-General Federation and Ors.*²¹, the Supreme Court held that the plain and literal construction of the constitution or statute will only be rejected if such interpretation or construction will lead to some absurdity or defeat the obvious intention of the makers of the constitution or make nonsense of other provisions of the constitution²². In *Action Congress v. INEC*²³ it was also held by the Supreme Court that where the words of a statute are plain and unambiguous, no interpretation is required; the words must be given their natural and ordinary meaning unless such interpretation would lead to absurdity or some repugnancy or inconsistency with the rest of the legislation²⁴.

However, while applying the rule in *Ugwu v. Ararume*²⁵, the Supreme Court made it clear that the golden rule, which permits a judge to seek internal aid within the body of the statute itself or external aid from statutes in *parimateria* in order to resolve an ambiguity in a statute or avoid doing injustice, is an exception to the rule rather than the rule. This underscores the point that the literal rule remains the primary rule of interpretation while the golden rule is only had recourse to as an exception to the literal rule. The mischief rule adopts the purposive approach to interpretation of statute. It involves tracing the legislative history of a statute to ascertain the aim, intention or purpose of the legislature in enacting such statute so as to give effect to such aim, intention and purpose. The steps utilised have been reduced to the following;

1. How the law stood when the statute to be considered was passed;
2. What was the mischief for which the old law did not provide;
3. What is the remedy provided by the statute to cure the mischief²⁶

The court is required to interpret the statute in such a manner as to suppress the mischief and advance the remedy²⁷. These rules date back centuries and formed part of the received English law that make up some of the sources of Nigerian law²⁸. A look at these three cannons of interpretation would show that the literal rule occupies a vantage position in Nigeria's legal system. Having given an overview of these rules of interpretation, the next issue to be considered is whether any of the rules could be used to justify the Supreme Court's retrospective application of the provisions of the Fourth Alteration Act No. 21 2017 to cases initiated prior to the commencement of the Act.

4. The Supreme Court's Interpretation and Application of Section 285(8) - (14)

Some controversy has trailed the Fourth Alteration Act No. 21, particularly Section 285(8), (9), (10), (11), (12), (13) and (14) against the backdrop of the interpretation given by the Supreme Court in its application to some high profile cases, particularly with regard to its application to suits that were originated prior to the commencement of the Alteration Act²⁹. Some of these cases include; *Segun Abraham v. Akeredolu*³⁰, *Ayodele Kusamotu v. All*

¹⁸See *Becker v. Smith* (1836) 2 M. & W. 191 at p. 195

¹⁹(2007) All F.W.L.R. (pt. 367) 834.

²⁰*Uwazurike v. Attorney-General Federation* (n...)

²¹(1981) 10 S.C. 1

²²*Attorney-General Bendel State v. Attorney-General Federation* (n...) at p 77-79. Also reported in (2001) F.W.L.R. (Pt. 65) 448 at p. 548-549

²³(2007)All F.W.L.R. (Pt. 378) 1012

²⁴*Action Congress v. INEC* (n 23) at p. 1061 paras. D-F S.C.

²⁵(2007) All F.W.L.R. (pt. 377) 807 at p. 853 paras.A-F. S. C.

²⁶*Re Mayfair Property Co.* (1898)2 Ch. 28 at p. 35

²⁷*Heydon's case* (1584) 3 Co. Rep &a, 76 E.R. 638, cited in Obilade, A.O. *The Nigerian Legal System* (Spectrum Books Limited, Ibadan, 2009) 60

²⁸The received English law comprised of the common law, doctrines of equity and statutes of general application in force in England on 1 January, 1900. See Olarenwaju, O. 'Primary Sources of Law: Received English Law' (DJet Lawyer, 9 November 2016) <<https://djetlawyer.com/received-english-law/>> accessed 30 September 2019

²⁹A Adesomoju, 'Pre-Election Suits: How Constitution's 4th Alteration Dashed Politician's Hope' (*Punch*, 28 March 2019) <<https://punchng.com/pre-election-suits-how-constitutions-4th-iteration-dashed-politicians-hope/>> accessed 2 October 2019

³⁰Governorship primaries of Ondo State 2016. The Suit was dismissed on the ground that the Abraham approached the Court 28 days after the election as opposed to the 14 days stipulated. See Ojuola, B. 'Supreme Court Ends Abraham's Dream to Unseat

*Progressive Congress*³¹, SC/307/2018 and SC/308/2018,³² *Umaru Dahiru v. Aminu Tambuwal*³³; *Wahab Abiodun v. Monsurat Sunmonu*. These cases, which were pre-election matters, were struck out by the Supreme Court on the ground that they were, either not commenced within 14 days after the conclusion of primaries, or concluded within 180 days by the trial court and/or appeal concluded within 60 days³⁴. About 14 pre-election appeals caught by the alteration to section 285 CFRN 1999, including that of Umaru Dahiru and Governor Tambuwal and that of Wahab Abiodun and Monsurat Sunmonu, were struck out by the Supreme Court on 23 January, 2019³⁵. The most interesting part of the decision of the Supreme Court is the fact that these cases were commenced prior to June 2018 when the Fourth Alteration Act No. 21 came into effect, yet the court applied the provisions of the Act to such cases. One of the cardinal principles of the rule of law, often cited as a major factor which distinguishes a democratic government from a military regime, is that laws are not supposed to have a retrospective effect³⁶.

The U.S. Constitution affords some protections against retrospective application of legislation³⁷. Katz has suggested that if there is neither an express command nor intent to apply a statute prospectively only, one should look to the effect that the statute will have. If it would ‘impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed,’ then it has a retrospective effect and should only apply prospectively, unless Congress clearly intended to apply the statute to pending cases³⁸. In the United Kingdom, the House of Lords has reiterated presumption under the common law that a statute does not have retrospective effect³⁹. This is best captured by Maxwell thus;

Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication⁴⁰.

The question then is, if the Fourth Alteration No. 21 specifically provides for its commencement to be in June 2018, could it be said that the National Assembly intended for it apply to suits commence before then. If they so intended, wouldn’t they have made such intentions clear by the use of words which expressly communicate such intention? Perhaps, if the Fourth Alteration No. 21 itself had been silent as to its commencement date, one might be tempted to take that to mean that the law should apply retrospectively. But this argument is equally faulty in that, even where an Act of the National Assembly is silent as to its commencement date, it would be presumed to have come into effect on the date it received presidential assent⁴¹, which in this case was on the 7th of June 2018. In the absence of the Act

Akeredolu’ (*Daily Trust*, 5 March, 2019) <<https://www.dailytrust.com.ng/supreme-court-ends-abrahams-dream-to-unseat-gov-akeredolu.html>> accessed 2 October 2019

³¹(2019 LPER SC.126/2018, judgement delivered on 15 February 2019 <<http://www.lawpavilionpersonal.com/newfulllawreport.jsp?pk=SC.126/2018>> accessed 10 October, 2019

³²H.Yahaya, ‘Supreme Court Turns Down 14 Pre-Election Cases’ (*Premium Times*, 24 January 2019) <<https://www.premiumtimesng.com/news/top-news/307536-supreme-court-turns-down-14-pre-election-cases.html> accessed 2 October 2019> accessed 10 October 2019. Incidentally, Rhodes Vivor JSC, who delivered the lead judgment of the Supreme Court in the case of *Isaac Obiuevbi v. Central Bank of Nigeria* SC 266/2006 judgement delivered by the Supreme Court on 11 March, 2011, was part of the panel that struck out SC/308/2018 on the ground that the provisions of the Fourth Alteration Act No. 21 2017 applied retrospectively.

³³Governorship primary for Sokoto State 2015 election. See Adesomoju (n 29)

³⁴Adesomoju (n 29)

³⁵Ibid.

³⁶See *Wilson and Others v. Secretary of State for Trade and Industry* [2003] UKHL 40 See also *Isaac Obiuevbi v. Central Bank of Nigeria* (n 32)

³⁷TL Katz, ‘Retrospective vs. Prospective Amendments: When Does New Federal Legislation Impact my Case?’ (American Bar Association, March 28 2018) <<https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/retrospective-vs-prospective-amendments-when-does-new-federal-legislation-impact-my-case/>> accessed 2 October 2019

³⁸Ibid.

³⁹*Wilson and Others v. Secretary of State for Trade and Industry* (n 36) <<https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030710/will-1.htm>> accessed 10 October, 2019

⁴⁰Maxwell on *Interpretation of Statutes* (12th ed. 1969) cited with approval in *Wilson and Others v. Secretary of State for Trade and Industry* (n 39)

⁴¹S. 1(1)(2) Interpretation Act Cap I23 Laws of the Federation of Nigeria 2004.

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expressly stating that it is to have retrospective effect and having regard to it clearly stating that it was to commence on the 7th of June 2018, what then is the justification for the Supreme Court applying its provisions to cases commence prior to that date? The Supreme Court appears not have taken cognizance of its past decision in the case of *Isaac Obiuwevbi v. Central Bank of Nigeria*⁴². In that case, the Appellant commenced his case at the Lagos State High Court on 7th July 1988 challenging the termination of his appointment. As at that date, the State High Court had jurisdiction to hear and determine the case pursuant to the provisions of the CFRN 1979. In 1993, Decree No 103⁴³ was promulgated by the then military government which amended the CFRN 1979 and conferred exclusive jurisdiction on the Federal High Court in matters involving, inter alia, agencies of the federal government. The provisions of Decree No. 103 subsequently became incorporated into section 251 CFRN 1999. The issue before the Supreme Court was whether Decree No 107 of 1993 with effect from 17th November 1993 operated in retrospect to affect the Appellant's action which was already pending in the Lagos State High Court since 1988 and whether the claimant's (appellant's) action is caught by the provisions of Section 251 (i) (p) (r) of the 1999 Constitution notwithstanding its commencement in 1988 before the promulgation of the 1999 Constitution. While upholding the appeal, the Court stated that Decree No 107 of 1993 is a substantive law which has no retrospective operation, and so would not affect ongoing proceedings that were initiated before 17 November 1993 when it came into effect. In a lead judgment delivered by Rhodes-Vivor JSC, the Court stated thus:

The law in force or existing at the time the cause of action arose is the law applicable for determining the case. This law does not necessarily determine the jurisdiction of the court at the time that jurisdiction is invoked. That is to say the law in force at the time cause of action arose governs determination of the Suit, while the law in force at the time of trial based on cause of action determines the court vested with jurisdiction to try the case. For example, Decree 107 of 1993 came into force on 17/11/93. A litigant who had a cause of action in 1990 would have his case governed by the law at the time (i.e.1990) if trial commences before 1993 the court to try the case would be the State High Court but if after 17/11/93 the case would be tried in the Federal High Court.

In reaching its decision, the court relied heavily on the provisions of section 6(1) Interpretation Act⁴⁴. Having regard to the above decision of the Supreme Court in the case of *Isaac Obiuwevbi v. Central Bank of Nigeria*⁴⁵, one therefore wonders how it arrived at its decision to apply the provisions of the Fourth Alteration Act No. 21 2017 retrospectively. If the literal rule were to be applied to the provisions of the Fourth Alteration No. 21, especially on the application of the said provisions to pre-election matters commenced prior to its coming into effect, then the approach of the Supreme Court in applying the provisions retrospectively could be said to have flouted this time-honoured principle. The words of the Fourth Alteration Act No. 21, on its commencement date, are clear and unambiguous as to their intended meaning. Thus, the Supreme Court's action cannot be justified on the basis of the literal rule. In the absence of any ambiguity or absurdity, adopting the approach of the golden rule would be unnecessary. Even if this issue were to be looked at from the perspective of justice, it can safely be argued that greater injustice would be caused by a retrospective application of the provisions of the Fourth Alteration Act No. 21 than otherwise.

Perhaps, the most important factor taken into consideration by the Supreme Court could be the prevailing circumstance prior to the enactment of the Fourth Alteration Act No. 21, particularly the issue of the protraction of cases from trial courts/tribunals until eventually disposed of, which could be termed a 'mischief' intended to be cured by the Fourth Alteration Act No. 21. This was clearly the reason for the decision of one of the judges of the

⁴²*Isaac Obiuwevbi v. Central Bank of Nigeria* (n 32)

⁴³Decree No. 103 came into effect on 17 November 1993

⁴⁴ Cap C23 Laws of the Federation of Nigeria 2004 which provides as follows; 6(i) the repeal of an enactment shall not:

- (a) revive anything not in force or existing at the time when the repeal takes effect;
- (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;
- (c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under, the enactment;
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if, the enactment had not been repealed

⁴⁵*Isaac Obiuwevbi v. Central Bank of Nigeria* (n 32)

High Court of the Federal Capital Territory⁴⁶, in his judgements on two separate cases challenging the qualifications of the candidates of a particular party to contest the election held on 9 March, 2019 in Ogun and Adamawa States respectively. According to the learned Judge;

Experiences of the facts, of which this court is entitled to take judicial notice, being notorious fact, are that pre-election matters, particularly relating to qualification and/or nomination of candidates for a particular election, in many instances protracts beyond the election in question. In some instances, courts contrive to grapple with pre-election actions challenging the nomination of candidates even after the elections had been conducted, won and lost. In some instances, pre-election matters outlast the tenure of candidates that won the election. It is the view of this court, therefore, that it is in order to prevent the recurrence of these ridiculous and embarrassing situations, which have caused chaotic and needless distractions for elected officers from performing the functions for which they are elected. It was this that precipitated the insertion of section 285(9) into the constitution, in order to ensure that all the pre-election matters of whatever nature or complexity, are resolved to finality prior to the conduct of the elections⁴⁷.

In view of the fact that the decision of the learned Judge, captured above, was predicated on cases that arose after the commencement of the Fourth Alteration Act No. 21, one cannot fault the adoption of the mischief by the learned Judge. Same cannot however be said of the Supreme Court justices. The mischief rule cannot also justify the retrospective application of the Fourth Alteration Act No. 21. The rule envisages providing a remedy to cure future and not past, 'mischief'. The approach adopted by the Supreme Court is tantamount to administering medication to dead patients which, of itself, is absurd. A law which is meant to do justice should not result in injustice. In as much as it could be argued that a protracted pre-election suit would work hardship on a successful candidate at the election and distract him from performing his duties, it is even more unjust to apply such law retrospectively in the case of a candidate who is challenging the legitimacy of the 'victory' of the other candidate. It is tantamount to taking the other litigant by surprise which the adversarial system practiced by Nigeria, frowns against. It offends the principle of *audi alteram partem*. As much as possible, parties should be afforded reasonable time to prosecute their cases and applying a law which limits such right retrospectively, is repugnant to natural justice, equity and good conscience. If the Supreme Court was considering public policy as a basis for its approach, the time honoured statement of Burrough J. in *Richardson v. Mellish*⁴⁸, comes to mind that 'public policy is an unruly horse, and when once you get astride it, you never know where it will carry you'⁴⁹. Even the Supreme Court had, in allowing the appellant's appeal in the case of *Sonnar v. Nordwind*⁵⁰ sounded a note of warning on the danger of deciding cases solely on the grounds of public policy. Public policy is not static as it evolves over time. This evolving nature of public policy, according to Awoyele, would make it difficult to serve as a principal guide in the interpretation of law by the courts⁵¹.

Public policy ought not to be used as a basis for such a draconian style of adjudication. A retrospective military decree is bad enough, but a judiciary applying a law retrospectively, when that is clearly not the intention of the legislature, is the worst form of judicial activism. It has already been argued that the application of section 285(8) to (14) CFRN retrospectively by the Supreme Court does not conform to any of the canons of interpretation highlighted in this paper. When a court gives a decision, such decision has to be justified and in doing so, reliance should not be placed only on the wordings as there is need for the court to appeal to authority, to sources of law and even to past precedents⁵². In the case of section 285(8) to (14) CFRN, it is an innovation, so obviously there is no past precedent on all fours with its provisions that the Supreme Court could have appealed to. Gasiokwu has highlighted some factors that may be considered by a court to justify its decisions to include;

- (a) The extent to which the proposed decision will cohere with existing principles and authorities. If the proposed decision is inconsistent with the existing legal framework, then it is not likely to be adopted;
- (b) The consequences of the decision for potential litigants, the legal system and indeed the role of law in society, i.e. will these consequences be acceptable in terms of justice or common sense;

⁴⁶Hon. Justice Olukayode Adeniyi

⁴⁷Adesomoju (n 29) emphasis supplied

⁴⁸(1824) 2 Bing 252

⁴⁹Ibid. Per Burrough J.

⁵⁰(1987) 4 N.W.L.R. (pt. 66) 520

⁵¹O Awoyele, 'Public Policy and Public Interest: The Meeting Point Between an Unruly Horse and the Law' (Legal Land Style, 12 January, 2019) <<https://dnlllegalandstyle.com/2019/public-policy-public-interest-the-meeting-point-between-an-unruly-horse-and-the-law-olutayo-awoyele/>> accessed 10 October, 2019

⁵²Gasiokwu (n 14) 101

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- (c) Other types of arguments may be used as justification. Judges may refer to common sense, the supposed view of a reasonable man or they may refer to the notions of justice and fairness⁵³.

It is submitted, here, that the recent decisions of the Supreme Court on Section 285(8) to (14) CFRN fall short of the factors highlighted by Gasiokwu as shown above, particularly the second and third factors. The consequence of applying Section 285(8) to (14) CFRN retrospectively, to cases commenced prior to the commencement of the alteration, is that potential litigants would no longer feel at ease or have confidence in the judiciary. There is no guarantee that their cases would not be caught by a subsequent law enacted after initiating their suit. Common sense dictates that a litigant should not be taken by surprise. The maxim *ignorantia juris non excusat*⁵⁴ should be limited to ignorance of existing laws as there is no way a litigant could possibly predict future laws that would be enacted by the legislature. In the same vein, applying the reasonable man's test, a reasonable man whose cause of action arose, and who filed his case prior to the commencement of the Fourth Alteration Act No. 21 2017, could not have anticipated the innovation introduced by the section 285(8) to (14) CFRN. Assuming, but without conceding, that such innovation was, in fact, anticipated, could a reasonable man have anticipated a retrospective application of the provisions of the said section? The answer is clearly in the negative.

Therefore, the Supreme Court was obviously being subjective, rather than objective, in its application of Section 285(8) to (14) CFRN. In a world where constitutional interpretation is seen as a judicial matter, judges hold the capacity to modify, overrule, re-shape and nullify the ways in which rights and liberties are conceived⁵⁵. As Kramer has postulated, judges should interpret the constitution according to their best judgement but should do so with the awareness that there is a higher authority out there with power to overturn their decisions⁵⁶. Kramer's postulation is particularly worth noting with reference to lower courts, but in the case of the highest court in the land, in this case the Supreme Court of Nigeria; there is no higher authority to subject their decisions to judicial review. Waldron⁵⁷, while distinguishing between judicial supremacy and judicial review, has highlighted what happens in a system where there is strong judicial review. According to him, in such a system, the courts have the authority or power to refuse to apply a particular legislation in certain case, modify the effects of a particular legislation, declare a particular statute inapplicable in certain cases, or strike out a particular statute out of the statute book⁵⁸.

While advocating for the indispensability of judicial review, Harel has highlighted its importance to be that it gives individuals the opportunity to challenge decisions that impinge (or may have impinged) upon their rights to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation⁵⁹. Judicial review envisages a higher court reviewing the decisions of a lower court. Since the Supreme Court is the final court in Nigeria from which no appeal lies, who would then subject its decisions, based on its interpretation of the Fourth Alteration Act No. 21 2017, to judicial review? There is a provision in the constitution for reference of constitutional matters to a higher court for interpretation. Thus, where in the course of any proceedings in any court of law in Nigeria, any substantial question of law as the interpretation, or application, of the Constitution arises, section 295 CFRN 1999⁶⁰ permits reference of such question of law to a higher court. This

⁵³Ibid.

⁵⁴Ignorance of the law is not an excuse see Garner (n 12) 815

⁵⁵Hutt (13) 3

⁵⁶L Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004) 253

⁵⁷JWaldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1354

⁵⁸Ibid.

⁵⁹A Harel, *Why Law Matters*. (Oxford University Press, 2014) 199

⁶⁰ S 295(1) CFRN 1999 'Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria' (other than in the Supreme Court, the Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or a High Court having jurisdiction in that part of Nigeria and the Federal High Court or the High Court shall

(a) if it is of opinion that the question involves a substantial question of law, refer the question to the Court of Appeal; or

(b) If it is of opinion that the question does not involve a substantial question of law, remit the question to the court that made the reference to be disposed of in accordance with such directions as the Federal High Court or the High Court may think fit to give.

(2) Where any question as to the interpretation or application of this constitution arises in any proceedings in the Federal High Court or a High Court, and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

constitutional mechanism for reference of constitutional matters to a higher court is not part the appeal process but is *sui generis*, calling for its own rules⁶¹. The extent and limitation of this section is outside the scope of this paper.

In the present analysis, the Supreme Court itself has interpreted the Fourth Alteration Act No. 21 2017, hence the procedure under section 295 CFRN 1999 cannot be utilised to bring its provisions before it for interpretation. The only recourse would be for the legislature to redress the perceived injustice occasioned by the lopsided interpretation given by the Supreme Court. It is also hoped that the opportunity would present itself for the Supreme Court to review the retrospective application of the provisions of the Fourth Alteration Act No. 21 2017. Nigeria operates a constitutional supremacy and not judicial supremacy⁶², however it is the constitution that gives the judiciary the sole authority when it comes to the interpretation of statutes including the constitution itself. Since the function of higher courts is to secure uniformity of interpretation of law among courts⁶³, such function must be exercised with caution and not whimsically. Hutt has argued that judges should not impose their own political morality or philosophical understanding of what is the best solution to a dispute from a purely moral or political point of view⁶⁴. The point is worth noting that the decision of the Supreme Court may, or may not, have been politically oriented. In the light of the recent decision of the Supreme Court on the interpretation of the Fourth Alteration Act No. 21 2017, one cannot help but ponder whether or not the argument of Hutt⁶⁵, that constitutional interpretation should not be left entirely at the hands of judges, is not without its merit. However, in the case of Nigeria the function of interpretation has been exclusively reserved for judges⁶⁶. Justice, in its simplistic content means quality of being just, fair play and fairness. It is an element of quality of egalitarianism in its functional context⁶⁷. Perhaps the need to decongest the court of what it perceived as protracted, frivolous pre-election matters may have propelled the Supreme Court to wield the big stick, but in doing so, the notion of justice became the ultimate victim. If decongesting the court was the underlying factor, there are existing rules the Supreme Court could have utilised for striking out protracted cases for want of diligent prosecution and not necessarily by applying the provisions of statutes of limitation of time retrospectively.

5. Conclusion and Recommendations

This paper has examined the recent approach of the Supreme Court in applying Fourth Alteration Act No. 21 2017, which altered section 285 CFRN, retrospectively. It is the position of this paper that the retrospective application of the provisions of the Fourth Alteration Act No. 21 2017 cannot be justified under the major cannons of interpretation of statutes. It is not in consonance with common sense or the notion of justice, particularly where the provisions clearly provided for its commencement, and did not specifically provide for such retrospective application. It is in the light of this anomaly the following recommendations are made.

1. Public interest litigation should be taken up, and sponsored by civil rights and liberties organisations with a view to getting the Supreme Court to depart from its current approach of retrospective application of the provisions of the Fourth Alteration Act No. 21 2017.
2. The Supreme Court should, at the earliest opportunity presented to it, depart from its current stand on the retrospective application of the provisions of the Fourth Alteration Act No. 21 2017.
3. The National Assembly, for the sake of clarity, should include a provision in all future legislation to be enacted by it that such legislation is not have retrospective effect.

(3) Where any question as to the interpretation or application of this constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate.

⁶¹VAshe, 'Some Issues Relating to Reference of Questions to a Higher Court' in *Legal Principles and Policies: Essays in Honour of Justice Chukwunweike Idigbe*, E Chianu, (ed.) (Distinct Universal Limited, Lagos, 2006) 275.

⁶²See s. 1(1) CFRN 1999 which provides that the constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

⁶³Hutt (n 13) 4

⁶⁴Hutt (n 13) 5

⁶⁵Ibid.

⁶⁶See ss 6, 230-284 CFRN 1999 (as amended)

⁶⁷See *Inajoku v. Adeleke* (2007) All F.W.L.R. (Pt. 353) 3 at p. 119 para. G. S.C.