EXTRA JUDICIAL 'CONFESSIONS' IN NIGERIAN CRIMINAL TRIALS: THE ACJA LEGAL REVOLUTION AND STATES' ACJLs *ULTRA VIRES* PROVISIONS*

Abstract
Criminal trials, especially for serious offences, have been fraught with trials within trial with people standing trial mostly coming out as losers[1]. The Police that beat 'confessions' out of their victims would also be the only available witness to testify whenever the voluntariness of such a statement is in issue. This work has taken an analysis of decided cases, relevant statutes and juristic works to come to the conclusion that the Administration of Criminal Justice Act (ACJA) has not only rendered trials within trial not always necessary but has also alleviated the problems of defendants seeking to refute the voluntariness of their 'confessions' before courts. It is also the finding that states' Administration of Criminal Justice Laws (ACJL) on confessions are not without constitutional (Constitution of the Federal Republic of Nigeria, 1999 hereinafter referred to as CFRN) hiccups. An amendment of the Evidence Act is recommended to cater for defendants in the states' criminal jurisdictions. Key words: confession, voluntary, statement, police, Administration, Criminal, Justice and trial.

Keywords: *ACJA, Extra Judicial Confessions, Criminal Trials, Ultra Vires, Revolution, Nigeria*

1. Introduction

The confession of the commission of a crime by a defendant in a criminal trial is the best form of proof of guilt. It is preferred because a normal defendant would not admit the commission of a crime that he has not committed; or if he does then the blame for inflicting punishment on the wrong person is on him. Interestingly, these written 'confessions' produced in evidence before courts have almost always been challenged by defendants for want of compliance with the rules of confessions especially voluntariness. The situation was lamented in the following terms by Sarkar et al:

> It is unfortunate that in this country confessions should be as plentiful as retractions at the trial. They go to show that most of these confessions do not proceed from any feeling of penitence and remorse as they should, but they have their origin in inducement, threat, torture, hope or any other non-validating cause.[2]

Confessions of crime to the police are referred to as extra-judicial confessions because they are made outside the court room and not before a judicial officer. When they are made in the court room and before a judicial officer, they are referred to as judicial confession[3]. This type of confession in most cases takes the form of a plea of guilty to a charge. Where the charge is for a capital offence, a plea of not guilty is always entered for any defendant that pleads guilty[4]. Whether extra judicial or judicial, a confession must be direct and positive to ground a conviction[5]. An admission made by a person who suggests that he has committed a crime is a confession of the commission of such crime by him[6] and could be used against him in evidence[7]. To ensure justice to persons standing trial before criminal courts, the law currently lays down the conditions that such confessions must not have been secured by

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[1] *Owhoruke v. Commissioner of Police* (2015) 15 N.W.L.R. (Pt 1483)557 at 576.

[2] M.C. Sarkar et al, *Law of Evidence in India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore* (16th edn. Reprint New Delhi: Wadhwa and Company Nagpur Law Publisher, 2008) p.535; *In R. v. Thompson* [1893] 2 Q.B. 12, Cave J. remarked that such the desire to confess crimes out of remorse or penitence were vanishing as soon as defendants appeared in courts.

[3] Fidelis Nwadialo, *Modern Nigerian Law of Evidence* (2nd edn. Lagos: University of Lagos Press, 1999) pp.275 and 276.

[4] *Offor v. State* [2013] All F.W.L.R. (pt 666) 396 at 413 paragraph D-G.

[5] *Afolabi v. Police* [1961] 1 All N.L.R. 654.

[6] The Evidence Act, Laws of the Federation of Nigeria (LFN), 2011, s27; see also *Akpan v. State* [1990] 7 N.W.L.R. (pt160) 101

[7] (n6) s29 (1).

oppression[8] or in consequence of anything said or done to a defendant in the circumstances of that moment which make his confession unreliable. Except the prosecution proves beyond reasonable doubt that such confessions complied with the requirements of the law, it is inadmissible[9]. A police officer recording a statement must read it over to the maker who shall approve of it before signing the statement[10] to ensure that the statement was voluntarily made by the defendant otherwise, it will not be admissible[11]. Other such conditions that have not been explicitly provided for under our laws, especially the Evidence Act, are such conditions that sometime negate liability for the commission of crimes. Chiefly among these are insanity and mistake. No court would or should rely on a confessional statement of a defendant who is proved to have made it in a state of mental disorder[12], mistake or even drunkenness. These could rightly be implied by a judge to negate voluntariness as required by law[13].

2. Extra-Judicial and Judicial Confessional Statements

An extra-judicial confessional statement[14] and a judicial confessional statement[15] have a distinguishing feature in the former always consisting of the facts but not necessarily the mental elements of the offence admitted by the defendant, but the latter, in addition to the factual elements of the offence, *actus reaus*, consists also of the mental elements of the offence, *mens rea* . This is because a well prepared charge to be pleaded to by a defendant must consist of the allegation of the facts and mental elements that constitute the offence. The confession by way of guilty plea before a court would consist of admitting the commission of the offence as prescribed by a penal statute save, of course, for strict liability offences. It is for this reason that a defendant is hardly left with a defence if he makes a judicial confession that is direct and positive[16] (except in capital offences where a plea of not guilty must be entered for him) but a defendant may still advance a defence if his confession is extra judicial. For instance, a defendant that has confessed killing another in his extra-judicial statement might have confessed to the killing without necessarily stating the reason for doing so which may negate *mens rea* when advanced during his defence.

3. The Difference between Confession and Admission

Though confession has been legally defined in the terms of admission[17] and has been described also as a member of the household of admission[18], admissions are mostly used in civil proceedings while 'confession' has its notorious use in criminal proceedings. The dividing line between the two may be faint; yet the jurisdictional use of the two may be the cause of an apparent world of difference between them.

4. Extra-Judicial Confession in Nigeria in Retrospect

The thrust of this paper is on extra-judicial confessions, thus this part shall treat the pre-ACJA position of extra-judicial confessions first as a background to a proper understanding of the subject to be discussed. The latitude of power at the disposal of the police in the pre-ACJA era[19], and the disadvantageous position of the defendants left

[8] (n6) s29 (5) defines 'oppression' to include 'torture', inhuman degrading treatment', '...use or threat of violence whether or not amounting to torture'.

[9] (n6) s29 (2) (b).

[10] Baba M. Shani, *Notes on some aspects of Criminal Procedure in Northern Nigeria* (Zaria: A.B.U. Press Ltd., 1988) p.45

[11] *Commissioner of Police v. Alozie* [2017] LPELR-411983 (SC).

[12] In *R. v. Everett* [1988] Crim. L.R. 826, the Court of Appeal allowed an appeal against conviction founded on a confession when it was shown that the maker was mentally unfit at the time of the confession. See also M.C. Sarkar et al (n2).

[13] (n6) s29 (2).

[14] A confessional statement cannot be given by proxy, but must be given by the suspect personally. See Ozaki v. State [1990] 1 N.W.L.R.(pt 124) 92, *Otufale v. State* [1968] N.M.L.R. 262.

[15] Fidelis Nwadialo (n3) p. 275 discusses these two more elaborately.

[16] In *Omisade v. The Queen*[1964] 1 All N.L.R. 233, defendants who confessed committing treasonable felony said they went for a military training as alleged against them but never knew the purpose of the training was to wage war against 'Head of State'. Their statements were held to be short of confession.

[17] (n6).

[18] Fidelis Nwadialo (n3) p.275.

[19] Note that this era includes the Criminal Procedure Codes of states of Northern Nigeria and Criminal Procedure Laws of states of Southern Nigeria that are yet to enact the new legal regime into law.

the police with an undue advantage when the issues of the voluntariness of confessional statements arose during criminal trials. Defendants were almost always retracting or denying their 'voluntary' confessional statements[20]. The prosecution would 'brandish' the written and signed confessional statement of the defendant in court while the latter would either deny making the statement completely or that it was made by 'oppression' from the investigator/police. To resolve these crises situations between the prosecution and the defendants, courts of criminal trials would *suo motu* or upon the request of any of the parties resort to a trial within trial. A trial within trial is always meant to tidy up the fog surrounding the voluntariness of a 'confessional' statement of a defendant sought to be tendered by the prosecution[21]. The hoary rule that the prosecution bears the burden of proof beyond reasonable doubt that such statements were voluntarily made was always observed by courts[22]. If the prosecution succeeded, as they hardly failed to, in leading evidence to show that the defendant made the statement voluntarily, the burden shifted to the defendant to show how it was not voluntarily made[23]. The defendant would have only police officers who witnessed the circumstances surrounding the making of the statement to call as witnesses. That would be the beginning of the tail of his woes; none of them would be at his service as they would always prefer to go with their own! With the lighter burden of proving the involuntariness of his 'confessional' statement on him, defendants have almost always failed to discharge that lighter burden.

It has been suggested that a confessional statement be recorded in the language used by the defendant[24] to avoid technical arguments on the 'correctness and accuracy of the statement made by the defendant...'[25] The goal of a rule like this is to ensure that a defendant is not punished upon an admission of a crime he did not make or where the circumstances surrounding the making of such a 'confessional' statement make the voluntariness of the statement doubtful. It is for this reason that a statement given in Hausa language and recorded as a direct speech and partly as a reported speech before it was translated into English language was adjudged improperly given or recorded[26]. The use of an interpreter isn't improper if the statement is not made in the language it is recorded, provided the interpreter is called as a witness during the trial to make the statement admissible[27]. The necessity of the evidence of the interpreter (especially if conviction is to be based on the confessional statement solely[28]), is to render the evidence contained in such a statement as direct evidence and not hearsay[29].

5. Confession of Crimes in the Pre-ACJA Era and the Judicial Revolution

Anyone with the faintest knowledge of the conducts of the Nigeria Police during investigations of crimes, especially grievous crimes, cannot help but pity a defendant who, under the old regime[30], laboured to disprove the voluntariness of his statement in a criminal trial. We are all living witnesses to the public outcry against the activities of the Special Arm Robbery Squad (SARS) in the year 2018. This led to a lot of reorganisation of the squad. Details of the procedure in dealing with an extra-judicial 'confessional' statement of a defendant is not the main concern of this presentation but the revolutionary judicial and legislative steps taken to ensure justice to vulnerable suspects in police custody on investigation of crimes during trials in court. A judge sitting over such

[20] M.C. Sarkar et al (n2).

[21] This stage is the appropriate point a defendant can raise objection to the admissibility of a 'confessional' statement. See Basil Momodu, *Court-Room Rapid Reference Handbook* (Vol. 1 Benin City: Evergreen Overseas Publications Ltd., 2014) p. 333.

[22] Aubo A. Okoh, *Criminal Procedure Law in Nigeria* (Jos: Innovative Communications, 2012) p. 317- 319; (n6) s 135. see also *Joshua v. A.G. of Western Nigeria* (1966) 1 All N.L.R. 47.

[23] Basil Momodu (n21) p.336, *Chairman, E.F.C.C. v. Little Child* [2016] 3 N.W.L.R. (pt1498) 72, *Al-Mustapha v. State* [2013] 17 N.W.L.R. (pt1383)350, *Duru v. F.R.N.* [2013] 6 N.W.L.R. (pt1351) 441.

[24] *Oseni v. State* (2011) All F.W.L.R. (Pt 592)1722.

[25] Sebastine Tar. Hon, *Law of Evidence in Nigeria* 2nd edn. Vol. 1 (Port-Harcourt: Pear Publishers, 2013)p. 278.

[26] *Ahmed v. State* (1999) 7 N.W.L.R. (pt 612) 641.

[27] *Lasisi v. The State* (2011) All FWLR (pt 601) 1401.

[28] It has been held that a conviction can be founded on a free, direct, positive, unambiguous and voluntary confessional statement. See *Dibie v. State* [2007] 9 N.W.L.R. (pt 1038) 30; *Solola v. State*[2005] 11 N.W.L.R. (pt 937) 460; *Uluebeka v. State* [2000] 7 N.W.L.R. (pt 665) 404; *Akpa v. State* [2008] 14 N.W.L.R. (pt 1106) 72.

[29] *F.R.N. v. Usman*(2012) 3 S.C. (pt 1) 128.

[30] The old regime means the pre ACJA era and the current regimes of the Criminal Procedure Codes and the Criminal Procedure Laws of northern and southern states of Nigeria respectively that are yet to adopt the new legal position.

cases would not be opportune to see all these, yet may entertain the thought that they happen because of the public outcries on the media. With bountiful harvest of witnesses and evidence of voluntariness of such 'confessional' statements of defendants in relation to the draught of evidence in rebuttal from the defence because of the circumstances that would always surround such statements, courts have been left with no choice but to deliver rulings in most cases in favour of the prosecution. Perhaps bored by this wrong to defendants that are vulnerable victims of police investigations, courts had cause to read the wordings of the testimony of prosecution with scrutiny to aid the cause of justice especially where justice is seen slip pass defendants. One of the areas of this judicial intervention is when the police give evidence of 'obtaining the 'confessional' statements of a defendant. Ngwuta J.S.C., in the leading judgment of the Supreme Court in the case of *State v. Salawu*[31], given the situation a confessional statement of the defendant was obtained, held that:

> My Lords, a statement, confessional or exculpatory, made by an accused to a police officer investigating the crime for which he is arrested is a form of evidence. PW3 said she was instructed to obtain the statement of the respondent, a form of evidence. The word 'obtain' connotes a demand and in my view, the statement made by the respondent on demand by the police officer cannot be said to have been voluntarily made. The demand for the statement wholly dissipated the effect of the caution administered by the police.[32] (Emphasis supplied).

This principle has been established for over five decades in the case of Onobu v. I.G.P.[33] where it was held that once a person has been arrested by the police, after the cautionary words, it is not the duty of the police to 'obtain' a statement from him[34]. Statements of suspects are recorded in the absence of all persons but the police especially when it would be secured through violence or the threat of violence. This judicial position could be the saving grace of a defendant who had no witnesses to establish the involuntariness of his confessional statement to the police. The position of the courts on 'obtaining a statement' that is confessional cannot be assailed. The law expects the confession to be voluntary and void of inducement of any sort. The cautionary words of the police to a suspect should stop short of offering him cautionary forms suggesting that giving a statement is mandatory. In most cases, a police officer would be asking the suspect questions as the answers he gives are reduced into writing which would be signed by the suspect as his statement. In their tradition of deviation from the rule, the police would induce or prompt the making of such statements and/or extract these statements from their 'victims'. In a situation that a statement is 'extracted' or 'obtained' such a statement cannot rightly be said to be voluntary. From the perspective of the presumption of innocence under the CFN[35], and the right to remain silent[36], it is preferable that once a defendant denies the voluntariness of a statement made to the police, the court should reject it or, at the very least, treat the issue of its admissibility with strictness. Any doubt in the situation should be resolved in favour of the defendant because a confessional statement can ground conviction without more evidence adduced by the prosecution[37]. Unfortunately, the police investigator sees securing a 'confession' from a suspect as a task that must be done to boost his ego that he has helped secure conviction. In practice, their goal justifies the foul means employed in securing such statements. It is difficult for a police man on investigation to inform an uninformed citizen of his right to remain silent or not to talk without seeing his lawyer or some other person of his own choice. Lawyers in practice are mostly abhorred by the police during investigations. The common language employed by the police has always been: 'wait for the case to be charged to the court'. Reason would suggest that such a police officer can go the extra mile to get what he wants especially when his claim of transparency during investigations cannot be refuted. It is for this reason that the judicial intervention by way of interpretation of the words used by prosecution becomes wholly justifiable[38].

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[31] (2011) 48 N.S.C.Q.R. 290.
[32] Ibid at p. 313.
[33] (1957) N.N.L.R. 25.
[34] Ibid at p. 26, per Hurley J. see also State v. Salawu (supra) at 313 paragraph F-H.
[35] The CFRN, s36(5).
[36] (n35) s35(2).
[37] *Gira v. State* [1996] 4 S.C.N.J. 94.
[38] (n14-16).

The Supreme Court, invoking the basis of the need for transparency in the conduct of investigations pursuant to which a confessional statement is 'given', has insisted on a standard that should not be compromised to aid the cause of justice to the defendants. This position of the court might have been taken in view of the vulnerability of suspects in police stations during investigations. In Owhoruke v. Commissioner of Police[39], Rhodes-Vivour J.S.C. on vulnerable persons in police custody for the investigation of crime(s) and the need to protect them, in the leading judgment of the court maintained that:

> The appellant did not have the service of a legal practitioner when he wrote exhibits E, a day after the incident. It must be noted than most crimes are committed by people with little or no education, consequently they are easily led along by the Investigating Police Officer to write incriminating statements which legal minds find almost impossible to unravel or resolve. Confessional statements are sometimes beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily. A fair trial presupposes that police investigation of crime for which the accused person stand trial was transparent. In that regard it is time for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from suspect if and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done such a confessional statement should be rejected by the court.[40] (Sic). (Emphasis supplied).

This salutary position of the Supreme Court would give more effect to the rights of the accused to remain silent and/or consult his lawyer before making an extra-judicial statement/confession. Courts of criminal trials should view 'confessional' statements with circumspect. Nothing stops a defendant who has regrets over his commission of a crime from confessing to the police and also to the court where his arraignment would be in the public. In some jurisdictions, it is the position that a court satisfies itself on the mental fitness of the defendant at the time he makes the confession before it[41]. Although not known to be a requirement of our written law, it is trite that when the sanity of a defendant is in issue in any criminal trial, the onus is on him to prove insanity[42]; consequently, it is the duty of the defence to prove insanity at the time of confession before a judge. Where, however, the confession or plea of guilty to a charge of a capital offence is made by a defendant before a judge, a plea of not guilty is to be recorded for him[43].

6. Extra Judicial Confession and the ACJA Revolution

Lagos State has gone down in the history of legislative activism in Nigeria for its innovations. Living up to its high record of legislative activism, it passed the ACJL in 2007 and amended same in the year 2011. This was followed by the ACJA, 2015 which applies to all courts of criminal jurisdiction in the Federal Capital Territory, Abuja[44]. The Act repeals the Criminal Procedure Code that hitherto applied in the Federal Capital Territory, Abuja[45]. Maraizu and Arzard[46] have entertained the fear that the repeal of the Criminal Procedure Code and the Criminal Procedure Act by the ACJA may occasion legislative confusion. According to Maraizu, 'Prior to their abrogation, the CPC and the CPA respectively applied in the northern and southern states of the country...Following the abrogation of the CPC and the CPA the Act will now apply in all states of the Federation.'[47] There is no shred of doubt that the fear of Maraizu and his likes lack basis in the face of the clear provisions of the ACJA and our legislative history.

[39] [Supra].
[40] (n1) p. 576.
[41] M.C. Sarkar et al (n2) p. 561.
[42] (n6), s139 (3)(c).
[43] (n4).
[44] The ACJA, 2015, s2 (1).
[45] (n44) s 493.
[46] Habila S. Arzard 'An Examination of the Legal Challenges to Combating Corruption in Nigeria' (2016 &2017) *A.B.U. J.C.L*. 221 at 235.
[47] Iheanyichukwu Maraizu 'CRITIQUE OF ADMINISTRATION OF CRIMINAL JUSTICE ACT (ACJA) 2015' www.nigerianlawguru.com >articles> visted 27/3/2019.

For the avoidance of doubt, the relevant provision is section 493. The Criminal Procedure Act (CAP. C41 LFN 2004), Criminal Procedure (Northern States) Act Cap. 42 LFN 2004 are repealed.[48]

Furthermore, ACJA provides thus: 2.-(1) Without prejudice to section 86 of this Act, the provisions of this Act shall apply to criminal trials for offences established by an Act of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja.[49] The Federation and States have concurrent legislative competence over matters of criminal procedure to the extent that the federation legislates for Abuja and can prescribe the rule of procedure to be applied by any court conferred with jurisdiction over offences created by its enactments[50]. On this premise states' criminal procedure laws were and are still applicable in their various jurisdictions despite the existence of the federal provisions repealed by the ACJA. From the above provisions, the repeal in the ACJA do not affect the states' criminal procedure laws and (the ACJA) applies in states' courts or federal courts in states' territories when a trial is for the contravention of a federal penal law[51]. The Federal Capital Territory, Abuja is a federal legislative territorial jurisdiction; consequently, the ACJA is a proper law within the territory criminal proceedings save matters before Court Martial within the territory or anywhere[52]. The federation's legislative competence over the Federal Capital Territory, Abuja is the legal basis of laws applicable to states of the federation which are relevant to the capital territory were domesticated by the Federal Capital Territory Act as federal laws[53]. Both Caps. 41 and 42 repealed by the ACJA[54] have never displaced any state law on criminal procedure but would appear to have been reserved to regulate the courts when they entertain criminal matters that are federal in nature under the criminal and penal codes[55]. The Criminal Procedure Act, which came into force on the 1st day of June, 1945 was meant to apply to high Courts and Magistrates' Courts[56] at a time we know the present states' judicial structures were not in existence. The Long title of the Criminal Procedure (Northern States) Act[57] which came into force on the 30th September, 1960 makes it plain that the Act[58] applied when courts in the Northern Region sat over offences defined to be federal offences[59] but prior this position the Criminal Procedure Act (CPA), applied in criminal courts all over Nigeria[60]. The application of the CPA was restricted to states of the southern part of Nigeria in 1963 but thereafter, each state of the southern part of Nigeria re-enacted it as its state law[61]. For instance, before the Administration of Criminal Justice Law of Lagos State, 2007 as amended in 2011, Lagos State was applying Criminal Procedure Law[62]; before the enactment of the Administration of Criminal Justice Law of 2015, Oyo State was applying Criminal Procedure Law[63] while the states of the North each had its Criminal Procedure Code being a re-enactment of the Criminal Code of Northern Nigeria, 1960. The above shows that before the ACJA 2015, each state of the Federation of Nigeria had its criminal procedure law independent of Caps. 41 and 42 that were repealed by section 493 of the ACJA. It is these states' laws that regulated and are still regulating criminal proceedings in states' criminal matters in the various states. However, a state's court that has jurisdiction over an offence prescribed by a federal statute is bound to apply the ACJA in the proceedings[64]. This

[48] (n44) s 493.
[49] (n44) s2 (1).
[50] See item 2, Part II of the second schedule to the 1999 Constitution of Nigeria.
[51] Note that states' penal laws have federal provisions in them. See Kharisu S. Chukkol, *The Law of Crimes in Nigeria* (Revsd. Edn. Zaria: A.B.U. Printing Press Ltd., 2010) pp. 321 and 436.
[52] (n44) s2 (2).
[53] Cap. 128, Laws of the Federation of Nigeria, 1990, s13.
[54] ACJA, s 493.
[55]See Kharisu S. Chukkol, (n51).
[56] Cap. 41, Long title of the Act and s.2.
[57] Cap. 42, LFN, 2004.
[58] (n57).
[59] (n55) s2.
[60]See Legal Emperors, 'Laws and Rules Applicable to Criminal Courts in Nigeria' legalemperors.blogspot.com/2016/01/laws-and.rules-applicable-to-criminal .html?m=1 visited 09/04/2019. Cap. 43, Laws of the Federation of Nigeria, 1948, later Cap. 80, LFN, 1990 and later Cap. 41, LFN, 2004.
[61] (n57).
[62] Cap. 33, Laws of Lagos State, 1994.
[63]Cap. 39, Laws of Oyo State, 2000.
[64] ACJA, s(1).

lays to rest the fears/doubts of Maraizu[65] and Arzard[66]. The mistake investigators of crimes make in Nigeria is that they treat the record of the statements of suspects as a formality that must be met in the first place, and secondly, they see securing confession for a crime by a suspect as a job that deserves so much commendation that the lawful procedure for doing so could be ignored or they linger in ignorance of the procedure and its legal significance. The lawful conditions for recording a confessional statement as an investigator are statutorily laid down. For the purpose of clarity, the ACJA provides: Section 15(4): Where a suspect who is arrested with or without warrant volunteers to make a confessional statement, the police officer shall ensure that the making and the taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio visual means.[67] The word 'volunteer' in this provision makes it the duty of a suspect, out of his own free will and volition, to choose to give a statement. Any inducement or facilitation of the statement would render it involuntary.

Section 15(4) of the ACJA has made the revolutionary requirement of such a statement being in writing and 'may' be 'electronically' recorded on a 'retrievable compact disc or such other audio visual means' recording of a confessional statement. The third requirement is laid down in section 17(2) of the ACJA; it requires that the statement may be recorded in the presence of a legal practitioner of the suspect's choice. The first part of the requirement, 'in writing' has been the part that has been in vogue and has been fraught with nerve flexing moments between the prosecution and the defence in courts during trials within trial. The prosecution will insist that the statement was voluntarily made since it is in writing and signed by the defendant but the defence would assert the contrary. The second and third requirements of electronic recording and in the presence of a legal practitioner of the suspect's choice would hardly surprise anyone with the faintest idea of the ordeal of defendants and their lawyers in the trial within trial procedure. These two requirements appear to tantalize defendants because of the use of the word 'may' in both provisions which do not appear to make it mandatory for the prosecution to comply with the electronic recording requirement[68] and recording the statement of the suspect in the presence of a legal practitioner of the suspect's choice[69]. The argument in favour of the permissive and not compelling position of the provisions of sections 15(4) and 17(2) of the ACJA may sound very convincing. On a careful consideration, however, there is more to these provisions that meet the eye on a cursory look. A permissive interpretation of these two provisions would ignore that the ACJA came as a revolutionary Act to change the mischief contained in the Criminal Procedure Code and the Criminal Procedure Acts repealed by the ACJA. If all that sections 15(4) and 17(2) of the ACJA can achieve is to leave the defendant in a no better position than it has met him then the goal of the law maker would not have been achieved. Furthermore, it is a principle of the interpretation of statutes, that when a statute sets out to tackle a mischief in a previous statute, the interpretation of the latter statute that would help actualise its goal and not defeat it be adopted by courts of law[70]. It is for this reason, *inter alia*, that 'may' in sections 15(7) and 17(2) of the ACJA should be construed as mandatory. In Nnajiofor v. F.R.N.[71], the appellant, who stood trial as the third accused person before the Federal High Court sitting in Lagos, took objection to the admissibility of a statement made by him during investigations on the ground that it was not voluntary in tandem with the requirements of the Evidence Act[72]. The provisions of sections 15(4) and 17(2) of the ACJA were held by the trial court to be permissive because the word 'may' in them denote no compulsion. On appeal, their Lordships of the appellate court held that criminal procedural laws that confer rights on defendants standing trials must have 'may' such as in sections 15(4), (7) and 17(2) interpreted to mean mandatory. The Supreme Court laid down this principle in *Okegbu v. State*[73] in the following terms: 'As is well known, enactment regulating the procedure in courts are usually construed as imperative; and that is a cardinal principle of interpretation of statutes especially

[65]Iheanyichukwu Maraizu (n46).
[66] Habila S. Arzard (n47).
[67] (n44) s15 (4).
[68] (n44) s 15(4).
[69] (n44) s17 (2).
[70] *Coca Cola (Nig.) Ltd. v. Akinsanya* [2017]17 N.W.L.R. (pt 1593) 74 at 123.
[71] {2018] LPELR 43925 (CA).
[72] (n6), s 29.
[73] [1979] 12 N.S.C.C. 157.

where procedural provisions, as under section 164(1), are inserted for the protection of accused persons'.[74] Section 17(3) and (4) of the ACJA provide for the role of an interpreter in the course of recording a statement. This has been dealt with above and we only need state that the provisions are in furtherance and not in isolation from those of sections 15(4) (7) and 17(2) of the ACJA. The view expressed by his Lordship, Rhodes-Vivour J.S.C.[75] was a prophetic judicial pronouncement for a change in the legislative regime that favoured the state more than the citizen and which attached more importance to the goal of securing confessions than the means by which such statements were secured. The provisions of the ACJA have vindicated his Lordship, Rhodes-Vivour J.S.C. in his fight for transparency in criminal investigations.

The Full effect of section 9(3) of the ACJL of Lagos State is found in sections 15(4) and 17(2) of the ACJA[76]. This effect is the need for a video footage of the confession while it is made and also the presence of a legal practitioner of the suspect's choice while he makes the statement. The Lagos State provisions make it clear that a video footage and the 'presence of a legal practitioner' while a suspect makes a statement need not co-exist but are optional. A community reading of sections 15(4) and 17(2) of the ACJA[77] would suggest that the two conditions of video footage and the presence of legal practitioner must co-exist before such a confessional statement could be admissible since 'may' in the provisions has been interpreted to mean 'shall'. While the presence of legal practitioner of the defendant's choice is enough confirmation of a confessional statement, a video footage alone may not because of the possibility of manipulations. It would be preferred that the provisions of the ACJA be given a community reading as laying down two conditions that must co-exist if such a confession involves the commission of a capital offence provided the presence of a legal practitioner of the suspect's choice when he made the confessional statement can suffice. It is, however, worthy of note that a video coverage done secretly by the police during investigations and for the purpose of section 15(4) of the ACJA will not be admissible for failing short of conveying a voluntary statement. In Lam Ching Ming v. The Queen[78], three persons were investigated for murder. In order to search the knife used for the murder under the sea, the defendants re-enacted the scene of the murder which led to the recovery of the knife. A video of the scene re-enacted that was 'silently' recorded showing the recovery of the knife was admitted by the trial court but rejected by the Privy Council on appeal for falling short of being voluntary. This case could be contrasted from that of Li Shu Ling v. R.[79] where the defendant was warned that the scene of the re-enactment of the way the crime he was investigated was going to be recorded and that he need not take part but he agreed to take part and was shown the video after the recording. The Privy Council held the video to be admissible as the defendant voluntarily participated in the recording. The ACJA further provides in section 15(5): Notwithstanding the provisions of subsection 4 of this section, an oral confession of arrested suspect shall be admissible in evidence. On a cursory look, it may be taken that such confession envisaged by this provision would include confession to the police. The difficulty associated with this line of argument would arise when a defendant denies making such a statement to the police before a court. A police officer that would narrate such a statement can do no better than leading hearsay evidence in the circumstances. It is preferable that this provision be restricted to an oral confession before a court by way of a plea of guilty to a charge.

7. **States' Administration of Criminal Justice Laws on Extra-judicial statements and the ultra vires Principle**

Lagos State has been lauded above for enacting the Administration of Criminal Justice Law in 2007 as amended in 2011 (about eight years before the ACJA, 2015). The Kaduna State Legislature followed suit in 2017 when it enacted the Administration of Criminal Justice Law (ACJL) 2017[80]. Section 9(3) of the ACJL of Lagos State foist

[74] (n54) at 174 paragraphs 10 and 11. See also S of S for Defence v. Warn [1968] 3 W.L.R. 609 at 614. Citizens rights in statutes foisting duties on states, 'may' in thir provisions should be interpreted to mean 'shall'; see *Mokelu v. Fed. Com. of Works and Housing*[1976] 1 All N.L.R. 224, *Edewor v. Uwegba* [1987] 1 N.W.L.R. (pt50) 313 at 339, *Ude v. Nwara* [1993] 2 N.W.L.R. (pt278) 638 at 661.

[75] *Okegbu v. State* (supra).

[76] Kaduna State ACJL, 2017, ss37(4) and 39(2).

[77] Ibid.

[78] [1991] 2 W.L.R. 1082 (P.C.)

[79] [1988] 3 All E.R. 138 (P.C.).

[80] Note that many states have enacted this law but we are using very few as examples here.

on the investigator the obligation of video recording of a suspect making a confessional statement[81], and to ensure the presence of a legal practitioner of the defendant's choice while he gives his statement[82] as in the ACJA provisions already considered. The ACJL of Kaduna State[83] makes provisions for an interpreter as does the ACJA. Commendable as the Kaduna and Lagos provisions may be on video footages and the presence of a legal practitioner of the defendant's choice as well as the rule concerning an interpreter[84] for the purpose of the admissibility of a confessional statement in evidence, they are laws on evidence. The CFRN confers on the National Assembly the exclusive legislative competence on evidence[85]. The implication is that sections 9(3) of the ACJL of Lagos state and 37(4) and 39(2) of the ACJL of Kaduna State on the admissibility of confessional statements being states' legislations are *ultra vires* section 4 of the CFRN[86]. This position finds judicial blessing in the decision of a full panel of the Supreme Court in Benjamin v. Kalio[87]. In this case section 20 the Land Instruments Registration Law of Rivers State came before the court for consideration. This state law provides that a land instrument that needs be registered but is not registered cannot be pleaded and consequently is not admissible in evidence. The apex court held this provision on evidence to be an unlawful incursion by the Rivers State Legislature into the legislative field of the National Assembly. The apex court took this position that cannot be gainsaid after considering section 4(3) and (5) of the CFRN and item 23 of the first part of the second schedule i.e. the exclusive legislative list meant to be legislated upon by the National Assembly to the exclusion of states' assemblies.

8. Conclusion and Recommendations

8.1 There is no gainsaying the fact that the provisions of sections 15(4) and 17(2),(3),(4) and (5) of the ACJA are salutary for curing the mischief associated with the admissibility of 'confessional' extra-judicial statements in the Criminal Procedure Code and the Criminal Procedure Act regimes. Now suspects can breathe an air of relief from the cruelty that went with investigations of crimes, especially capital offences, by the police. While states that have enacted the ACJL could be commended for the effort but their efforts have yielded no dividend in the areas of extra-judicial confessions and their admissibility. Such area being evidential in nature, it is within the exclusive legislative zone of the federation. The provisions of section 29 of the Evidence Act should be amended and be brought in tandem with the provisions of section 15(4) and 172, (3), (4) and (5) of the ACJA. This will be of benefit to states that need such provisions but lack the legislative competence to legislate on them and in whose courts and in respect of offences under whose laws the ACJA does not apply. It is recommended that sections 15(4) and 17(2) of the ACJA be read conjunctively and the conditions laid in them as cumulative. The video footage showing the voluntary confession of a crime must be backed by the presence of a legal practitioner of the suspect's choice.

[81] The difference between this provision of the ACJL of Lagos on the one hand and Kaduna State ACJL, 2017, s37(4) and (n44) s 15(4) on the other is that the Lagos State ACJL 2007, s 9(3) has 'shall' while the other two have 'may' in their provisions.
[82] (n60) s 37(4).
[83] (60) 39(3), (4) and (5).
[84] (n60) ss37 (3) and 39(2), (3), (4) (5) and s9 (3) of Kaduna and Lagos states respectively.
[85] The Constitution of the Federal Republic of Nigeria, 1999, s4 (1), (2) and (3) and (4) item 23 of the first part of the second schedule to the constitution.
[86] The 1999 Constitution of the Federal Republic of Nigeria, 1999, s4 (2) and (3) and item 23 of the first item of the second schedule the Constitution.
[87] [2018] 15 N.W.L.R. (pt 1641) 38.