REVISITING THE PARDON POWER IN PRE-CONVICTION CASES: A CRITIQUE OF FEDERAL REPUBLIC OF NIGERIA V. ACHIDA & ANOR

Philip Ebosetale Oamen*

Abstract

In the recent case of Federal Republic of Nigeria v Achida & Anor, the Court of Appeal of Nigeria held that the pardon power, as donated by the Nigerian Constitution, can only be exercised over persons who have been tried and convicted by a competent court. In other words, relying on the constitutional presumption of innocence and the ejusdem generis rule of interpretation, the court reasoned that a person who is presumed innocent until proved guilty cannot be a beneficiary of pardon at a pre-conviction stage. However, drawing on several provisions of the Constitution and other statutes, this paper offers a critique of the judicial decision and calls for a review of the position. The central argument in this paper is that, going by the framing of the relevant provisions of Nigerian laws on pardon, pardon can indeed be granted, before, during or after conviction in a criminal trial.

1. Introduction

The Constitution of the Federal Republic of Nigeria (the Nigerian Constitution) donates the pardon power to Governors and the President by virtue of sections 212 and 175 respectively. While it is beyond any debate that the pardon power exists, it is, however, 'problematic to situate the scope of this power'.[1] One of the problems associated with the scope of pardon power recently became a subject of judicial decision in the case of *Federal Republic of Nigeria v Achida & Anor (Achida case)*[2]. In that case, the Makurdi division of the Court of Appeal of Nigeria held, amongst others, that the pardon power can be exercised only in favour of those who have already been convicted by a court of competent jurisdiction. Put differently, the court held that pardon is not available at a pre-conviction stage. The two major reasons given by the court were that a pre-conviction pardon negates the constitutional presumption of innocence and that the *ejusdem generis* rule of interpretation was applicable in the interpretation of the above constitutional provisions.

The essence of this paper is to critique the above decision of the court. Through the lens of several provisions of the Nigerian Constitution and other laws, this paper argues that the Court of Appeal's

*Doctoral Researcher & Teaching Associate, Birmingham Law School, University of Birmingham, United Kingdom. Email: philipoamen1@gmail.com.

[1] Philip Ebosetale Oamen, "Grant of Presidential Pardon in the United States and Nigeria: Posthumousness, Corporateness and other matters"(2020) *Commonwealth Law Bulletin*, 2, DOI: 10.1080/03050718.2020.1795899.

[2] [2018] LPELR 46065 (CA) 23.

decision does not represent the intention of the lawmakers. The overarching argument is that, by the framing of the extant Nigerian laws on pardon, pardon can indeed be granted to persons who are yet to be convicted. The paper, thus, recommends that the court should reconsider its position when another opportunity comes up, or alternatively, the Nigerian Constitution should be amended to reflect the judicial opinion. A co-existence of the judicial opinion with the extant constitutional provisions, it is argued, would lead to some absurdity.

This paper is organised in five sections. While this section introduces the work, section two sets out the facts of *Achida case*. In section three, the paper unpacks relevant portions of the decision of the court while section four provides a critical analysis on the judicial decision. Section five concludes the paper and makes recommendations.

2. Facts of the Case

In the *Achida case*, 17 persons, including the respondents, were standing trial before the High Court of Justice, Sokoto State sitting, *Coram*: Abbas, J on a 144 count Amended Charge for various offences including conspiracy, breach of trust and receiving stolen property punishable under various provisions of the Penal Code Law of Sokoto State. Midway into the trial and after the appellant's legal team had already adduced evidence through six witnesses, the respondents' counsel filed an application which prayed for an order discharging and acquitting the respondents. The basis of the application was that the Governor of Sokoto State, Rt. Hon. Aminu Waziri Tambuwal, acting pursuant to his constitutional power in section 212(1) of the Nigerian Constitution, had granted an unconditional pardon to the respondents. The Governor, vide a 2016 instrument of pardon named the 6 beneficiaries of the pardon and then went ahead to state that:

> *"The indictment by the Report of Alhaji Muhammad Aminu Ahmad's Commission of Inquiry and the Government White Paper dated 28th October, 2009 and Six (6) of them are hereby granted Unconditional State Pardon for the offences they are concerned with arising from the report and white paper and any criminal offence they might have been accused of against the laws of Sokoto State".*[3]

The application for discharge and acquittal was vehemently opposed by the appellant counsel. However, on 29 June 2017, the trial court delivered its ruling wherein it discharged and acquitted the respondents based on the unconditional pardon as conveyed by the instrument of pardon. Dissatisfied with the ruling, the appellant filed an Appeal on 25 September 2017, and pursuant to the leave of Court granted on 26 March 2018, the appellant filed an Amended Notice of Appeal on 3 April 2018. The relevant issue among the three issues for determination was:

---

[3] *Supra* note 2 at 2.

"Whether the trial Court was right when it discharged and acquitted the Respondents from the charges against them in the Case No. SS/33C/2009 on the ground that they have been granted unconditional pardon by the Governor of Sokoto State when the Respondents had not been convicted of any offence by any Court. (Grounds one and two)".[4]

The appellant's counsel submitted that the Governor's power to grant pardon to "any person concerned with or convicted of any offence" is derived from Section 212(1) (a) of the Nigerian Constitution. He further submitted that a person who has not been tried and convicted by a competent Court for an offence, cannot be said to have committed an offence to deserve a pardon, because, by virtue of section 36(5) of the Constitution, such a person is presumed innocent until proved guilty.[5] Counsel concluded that a person cannot be "concerned with an offence" unless and until he/she has been convicted of the offence, and he thus urged the court to apply the *ejusdem generis* rule to interpret the phrase "any person concerned with or convicted of any offence". It is instructive to note that the *ejusdem generis* rule states that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.[6] The inapplicability of this rule to the instant case is discussed below.

On his part, the respondents' counsel contended, amongst others, that under section 212(1), there are two categories of persons who can benefit from pardon, that is "any person concerned with OR convicted of any offence." He submitted that the word "or" in the phrase was deployed deliberately by the lawmakers to distinguish between pre-conviction and post-conviction pardons. He thus argued that "any person concerned with any offence" is different from "any person convicted of any offence" and that both can be beneficiaries of pardons under section 212(1).

3. The Decision of the court

On 28 November 2018, the Court of Appeal held in favour of the appellant, whereby their Lordships stated that constitutional pardon cannot be granted at a pre-conviction stage. In delivering the lead judgment, Sankey, JCA made some far-reaching pronouncements which have agitated the mind of this present writer and thus forms the basis of this paper. For example, at pages 22-23 of the Law Report, His Lordship, after reviewing the meaning of pardon, held:

"Thus, to contemplate the grant of pardon to an offender who is yet to undergo trial or to fully pass through the justice system to its full extent and be pronounced guilty of the crime for which he is standing trial yet presumed innocent, is to unnecessarily short-circuit the criminal process

---

[4] *Supra* note 2 at 7-9.

[5] For a judicial affirmation of this principle, see *Amaechi v. INEC & Others* [2008] LPELR-446, 1 at 260; *Garba v. University of Maiduguri* [1986] 1 NWLR (Pt. 18)550; [1986]NSCC (Pt. 1) 245 at 265.

[6] *Buhari v. Yusuf* [2003] NWLR (pt 841) 446; [2003] 6 S.C. (pt. II) 156; *Circuit City Stores Inc v Adams*, 532 U.S. 105 (2001).

of trial anticipated by Sections 175 and 212 of the CFRN. It is the exclusive preserve of the Judiciary to try offenders and convict or exonerate them of offences alleged/charged, as the case may be or as the circumstances deserve. It is however the discretionary power of the executive thereafter to pardon, grant amnesty, clemency or reprieve convict, or even to commute his sentence thereafter. Certainly Section 212(1) (a) (supra) does not contemplate that the executive would interfere with this process".

His Lordship went further to justify the position taken by stating that:

"…This position is in contemplation of the notion that there must be guilt for the exercise of pardon to be activated, taking into consideration the presumption of innocence in Section 36 of the CFRN which attaches to every citizen of Nigeria. By these findings, it is rather apparent, in my humble view, that for there to be a pardon, there must have been a conviction. A pardon is premature and uncalled for when a person, who is presumed innocent until found guilty by a competent Court of law, is yet to be convicted. To proceed to grant a pardon to such a person to whom the presumption of innocence attaches, is to limit or restrict or constrict the constitutional presumption of his innocence therefore impinging on his right, and unwittingly concluding extra judicially, that the accused person still standing trial, is guilty of the offence charged and therefore deserving of a pardon, id est forgiveness".[7]

On the phrase, "any person concerned with or convicted of any offence", His Lordship stated:

"The words "any person concerned with..." in Section 212(1) (a) (supra) does not contemplate that an executive should constitute himself into the Attorney General who is empowered under the preceding provision, to wit: Section 211(1) (c) of the CFRN to discontinue any criminal trial instituted by him before any Court without the necessity of giving reasons for such; which is also known as the power of nolle prosequi. Or that the executive should imbue himself with judicial functions prescribed in Section 272 of the CFRN...".[8]

On the same issue, His Lordship stated that:

In the instant case, the Appellant has discharged this onus of showing that Section 212(1) (a) CFRN (supra) discloses an intention of applying the ejusdem generis principle, as only by doing so can effect be given to that provision as a whole. Consequently, the words "grant any person concerned with or convicted of any offence created by any Law of a State…" must be construed to mean persons convicted of offences in any Law of Sokoto State similar to the indictments of the Respondents in the Commission of Inquiry Report and Government White Paper. Thus, the

---

[7] *Supra* note 2 at 44-45.
[8] *Supra* note 2 at 24.

word "or" therein should be read as "and" to give meaning and effect to Section 212(1) (a) CFRN and the spirit and intendment of the Constitution as a whole. Also, the Supreme Court in the case of Skye Bank Plc V Iwu (supra) per Nweze, JSC, strongly advocates for a holistic interpretation of the provisions of the Constitution in order to avoid an absurdity. In so doing, the only interpretation permissible is to give the word "or" in the provision a conjunctive meaning.

It is also trite that in the interpretation of the Constitution and/or statutes and in construing the contents of documents, the word "or" can sometimes be construed to mean "and" so as to give meaning and effect to the statute…". [9]

4. Critical Analysis of the Decision

No doubts, the above judicial pronouncements are illuminating, and they sound convincing. However, this writer finds issues with the pronouncements. Consequently, arguments are offered below in a bid to deconstruct the position of the court.

Now, what called for the court's interpretation was "any person concerned with or convicted of any offence" in section 212(1) (a) of the Constitution. Section 212(1) provides:

"212. (1) The Governor may –

(a) Grant any person concerned with or convicted of any offence created by any law of a state a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, of the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for any person for such an offence; or

(d) remit the whole or any part of punishment for any punishment imposed on that person for such any offence or of any penalty forfeiture otherwise due to the state on account of such an offence".

With all due respect to their Lordships, this author finds it difficult to agree with the court's decision which was rooted on the presumption of innocence.

To start with, an examination of the entire section 212(1) would reveal that the lawmakers deliberately used the phrase "any person concerned with or convicted of any offence" in paragraph (a) of the subsection with the intention of extending pardon to those who are yet to be convicted. For example, while paragraphs (b) to (d) of section 212(1) expressly talk about a post-conviction situation by their reference to imposition of punishment, it is only paragraph (a) that specifically uses the phrase "any person concerned with" with an offence. It is trite law that words are to be given their ordinary meanings, except

[9] *Supra* note 2 at 59-60.

such meanings would lead to absurdity.[10] So, the use of a disjunctive ("or") instead of a conjunctive ("and") between "any person concerned with" and "convicted of" must be taken into consideration. The Constitution does not define what "concerned with" or "or" means. However, by section 18(3) of the Nigerian Interpretation Act, "The word 'or' and the word 'other' shall, in any enactment, be construed disjunctively and not as implying similarity".[11]

On the other hand, the Cambridge Dictionary defines the word "concerned" as "involved in something or affected by it".[12] The Merriam-Webster Dictionary also defines the word as "having an interest or involvement in something".[13] Thus, it is possible for one to be involved in an offence without being convicted of the offence. So, it is argued here that, the framers of the Nigerian Constitution intended the pardon power to apply to pre-trial, pre-conviction and post-conviction cases. Any contrary interpretation would do violence to the clear provisions of the Constitution. While it is conceded that there are cases where the word "or" may mean "and" and vice versa, in order to avoid absurdity,[14] it is this writer's argument that the instant case does not warrant such an interpretation. This is because, the literal interpretation of "any person concerned with or convicted of any offence" would lead to the lawmakers' intention. A journey into a commonwealth country, the Republic of the Gambia (the Gambia) would help to drive this point home. Section 82(1) of the 1997 Gambian Constitution contains similar provisions on pardon power, but it clearly states that, "[t]he president may, after consulting the Committee established by subsection (2) grant to any person **convicted of**[15] any offence a pardon either free or subject to lawful conditions". This Gambian Constitution clearly provides that presidential pardon is only available to those who have been convicted. So, if the Nigerian lawmakers had intended the same thing, they would not have inserted "concerned with" alongside "convicted of" in sections 212(1) and 175(1) of the Nigerian Constitution.[16]

More fundamentally, this writer disagrees with their Lordships as regards their reliance on the presumption of innocence to arrive at their decision. It is submitted that a holistic reading of the entire Constitution would reveal that, indeed, the presumption of innocence in section 36(5) of the Constitution

---

[10] *Buhari v. Yusuf* [2003] 14 NWLR (Pt. 841) 446.

[11] See *Abubakar v. Yar'adua* [2009] All FWLR (Pt. 457) 1 where the court held that "or" is not the same as "and".

[12] The *Cambridge Dictionary*, available at: <https://dictionary.cambridge.org/dictionary/english/concerned> accessed on 04 September 2020.

[13] The *Merriam-Webster Dictionary*, available at: <https://www.merriam-webster.com/dictionary/concerned> accessed on 04 September 2020.

[14] *Ndoma-Egba v. Chukwuogor* [2004] 6 NWLR (Pt. 869) 382 ("In ordinary usage, the word 'or' is disjunctive and 'and' is conjunctive. But … there are situations which would make it necessary to read 'and' in place of 'or' and vice versa. This may occur in order to carry out the intention of the Legislature… "). Also see Philip E. Oamen, "Judicial Attitude towards Entitlement to practise Law in Nigeria vis-a-vis the Competence of Court Processes signed by Law Firms" (2015) 4 *University of Benin Journal of Private & Property Law* 42–63.

[15] Emphasis supplied.

[16] Oamen, "Grant of Presidential Pardon", note 1 at 24.

cannot dislodge the Governor's pardon power in section 212(1). Hence, while the court was correct when it held that "…when a particular section of a statute is being interpreted, that section should not be read in isolation, but the whole statute must be considered because the section is part of the whole…",[17] the court itself was however caught in the web of isolationist or selective interpretation of the Constitution.

To justify this writer's instant argument, it is needful to set out other relevant portions of section 36 of the Constitution instead of concentrating solely on section 36(5) which the court selectively picked and chose. Now, the section provides:

> *"Section 36*
>
> *(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty;*
>
> *Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.*
>
> *(6) ……..*
>
> *(7) ……*
>
> *(8) ……..*
>
> *(9) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.*
>
> *(10) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence".*

A calm review of the above provisions would reveal certain fundamental issues. First, and in line with the court's reasoning, everyone charged with an offence has a presumption of innocence in his favour.[18] Second, the section never expressly says the presumption bars pardon, that is, the presumption alone is not suggestive that the President or Governor cannot grant the accused pardon while still enjoying the presumption of innocence.[19] Third and most importantly, a closer examination of section 36 (9) and (10) above would reveal that the framers of the Constitution never intended that the presumption of innocence would inhibit exercise of pardon power before conviction.[20] Hence, while section36(9) clearly provides that before one can raise the plea of double jeopardy, he must have been convicted or acquitted,[21] section

---

[17] *Supra* note 2 at 28.
[18] Oamen, "Grant of Presidential Pardon", note 1 at 20.
[19] Ibid.
[20] Ibid.
[21] See *Umeze v. State* [1973] S.C. 221 w

36(10), on the other hand, only requires a person who pleads pardon as a defence against double trial to show evidence of his pardon for a criminal offence. In other words, section 36(10) deliberately omits the requirements of conviction or acquittal which section 36(9) requires. A holistic interpretation of the entire section 36, together with section 212 would have revealed to the court that pardon is grantable at a pre-conviction stage.

Therefore, it is submitted that the omission of the requirement of conviction or acquittal in section 36(10) was not a cosmetic act but an intentional legislative recognition of the Governor's power to grant a pre-conviction pardon as envisaged in the "any person concerned with" phrase in section 212(1) of the Constitution.[22] So, as this writer has argued elsewhere, the implication is that, "once criminal prosecution has commenced against a person, the President or Governor does not have to wait till the completion of the prosecution before he can pardon him or her, and such a pardon absolves the pardonee of the punishment for the present trial and any subsequent trial on the same facts".[23]

To concretise the argument being made, it is pertinent to have recourse to other Nigerian statutes. For example, section 277(1) of the Administration of Criminal Justice Act 2015(ACJA) provides that, "A defendant against whom a charge or information is filed may plead that: (a) by virtue of section 238 of this Act he is not liable to be tried for the offence with which he is charged; **or**[24] (b) he has obtained a pardon for his offence'. Just like the constitutional provisions in section 36(9) above, the referenced section 238 of ACJA requires that an applicant who pleads double jeopardy under section 277(1)(a) must prove either a conviction or acquittal in his earlier trial, whereas nothing of such is required about pardon in section 277(1)(b). Likewise, section 221(1)(b) of the Criminal Procedure Act(CPA)[25] provides that where an accused person pleads and proves that he has obtained a pardon for his offence, by the production of the instrument of pardon, the court must acquit him. Thus, the silence of the Constitution and these statutes, on the requirement of a conviction as regards plea of pardon, supports the argument that pardon can be granted before conviction.[26]

Therefore, since in the *Achida case*, the respondent successfully produced the instrument of pardon, the court should not have bothered about their conviction. While the court's opinion that it might amount to "an unusual and extra-judicial interference by the executive of the judicial function of courts, whose duty/function is to try offenders for crimes committed against the State, for pardon to be granted to

[22] See equivalent provisions in section 175 of the Constitution as regards presidential pardon.
[23] Oamen, "Grant of Presidential Pardon", note 1 at 20.
[24] Emphasised supplied.
[25] Cap C41, Laws of the Federation of Nigeria (LFN) 2004.
[26] Oamen, "Grant of Presidential Pardon", note 1 at 21

accused persons still standing trial, and in particular, still presumed innocent"[27] sounds convincing, a holistic reading of the Constitution does not however support the opinion. The combined effect of sections 36(10) and 212 of the Constitution, section 277(1)(b) of ACJA and section 221(1)(b) of the CPA, it is submitted, is that an accused is entitled to an acquittal upon proof of pardon, whether or not such a pardon followed a conviction. In fact, it is argued here that, by the framing of section 212(1), the court has no vires to enquire into the conviction status of a person who pleads pardon. It would take a legislative, not judicial action to override the clear provisions of these laws. So, the court's importation of "conviction" into the ordinary meaning of "any person concerned with" amounts, with due respect, to undue judicial legislation. In any case, the beneficiary of the presumption of innocence was the same beneficiary of the pardon and there was no complaint whatsoever from him.

From another perspective, the court did not reckon with the Supreme Court's reasoning *in Nigerian Army V Brig. Gen. Maude Aminun-Kano*[28] which the respondents relied upon. While it has been argued that "the court in the Achida case might have been correct in distinguishing the two cases and disapplying the *Aminun-Kano* decision on the ground that condonation under the Armed Forces Act is different from the constitutional pardon",[29] it has equally been noted that it is "perplexing that the Court in *Achida case* did not consider the apex court's pronouncement on pardon before coming to the conclusion that there must be conviction before a pardon can be granted".[30] In the *Aminun-Kano case,* the Supreme Court was of the view that:

> *"Section 36(10) of the Constitution of the Federal Republic of Nigeria, 1999 lays down the principles of criminal law that where a person* ***accused of*** *committing a criminal offence which is recognized by law and where he has shown that he has* ***either*** *been pardoned of the offence by the appropriate authority* ***or*** *that he has been tried by a court of law or a tribunal set up by law, then he cannot be subjected to any further trial by any court or tribunal on that same offence".*[31]

By the apex court's decision, it is clear that, to succeed in a plea of double jeopardy, a person may EITHER show that he/she has been pardoned (after being accused, not convicted of an offence) OR that he has been tried (and convicted or acquitted). As argued elsewhere, "If the court in *Achida case* had taken this part of *Aminun-Kano* decision into consideration, it would have come to the correct position that pardon can be granted without conviction. Besides, the Court did not take the historical practice of pardon into consideration".[32] It is an

[27] *Supra* note 2 at 23.
[28] [2010] 5 NWLR (Pt. 1188) 42.
[29] Oamen, "Grant of Presidential Pardon", note 1 at 21.
[30] Ibid.
[31] *Supra* note 28 at 467–469. Emphasis supplied.
[32] Oamen, "Grant of Presidential Pardon", note 1 at 22.

established practice under the English common law that the King (or Queen) could grant pardon either before or after conviction.[33] Thus, while it is desirable that the courts serve as a watchdog to ensure that the executive and legislative branches stay within the confines of their constitutional powers, the courts themselves should also not encroach on the powers conferred on those other branches. Put differently, the idea of 'judges setting timetables for action on clemency[pardon]… by state governors'[34] or Presidents should not be entertained as it is not a feature of the pardon power provisions in sections 212 and 175 of the Constitution.

However, to justify its "timetable setting" for pardon, the court in the *Achida case* also referred to section 272 of the Constitution which provides that:

> *"Subject to the provisions of Section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person."*

In the appellate court's reckoning, the above section recognises the trial court's power to hear and determine criminal proceedings, but that a pre-conviction pardon would attenuate this power and the doctrine of separation of powers.[35] However, the court did not consider the proviso in the above section. Clearly, section 272 states that it is "subject to the provisions of Section 251 and other provisions of this Constitution". These "other provisions" of the Constitution, it is hereby argued, include sections 212(1) and 175 of the Constitution which donate pardon power to the Governors and President in respect of "any person concerned with" an offence. So, a pre-conviction pardon does not attenuate the principle of separation of powers or the court's adjudicatory power.

In addition, the court per Sankey, JCA was, with due respect, wrong when it held that:

> *"The words 'any person concerned with...' in Section 212(1) (a) (supra) does not contemplate that an executive should constitute himself into the Attorney General who is empowered under the preceding provision, to wit: Section 211(1) (c) of the CFRN to discontinue any criminal trial instituted by him before any Court without the necessity of giving reasons for such; which is also known as the power of nolle prosequi. Or that the executive should imbue himself with judicial functions prescribed in Section 272 of the CFRN".*[36]

---

[33] Edward Coke, *The Third Part of the Institutes of the Laws of England* (4th ed,1669 E. and R. Brooke,) 233. 2332, US (7. Pet.) 15; Maitland Frederic William & H. A. L. Fisher, *The Constitutional History of England* (1963, Cambridge University Press) 480.

[34] *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009).

[35] *Supra* note 2 at 25-26.

[36] *Supra* note 2 at 24.

To start with, the court misconstrued the pardon power with the power of the Attorney-General (A-G) to enter a *nolle prosequi.* In other words, what the Governor of Sokoto State did in the instant case was not in any wise in contemplation of the exercise of the A-G's power of *nolle prosequi*. From the facts, it was clear that the Governor was acting pursuant to section 212, not section 211, so the issue of usurping the AG's power does not arise.

Further, by the above judicial opinion, the court seemed to have glossed over the fundamental difference that exists between the power of *nolle prosequi* and pardon power. The discontinuance power (*nolle prosequi*) and pardon power are two separate powers exercisable by two different persons and having different legal effects, as a discontinuance does not generally enjoy the same constitutional potency as pardon.[37] Apart from the fact that criminal proceedings can be re-activated against the accused on the same facts subsequent upon discontinuance,[38] a discontinuance is not exercisable in all cases,[39] neither is it applicable where there is no current occupant in the office of the A-G.[40] On the other hand, according to section 36(10) above, a pardon bars all subsequent criminal proceedings on same facts.[41]

To summarise this arm of the argument, it is submitted that there was no irreconcilable conflict between sections 36 and 212 warranting the position the court took. However, assuming without conceding that such a conflict ever existed, a better option would have been to adopt the doctrine of specificity and last-in-time whereby the more specific provision on the subject matter (pardon) which is section 175 and which also happens to be later in time than section 36, would be treated as an exception to the more general provision in section 36.[42] After all, by virtue of section 240 of the Constitution, the jurisdiction of the Court of Appeal to hear and determine appeals from the High Court (including the instant trial court) is subject to other provisions of Constitution.

Moreover, the decision of the court in the *Achida case* is bewildering on another note. On the one hand, the court admitted that the A-G has power to discontinue a criminal trial before conviction, without being seen as encroaching on the judicial powers of the court. On the other hand, the court held that the Governor, who appointed the AG and who has been constitutionally empowered to grant pardon to "any person concerned with"

---

[37] Oamen, "Grant of Presidential Pardon", note 1 at 22.

[38] See *Clarke v. AG Lagos State* [1986] 1 QLRN 119. Also see Oamen, "Grant of Presidential Pardon", note 1 at 22.

[39] For example, by section 174 of the Nigerian Constitution, the A-G cannot prosecute, take over or discontinue criminal cases in a Court-Martial which tries military offences. This is unlike presidential pardon power in section 175 which applies to all federal offences. See Oamen, "Grant of Presidential Pardon", note 1 at 22.

[40] See *Attorney General of Kaduna State v. Hassan* [1985] 2 NWLR (Pt. 8) 483 where it was held that discontinuance power is personal to the A-G and that a Solicitor General or any other person cannot exercise same when there is vacancy in the AG's office. See Oamen, "Grant of Presidential Pardon", note 1 at 22.

[41] Oamen, "Grant of Presidential Pardon", note 1 at 22.

[42] Ibid; Philip E. Oamen & Tijani A. Abdulhakeem, "The Constitutional Jurisdiction of the National Industrial Court: The Unsettled Exclusiveness Question" (2013) 3(1) *Ambrose Alli University Law Journal* 1; AM. JUR. 2D *Constitutional Law* 67 (2009), cited in Mia So, "Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion" (2011) 86 *Ind Law J* 713.

an offence, cannot go ahead to discontinue a criminal trial by way of pardon, unless and until that person has been convicted. It is submitted, with due respect, that the fact that the A-G can discontinue a criminal trial which discontinuance may or may not lead to an acquittal[43] further lends credence to the argument that the intention of the lawmakers was to extend the presidential or gubernatorial pardon power to pre-conviction cases. If the court can acquit an accused person before conviction, based on A-G's discontinuance in certain situations, it would be an unnerving argument to suggest that the court cannot acquit the same person before conviction, when the Governor, who appointed the AG, has granted to him/her pardon under section 212, especially when the section specifically distinguishes between "any person concerned with" and "any person convicted of" an offence.

Lastly, this writer finds it difficult to agree with the court that:

> *"In the instant case, the Appellant has discharged this onus of showing that Section 212(1) (a) CFRN (supra) discloses an intention of applying the ejusdem generis principle, as only by doing so can effect be given to that provision as a whole. Consequently, the words 'grant any person concerned with or convicted of any offence created by any Law of a State … ' must be construed to mean persons convicted of offences in any Law of Sokoto State … Thus, the word 'or' therein should be read as 'and' to give meaning and effect to Section 212(1) (a) CFRN and the spirit and intendment of the Constitution as a whole".*[44]

The court misdirected itself here, because, the *ejusdem generis* rule was clearly inapplicable. To be sure, the rule states that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.[45] It is submitted that there are no general words in the phrase "concerned with or convicted of" to warrant the application of the rule. Rather, both "concerned with" and "convicted of" are specific words, thus it is wrong to use one to limit the other.[46] To be sure, general words are phrases such as "any other" or "such other" which invite one to compare; they are not phrases like "concerned with" or "convicted of" which can be attributed a meaning without reference to things already mentioned.[47] It is, therefore, difficult to see how the phrase "concerned with" could be limited or understood by reference to the phrase "convicted of" and vice versa.[48]

Further, assuming without conceding that either of the above phrases contains general words, it is submitted that the court was still not right in its application of the *ejusdem generis* rule.[49] Now, the phrase being interpreted in

---

[43] *Supra* note 38.
[44] *Supra* note 2 at 59-60.
[45] See *Buhari v Yusuf, supra* note 10.
[46] Oamen, "Grant of Presidential Pardon", note 1 at 23.
[47] Ibid.
[48] Ibid.
[49] Ibid.

the above case was “any person concerned with OR convicted of any offence”. A logical application of the *ejusdem generis* rule, if at all it applies, dictates that “any person concerned with” are the specific and PRECEDING words followed by “convicted of any offence” which are the general and SUBSEQUENT words.[50] As has been argued elsewhere, ‘If the rule were to apply, it means that the general words “convicted of any offence” would be construed strictly to embrace the preceding specific words “any person concerned with” and not the other way round. It is therefore bewildering and unnerving that the Court of Appeal could apply the rule in a reverse order”.[51]

Conclusion

This paper has reviewed the decision of the Court of Appeal in *Achida case* and offered an alternative argument on the Governor’s power to grant pardon at a pre-conviction stage. The paper critiqued the judicial decision as it relates to the interpretation of relevant provisions of the Constitution as well as the court’s adoption of the *ejusdem generis* rule of interpretation. The conclusion reached is that, it is only a legislative intervention, by way of constitution amendment, that can displace the executive power to grant a pardon at a pre-conviction stage.

[50] Ibid.
[51] Ibid.